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C A S E S  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF LOUISIANA,  
AT  
NEW ORLEANS.

~~~~~  
JANUARY, 1857.  
~~~~~

JUDGES OF THE COURT.

HON. E. T. MERRICK, *Chief Justice.*

HON. A. M. BUCHANAN, HON. H. M. SPOFFORD, HON. J. N. LEA, HON. C. VOORHIES,	}	<i>Associate Justices.</i>
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R. D. SHEPHERD v. LEEDS & Co.

The registry of a draft on the owner of a saw-mill expressed on its face to be for the value of machinery furnished for the saw-mill, but which was not accepted at the time of its registry, is not a registry under Art. 8289 of the Civil Code against the owner which will affect the property in the hands of an innocent purchaser, although the machinery may have increased the value of the immovable by having become a part of it.

**A**PPEAL from the District Court of Jefferson, *Burthe, J.*  
*Durant & Horner*, for plaintiff and appellant. *Thomas Hunton*, for defendant.

MERRICK, C. J. *Nicholas C. Hall* having a judgment against *Jesse Fulton* issued a *fi. fa.* thereon, seized the Carrollton saw-mills, the property in controversy, as the property of *Fulton*, and at the Sheriff's sale on the 11th day of July, 1851, purchased the same. *Hall's* title was recorded.

*Leeds & Co.* on the first day of October, 1851, received from *Jesse Fulton* two drafts (so called) payable in three and six months, drawn by himself on *Nicholas C. Hall*. They are in the following form:

"New Orleans, October 1st, 1851, three months after date *please* pay to the order of *Messrs. Leeds & Co.*, seven hundred and sixty dollars and nineteen cents, with eight per cent. per annum interest from date until paid, for value received in machinery furnished for saw-mill at Carrollton, in the parish of Jefferson, and place the same to account of said mill."

(Signed)

JESSE FULTON.

"To *N. C. Hall, Esq.*, New Orleans."

SHEPHERD  
v.  
LEEDS.

Before *Hall* accepted the drafts, if they may be so considered, viz: October 7th, 1851, they were recorded in the Recorder's office of the parish of Jefferson. It does not appear how they were noted on the index, whether against *Hall* or *Fulton*.

On the 11th day of March, 1852, *N. C. Hall* sold the property to *Wood & Barrow*.

*L. F. Génères* having a judgment against *Wood & Barrow* seized the saw-mills, and caused the same to be sold at Sheriff's sale on the 2d day of May, 1853.

At this sale the plaintiff, *R. D. Shepherd*, became the purchaser. In March, 1855, *Leeds & Co.* obtained judgment against *Fulton* for the amount of their two drafts, and their privilege upon the property was recognized. Neither *Hall*, *Wood & Barrow*, nor *Shepherd* were parties to the suit.

*Leeds & Co.*, disregarding the various conveyances, issued an execution and seized the property and advertised the same for sale. At the time of the seizure *Fulton* was living on the property, but he informed the Sheriff that he was not the owner. It is not pretended that these sales were simulated, and the question on behalf of *Leeds & Co.* has been argued on the ground that the privilege gives them a right to seize and sell the property.

The plaintiff relies mainly upon two grounds to sustain his injunction, viz:

1st. The recording of the drafts could only affect *Fulton*, for he was the only party to them when recorded. But he was not the owner of the property. It could not, therefore, bind the property in the hands of *Hall*, the owner, so as to affect innocent purchasers.

2d. Conceding that *Leeds & Co.* had a privilege upon the property, they could not disregard the ownership of the plaintiff, a third possessor, and treat the property as belonging to *Fulton*.

As it will have the effect to end this controversy we will consider the first of these questions presented by the plaintiff.

By Article 3229 of the Civil Code, it is provided that contractors and those who have supplied the owner materials for the construction or repair of his buildings or other works, preserve their privilege *only in so far as they have recorded with the Register of Mortgages the act containing the bargain they have made, or the amount or acknowledgment of what is due them, in all cases where the amount of the bargain or agreement, or the amount of the account or acknowledgment exceeds the sum of five hundred dollars.*

The registry made by *Leeds & Co.* of their draft is not a registry against the owner of the property, and cannot prejudice third parties acquiring rights from the owner. The purchasers were only bound to examine the office of the Recorder in the name of *Hall* in order to ascertain whether any privileges had been created upon the property during the period that *Hall* was the owner of it.

The draft, until accepted, is no agreement or bargain of *Hall's*, neither can it be called an account against or acknowledgment by him. The registry of the draft, therefore, against one *not owner*, cannot affect the immovable as against innocent purchasers, although the machinery may have increased the value of the immovable by having become a part thereof.

As the contract of *Leeds & Co.* has not been recorded so as to operate as a privilege upon the property in controversy, the injunction sued out in this case must be perpetuated.

It is, therefore, ordered, adjudged, and decreed by the court, that the judgment of the lower court be avoided and reversed, and it is further ordered that the injunction sued out in this case be made perpetual; said *Leeds & Co.* and said Sheriff be perpetually enjoined from selling said steam engine used for running said steam saw-mill, and it is further ordered that the said defendants, *Leeds & Co.*, pay the costs of both courts.

SHERIFF  
v.  
LEEDS.

MRS ANN W. JETER v. MARY E. HEARD.

A continuance was properly refused when the party desiring the testimony of a witness absent in a distant parish, instead of taking out a commission to examine him, dispatched a special messenger to bring the witness; by doing so he took upon himself the risk of the witness being in court on the trial.

The affidavit of the jurors who tried the case, as to what they understood at the time of rendering their verdict would be its effect, is inadmissible. The effect of the verdict is a matter of legal construction, and the jurors have no capacity to serve as its interpreters.

APPEAL from the Sixth District Court of New Orleans, *Cotton, J.*

*A. T. Steele*, for plaintiff. *A. Lothrop* and *C. A. Johnson*, for defendant and appellant.

BUCHANAN, J. (SPOFFORD, J., absent.) Plaintiff sues for arrears of rent due her upon a contract of lease of a house.

Defendant pleads that plaintiff has violated a contract to finish certain repairs to the house by the 1st of October, 1854, by means whereof defendant was greatly damaged. She claims damages in reconvention.

The jury who tried the case rendered a verdict in favor of the plaintiff for the amount claimed in the petition; and that the suit in reconvention be dismissed. From a judgment, rendered in conformity to this verdict, the defendant has appealed.

Defendant and appellant urges that the District Court erred in refusing a new trial, applied for upon two grounds supported by affidavits. The first of those grounds is the absence of a material witness, named *Pitte*, whose absence had been the subject of an application for a continuance, and involves the correctness of the refusal of said continuance.

The District Court did not err in refusing the continuance. The defendant had not taken proper steps to secure the benefit of *Pitte's* testimony. He was in the parish of Avoyelles, and defendant, instead of taking out a commission to examine him there, had dispatched a special messenger to bring him to New Orleans; and had thereby taken upon herself the risk of his being in court on the trial.

The defendant also appended to her application for a new trial an affidavit, signed and sworn to by all the twelve jurors who tried the cause, that they had understood, in rendering a verdict dismissing defendant's reconvention, that the defendant was not to be barred by such verdict from instituting another suit for the same matters embraced in her reconventional demand.

The District Judge properly disregarded this affidavit. Even in the much stronger case of misconduct of the jury, it has been repeatedly decided that the affidavit of a juror is incompetent to impeach the verdict. 1 N. S. 514; 11 L. R. 141; 11 L. R. 191; 3 An. 435; 9 Rob. 387.

JETER  
v.  
HEARD.

Here then is no question of misconduct in the jury, but of a misunderstanding on their part of the legal effect of the verdict to which they all agreed. Such an inquiry is entirely inadmissible. It was the duty of the Judge to instruct the jury upon the form of their verdict, and we are bound to presume that he did so. The verdict was returned into court by the jury, and read and recorded in the presence of both parties represented by counsel. Its effect is matter of legal construction of its terms, and the jurors who rendered it have no capacity to serve as its interpreters.

Upon the merits, we think that the defendant has made out a case of damage occasioned by the fault of plaintiff. There appears to have been two contracts between these parties. The original one, a lease by *Jacob L. Florance* to *Mary E. Heard*, of a large boarding house called the "Florance House," for three years from October 15th, 1852, for the yearly rent of three thousand dollars, payable monthly; which contract was assigned to plaintiff by *Florance* in February, 1853.

This original lease was modified and altered by contract between the plaintiff (by *John T. Jeter*, her husband,) and *Mrs. Heard*, on the 17th July, 1854.

The essential clauses of the second or modified contract of lease are as follows:

"*Mrs. Mary E. Heard* hereby agrees and binds herself to release and deliver to *John T. Jeter* the two rooms of the basement of said Florance House, situate on the corner of Camp and South streets, for the purpose of a dry goods store, or for any other purpose that the said *John T. Jeter* may think proper to appropriate the same, due regard being had to the safety and convenience of *Mrs. Heard*, tenant of the remainder of said Florance House. The said release and delivery of said two rooms shall take effect whenever the repairs and alterations hereinafter particularly mentioned and described shall have been completed: that is to say, from 1st September to 1st October next, 1854. For and in consideration of the foregoing release and delivery of the above named two rooms, the said *John T. Jeter* hereby agrees and binds himself to make the following repairs and alterations of the remainder of said Florance House, occupied as a boarding house, to wit: to put gas fixtures in the parlors, dining room and halls, and also to put up a genteel iron verandah in front on South street, the entire size of the building, say fifty feet front on said street, the verandah to extend in front of each story on South street; to repair and otherwise fit up the gallery on Camp street, which is now in bad condition, and to put the same in good order and condition in every respect; and to paint and repair thoroughly the said building, both inside and out, so as to render it a good and substantial tenement, and adapted to the purposes of a genteel boarding house in every respect; all of said repairs to be made at the cost and expense of the said *John T. Jeter*, in a good, substantial and workmanlike manner. It is hereby expressly agreed between the parties that the original lease hereinbefore referred to shall remain in full force and virtue in every particular, as to the monthly payment of rent, and all other rights and obligations of either of said parties arising therefrom."

The evidence shows that the repairs which the plaintiff by this contract obliged herself to complete by the 1st October were not in fact completed until the 1st January, three months later, and that this delay interfered very materially with defendant's business, and caused her to lose many boarders. It may in fact be said, under the proof adduced, to have broken up the defendant's

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business for that season. Now, although the general rule of law is (C. C. Art. 2670) that if, during the lease, the thing leased should be in want of repairs, the tenant is obliged to submit to any inconvenience that he may be put to by such repairs, yet even that general rule provides for a diminution of the rent if the repairs occupy more than a month; and in this particular case the repairs were made the object of a special agreement fixing not only their extent but the time to be occupied in making them, and, what is particularly to be noticed, stipulating the release by the tenant to the landlord of a valuable portion of the premises leased, without any reduction of rent, to take effect from the 1st October, as a remuneration or indemnification to the landlord for making the repairs.

Now, it is in proof that plaintiff let the two rooms in the basement thus released for one hundred dollars a month, so that he appears to have received during the last year of defendant's lease three hundred and fifty dollars a month for those premises which, by the original lease, defendant hired for two hundred and fifty dollars a month. As the plaintiff, although she has reaped this considerable advantage from the contract of the 17th July, 1854, has violated her engagements under that contract towards the defendant, and has thereby caused the latter a loss, which, although not precisely ascertained by the evidence, yet was certainly very considerable, it has seemed to us equitable and even moderate to award to defendant the restitution of the additional rent, say twelve hundred dollars, which plaintiff has received for the Florance House during the last year of the defendant's lease.

It is to be observed that there is nothing before us but the reconventional demand; the claim and judgment of plaintiff having been satisfied in full, as appears by the record.

It is, therefore, adjudged and decreed, that the judgment of the District Court upon the claim of plaintiff remain undisturbed; that as regards the reconventional claim of defendant, the judgment be reversed; and judgment is hereby rendered in favor of defendant and appellant, against plaintiff and appellee, upon the reconvention, in the sum of twelve hundred dollars, with legal interest from the 11th of April, 1855, and costs of appeal.

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THOMAS S. GRIFFON et al. v. EVARISTE BLANC.

The rule of practice which, in an action of slander of title, imposes on the defendant who reconvenes and sets up title to the property the burden of proof which rests on the plaintiff in a petitory action, applies only to the case where the defendant is out of possession. Where the defendant is himself in actual possession, the plaintiff cannot so change his position by the form of action to which he resorts, as to escape the burden imposed on him by law of establishing his title. In such an action, if the title relied on by defendant is not a valid one, he cannot be permitted to controvert a confirmation of the plaintiff's title by the government, nor to require that the plaintiff's title should be traced from the original claimant to the confirmee.

The universal legatee cannot set up the will of the testator as a just title and make it the basis of the prescription of ten years.

APPEAL from the Tenth District Court of New Orleans, *Straubridge, J.*  
*L. Janin*, for plaintiffs and appellants. *H. A. Bullard*, for defendant.

MERRICK, C. J. This is an action of jactitation. The plaintiffs allege that they are the joint owners and possessors of a tract of land in the immediate

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vicinity of the city of New Orleans, having two arpents front on the south side of Canal Carondelet, being bounded on side nearest the city by lands lately belonging to *General Lafayette*, and now to *John Hagan*, and on the opposite side by lands, the title to which is in dispute, and which belong either to the petitioner, *John Moore*, and to the estate of *Theodore Nicolet*, or to *Madame De Pontalba*, and runs between parallel lines to Common street, (then) in the Second Municipality.

The defendant also set up title and averred possession in himself, and pleads prescription. The proof shows that defendant was in possession of the land at one end of the tract, and the plaintiffs are in possession at the other. The Judge of the lower court, after an elaborate examination of the long and complicated lists of titles produced by the parties, found for the defendant, and rendered judgment in his favor, and the plaintiffs appealed.

The first question the parties present for our consideration is, on whom is the burden of proof, whether on plaintiffs or defendant? The plaintiffs cite the cases of *Millaudon v. McDonogh*, 18 L. R. 102, and *Caldwell v. Hennen*, 5 Rob. 20, to show that the defendant who reconvenes in the action of slander of title is the plaintiff in a petitory action. We think these authorities apply more properly to an action of slander of title purely; one where the defendant is out of possession. But where the defendant is himself actually in possession, the plaintiff cannot be permitted to change his position with the form of action, and escape the burden imposed upon him by Art. 44 of the Code of Practice. In order to recover and turn his adversary out of possession, he must establish his title.

Since the pendency of this suit, the defendant's title has received the examination of this court and the Supreme Court of the United States, and been declared invalid. *Lafayette's Heirs v. Blanc*, 3 Ann. 59; *Blanc v. Lafayette et al.*, 11 Howard, 102. There is nothing in this case which presents defendant's title in a different light from the cases just cited, and that construction must govern us in the present case.

The plaintiffs' confirmation under the government of the United States, cannot be controverted by the defendants, neither are the plaintiffs obliged to trace up their title from the original claimant to the confirmee. *Jourdan v. Barrett*, 4 Howard, 169, and *Puris v. Harmanson*, 4 Ann. 422.

The remaining defence and that most insisted upon, is the plea of prescription.

The defendant's possession is shown to have extended back more than ten years prior to the commencement of this suit, and he invokes Article 3442 C. C. as a possessor in good faith. But when we examine his title we find that he holds as universal legatee under the will of *Mlle. Liotaud*, who inherited the pretensions of *Liotaud*, the original grantee of the title set up by the defendant.

The question is therefore presented, whether the universal legatee can set up the will as a just title, and make it the basis of the prescription of ten years. It was held, that a legatee by particular title, could not be presumed to be cognizant of any defect in the title of the testator, and must be regarded as a possessor in good faith. 4 Rob. 170, *Sicles v. Nettles*.

But it is evident that there is a material distinction between the legatee by universal title and the heir who holds by particular title. The one takes no greater right than the testator had, whom he represents. He is bound for his

debts and takes the estate with all its defects and burdens. *Succedit in vitia et virtutes*. C. C. 1606, 5 Ann. 200; Trop. No. 495. *Vitia possessionum a majoribus contracta perdurant et successorem auctoris sui culpa comitatur*. C. Const. 11, book 7, p. 32.

The other, the legatee by particular title, by receiving a gift of a particular thing from one who takes upon himself the character of owner, in no manner charges himself with the duties and obligations of his author and can well be supposed to receive in good faith under what appears to him to be a just title. C. C. 1879.

Marcadé enumerates among the just titles, sales, exchanges, donations, constitutions of dower, giving in payment and legacies. As to legacies and donations, he says: "We speak only of legacies or donations by particular title, since, as to successions by universal title, the question cannot be raised. It is known in fact, that these, according to Art. 2235, have always the same possession as their author, in such a manner that in spite of their personal good faith, they are possessors in bad faith, if their author was in bad faith, and *vice versa*. They have no new title." See further Marcadé, 6 vol. p. 194, No. ii, also note 2, just cited.

Article 2235 of the Napoleon Code corresponds with Article 3459 of our Code, which is in these words: "The possessor is allowed to make the sum of possession necessary to prescribe, by adding to his own possession that of his author, in whatever manner he may have succeeded him, whether by an universal or particular, a lucrative or an onerous title."

This article, we think, was intended to convey to the heir or universal legatee only, such possession as his author had, and not to change at once the possession of the author, whether in bad faith or by precarious title, into a possession in good faith in the heir or legatee. C. C. 3404, 3408.

The plea of prescription cannot avail the defendant.

It is therefore ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and that the plaintiffs recover and have possession of said tract of land herein described, and that they be quieted in their ownership and possession of the same, and that the present defendants, the testatrix widow in community, and heirs of said *Evariste Blanc*, deceased, pay the costs of both courts.

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#### MOORE et al. v. E. BLANC.

The principles of this case decided in case of *Griffon v. Blanc*.

**A**PPPEAL from the Fourth District Court of New Orleans, *Strawbridge, J.*  
L. Janin, for plaintiff and appellant. T. Curry, for intervenors.

MERRICK, C. J. This case was submitted in the lower court as well as in this, as depending upon the same testimony and legal principles as the case of *Thomas S. Griffon et al. v. Evariste Blanc*, just decided, and it must share the same fate.

For the reasons given in that case, it is ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and it is further or-

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dered, adjudged and decreed, that the plaintiffs be hereby declared to be the proprietors of the land described in their petition, and that the present defendants, as executrix widow in community, and heirs of said *E. Blanc*, pay the costs of both courts.

MME. DE PONTALBA v. EVARISTE BLANC.

Principles of this case decided in *Griffin v. E. Blanc*.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. L. Janin*, for plaintiff and appellant. *T. Curry*, for intervenors.

MERRICK, C. J. This case cannot be distinguished from the cases of *Griffin et al.* and *Moore et al.* against this defendant. It depends upon the same principles and testimony.

For the reasons given in the first of those cases, it is ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and it is further ordered, adjudged and decreed by the court, that the said plaintiff be recognized and declared to be the legal proprietor of the tract of land described in her petition; and it is further ordered that the present defendants, as executrix widow in community, and heirs of *Evariste Blanc*, pay the costs of both courts.

A. D. GRIEFF & Co. v. STEAMBOAT D. S. STACY, CAPTAIN AND OWNERS—  
Rule on FRELLSEN & FERGUSON, sureties on the appeal bond.

The seizure of property by the Sheriff under a writ of *heri facias*, and his subsequent carelessness or neglect by which the benefit of the seizure is lost to the seizing creditor, in consequence of the destruction of the property seized, furnishes no ground to the sureties on an appeal bond, to resist the payment of the judgment.

The Sheriff, in such a case, may, by his neglect, become responsible to the defendant whose property was lost by his neglect, or to the plaintiff whose debt he has jeopardized; but the sureties on the appeal bond would only be subrogated to the defendants' rights on payment of the judgment, and not until then could they exercise any right of action against the Sheriff.

**A** PPEAL from the Fifth District Court of New Orleans, *Augustin, J. Durant & Horner*, for plaintiffs. *Wolfe & Singleton*, for appellants.

MERRICK, C. J. The present proceeding is a rule taken upon *Frellsen & Ferguson*, the sureties on the appeal bond, to show cause why they should not pay the judgment heretofore affirmed by us in this case.

The defendants' counsel presents only questions of law on which he expects the reversal of the judgment of the lower court.

I. He contends that the lower court erred in dismissing the call in warranty against the Sheriff, on an exception filed by the Sheriff.

The allegations upon which the call in warranty is based, are that the steamboat *D. S. Stacy* was given up by the defendants to satisfy the writ of execu-

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DR. STACY.

tion; that plaintiffs had a lien and privilege upon the boat; that it was sufficient to satisfy the plaintiffs' demand, but that through the negligence and carelessness of the Sheriff, his deputies and agents, and his neglect to insure the steamboat and his illegally postponing the sale, the steamboat was destroyed by fire, and thereby the defendants in the rule discharged from the plaintiffs' demand, but if not discharged, that the Sheriff *John M. Bell* be required to hold them harmless, and that they have judgment over against said Sheriff.

The court did not err in sustaining the exception. Nothing short of *payment* was a discharge of the judgment against the original defendants. The seizure of property had not that effect. The sale of the property and the conversion of its proceeds into money in the hands of the Sheriff, would be equivalent to payment, and discharge the judgment, because the execution would be satisfied by the receipt of the money by the Sheriff, an agent competent to receive the payment. But the mere seizure of property can never produce the effect of discharging the judgment, nor can the careless or wilful destruction of the property seized by the Sheriff release the sureties, for the Sheriff is authorized to return the writ satisfied, only when he has in his hands gold and silver, or its equivalent, to deliver the plaintiffs in pursuance of the commands of the writ.

The Sheriff by his negligent acts may become responsible to the original parties; to the defendants whose property he has lost, or to the plaintiff whose debt he has jeopardized; but the surety does not become subrogated to this right (if at all) until he himself has paid the debt. The sureties therefore on the appeal bond in the present suit, upon their own showing, had no immediate cause of action against the Sheriff, and consequently the exception was properly sustained.

II. The remaining question is raised by a bill of exception taken to the opinion of the Judge of the lower court in refusing to admit testimony of witnesses, to prove that the steamboat *D. S. Stacy* was destroyed by fire by reason of the carelessness and negligence of the Sheriff and his employees, on the ground that it contradicted the return of the Sheriff, and that it could not be admitted as the Sheriff was not a party to the rule.

It is not necessary to consider the question whether a party or his surety may contradict the return of a Sheriff, as it is apparent that if the testimony had been received, it could not have changed the result.

We do not think the question, raised upon the call in warranty, entirely frivolous, and the damages prayed for in the answer of the appellees are refused.

Judgment affirmed.

## W. H. HARRIS v. E. B. HARRIS

Where the sale of succession property is ordered to pay debts, an heir cannot be allowed to retain the price of property adjudicated to him.

It is not necessary that the executor should make a tender of a transfer to the purchaser at public sale, in order to put the latter in default.

The proceeding of *folle enchère* may be resorted to in succession sales, and a new order of sale is not necessary.

**A**PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*P. E. Bonford and J. B. Eustis*, for plaintiff and appellant. *Chilton & Harrison*, for defendant.

BUCHANAN, J. Plaintiff appeals from a judgment of the District Court, setting aside an injunction obtained by him against a resale for his account and risk of certain succession property purchased by him, he not having complied with the terms of the first adjudication, which were cash.

The grounds alleged by plaintiff for an injunction, appear to be :

1st. That he is one of the heirs of the succession for account of which the sale was made, at which he became purchaser.

2d. That a rule to show cause why the property should not be resold for his account and risk, was made absolute without notice to him, although he is a resident of the State. The notice is alleged to have been given to a curator *ad hoc* appointed to represent him.

3d. No sufficient averment of *putting in default* was made in the rule taken upon petitioner, for the resale at his risk.

We agree with the district Judge, that the allegations of the petition do not present a sufficient legal cause for injunction.

The original sale is presumed to have been ordered by the court, for the purpose of paying the debts of the succession. C. C. 1661. Indeed the district Judge, in his reasons for judgment, declares that such was the fact. Supposing the plaintiff to be one of the heirs, he could not, on that account, be allowed to retain the price of adjudication in his hands ; for upon the showing of debts by the executor to authorize a sale, the heir would have nothing to receive from the succession, until the debts were paid. Again, plaintiff does not state how many heirs there are, nor that his proportion of the inheritance was equal to the amount of his bid. His words are, "that the succession of said *John L. Harris* is largely solvent, and that petitioner, as one of the heirs and distributees, is entitled to receive and will receive, a considerable sum on the partition thereof."

The petition alleges the rule for resale was made absolute without notice to him ; yet his allegations, which are very circumstantial, show him to be thoroughly informed, at the time of filing his petition, of all the proceedings upon the rule ; and no valid reason is stated why the rule should not have been made absolute. The petitioner does not allege that he has ever been ready and willing to pay the amount of his bid ; on the contrary, as we have seen, he pretends to be dispensed, in his quality of heir, from paying his bid.

The executor was not obliged to tender to plaintiff a transfer of the stock, in order to put the latter *in mora*. C. C. 2463.

In argument, the counsel of plaintiff have urged a ground for injunction, not stated in the petition, viz, that a purchaser at a succession sale, made by order of court, is not subject to the proceeding of *folle enchère*.

The contrary is settled by two decisions, *Landry v. Conelly*, 4th Rob. 127, and *Duncan v. Armant*, 3d Ann. 84. In the latter case, which comments the former one, it is even decided that no new order of sale is necessary.

Judgment affirmed, with costs.

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HARRIS.

### S. W. OAKLEY v. DAVID AIKEN.

When the value of the object in controversy is sufficient, according to the allegations of the petition, to give the court jurisdiction, the fact that the price paid for it by the plaintiff is below the amount required to give the court jurisdiction is not sufficient of itself to destroy the allegation as to the true value. The allegation in the petition as to the value of the object in controversy determines the question of jurisdiction when the claim is not evidently fictitious.

When the plaintiff in a suit for a partition sets up title to an undivided half of property in defendant's possession, claiming to have derived title thereto under a Marshall's sale, the defendant not claiming title to the interest of the seized debtor in the object thus sold, cannot contest the validity of the Marshall's sale for the want of formalities which were intended by law for the protection of the judgment debtor alone.

When neither the judgment debtor nor any third party claims an adverse interest in property thus sold, the want of an appraisal of the property is not such an informality as will avoid the sale.

APPEAL from the Fifth District Court of New Orleans, *Augustin J. H. B. Eggleston*, for plaintiff. *J. Livingston*, for defendant and appellant.

LEA, J. *John S. Turner* and *Elihu Woodruff* being partners in business under the name and style of *Turner & Woodruff*, the latter availed himself of the benefit of the bankrupt law, and surrendered the firm assets of *Turner & Woodruff*. At the sale of these assets the defendant became the purchaser. The plaintiff, who was a judgment creditor of *John S. Turner*, the other partner, caused to be seized in execution—1st, All the rights, credits, money and property belonging to *Turner* in the hands of *Aiken*. 2d, All the right, title and interest of *Turner*, as one of the partners of the firm of *Turner & Woodruff*, in and to the books, accounts and bills receivable of the late firm in the hands of *Aiken*. 3d, All the right, title and interest of *Turner* in and to the books, accounts, notes, and other assets adjudicated to *Aiken* at a sale made by the United States Marshal on the 20th March, 1844. It is in virtue of the sale made under this seizure that *Oakey* became the purchaser of *Turner's* share of the assets of which his representatives now ask a partition. An exception was taken to the jurisdiction of the District Court, on the ground that the value of the property sought to be divided was not sufficient to give jurisdiction to the District Court. It is alleged in the plaintiff's petition that his interest in the property sought to be divided is worth the sum of \$500 and upwards, and it is not shown that they are worth less; their nominal value far exceeds that amount, and the fact that they were purchased by *Oakey* for \$6 at a bankrupt sale by no means proves that the claim is fictitious, especially when the large nominal value of these assets is considered; moreover, if the interest be really less than \$50 in value, this court would have no jurisdiction of the appeal.

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AIKEN.

The defendant has suggested and alleged informalities in the sale made by the City Marshal, of which we do not think he is at liberty to avail himself under the circumstances.

Whether there was or was not an appraisal of the assets prior to the sale to *Oakey* is a matter wholly immaterial to *Aiken*. The want of the formality, assuming it to exist, is one which *Turner* alone could set up as a defence, as it was intended solely for the protection of the judgment debtor; and the same remark may, under the circumstances, be made with reference to the supposed invalidity of the seizure for want of an actual taking possession of the assets sold to *Oakey*—due notice of seizure was given to *Turner* himself—the assets for the most part are intangible. Neither the judgment debtor nor any third party asserts an interest in the assets thus sold, and the defendant himself is certainly secure against an adverse possession of any third party, as he pretends to have possession himself. We think it was incompetent for the defendant to urge informalities which, assuming their existence, could work no injury to himself, and of which the parties in interest have made no complaint.

Judgment affirmed.

#### JOSEPH ELLIOTT v. STEAMBOAT JAMES ROBB, CAPTAIN and OWNERS.

Where the plaintiff sued to recover the value of horses shipped on defendants' boat, and alleged to have died of a disease contracted in consequence of the negligence and want of skill of those in charge of the boat in removing the horses from one part of the boat to another, under the general denial it is competent for the defendants to give in evidence all circumstances going to relieve the act of removal, of the character of a tortious violation of the contract between the parties, by assigning a reasonable necessity for such removal.

**A**PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*

*J. W. Price*, for plaintiff and appellant. *W. S. Upton*, for defendant.

**B**UCHANAN, J. Thirty-five horses belonging to plaintiff were brought down the river from St. Louis to New Orleans, on board the "James Robb" steamboat, on freight, in the latter part of September, 1854. They were all delivered at the stock landing, and freight was paid upon them. Plaintiff himself accompanied his horses down, and had charge of them during the passage. He now claims of the captain and owners of the boat the value of two horses which died after their arrival in the city, on the ground that their death was caused by the fault of the defendants.

It appears that the captain allotted, by special agreement with plaintiff, the whole of the after guards to the plaintiff's horses; but, that, one night the mate took the horses which were upon the larboard guard into the deck-room, for the purpose of trimming boat, as the wind was high and the boat listed considerably to larboard. The next morning the horses were moved back to the guards. There was a considerable difference of temperature between the deck-room and the guards, and the transition from cold to heat and from heat to cold is alleged to have given the horses a fever of the lungs, from which they died.

The necessity of the temporary removal of the horses from the guards for the purpose of trimming boat is shown by several witnesses whose depositions,

although excluded by the District Judge, have come up in the transcript with a bill of exceptions to their exclusion, taken by defendants. We think the evidence should not have been excluded. Under the general denial it was competent for defendants to give in evidence all the circumstances which would go to relieve the removal of plaintiff's horses of the character of a tortious violation of the contract between the parties, by assigning a reasonable necessity for such removal.

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Sgt JAS. BOND.

Apart from this evidence, tending to justify the temporary removal of plaintiff's horses from the guards to the centre of the boat, we are by no means satisfied of the plaintiff's right to recover. The plaintiff, who is himself a horse doctor, is proved to have physicked and bled his horses before the removal in question. It is proven that the change of climate from the upper Mississippi and Ohio to New Orleans is very apt to produce fevers in horses, and to cause their death.

Some of the witnesses prove that all of plaintiff's horses were landed in good order, and when the freight bill was presented to plaintiff he made no objection on the score of injury to the horses by reason of the acts of the officers of the boat. The freight bill was paid by an agent of the plaintiff, out of his presence; but no effort has been made to show that this payment was without his knowledge and authority. Lastly, the proof of the cause of the death of plaintiff's horses is vague and unsatisfactory—resting too much upon opinion and conjecture to render it a safe guide for a judgment in plaintiff's favor.

It is, therefore, adjudged and decreed that the judgment of the District Court be reversed, and that there be judgment for defendants, as in case of non-suit, with costs in both courts.

#### E. WADDELL and HUSBAND v. MILLS JUDSON.

A judgment rendered against a married woman in a suit regularly prosecuted by attachment, is not open and cannot be questioned as to the original indebtedness, without any action of rescission having been brought or any appeal taken from the judgment within two years.

The Sheriff's return that property sold by him was duly appraised is sufficient in the absence of any rebutting evidence.

**A**PPPEAL from the Fifth District Court of New Orleans, *Strawbridge, J.*  
*Walker & Pierce*, for plaintiffs and appellants. *H. D. Ogden*, for defendant.

**STOFFORD, J.** In March, 1846, the plaintiff, *Eleanor C. Waddell*, authorized by her husband, mortgaged the slaves *Anthony* and *Louisa* (declaring them to be her lawful property) to the defendant *Mills Judson*, to secure the sum of \$500 then loaned her. The mortgage was by authentic act passed in New Orleans, where the plaintiffs then resided.

In December, 1848, the note given for this loan being long past due and the plaintiffs having left this State, *Judson* proceeded by attachment against *Mrs. Waddell* to foreclose the mortgage. The slaves *Anthony* and *Louisa* were attached, and a personal citation was afterwards served upon *J. P. Waddell*, her husband, together with a copy of the petition filed in the Fourth District Court of New Orleans.

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An answer was filed by an attorney-at-law on behalf of both *Mrs. Waddell* and her husband, and the proceedings resulted in a judgment against her, with privilege on the slaves attached.

Under this judgment, they were seized in execution, together with her interest in her mother's succession, and, at the Sheriff's sale, *Judson* became the purchaser of the property seized, and went into possession of both slaves in May, 1849.

In May, 1854, *Mrs. Waddell*, with the assistance of her husband, brought this suit against *Judson* for the said slaves or their value and hire since May, 1849.

She alleges that the slaves were hers by inheritance from her mother; that *Judson* got possession of them wrongfully, under color of certain judicial proceedings, meaning the attachment suit aforesaid; that she was absent at the time of these proceedings, and never cited and made no appearance; that the proceeds of the note on which the attachment suit was based did not enure to her benefit, but to her husband's; that her husband had paid usurious interest therefor, and that the Sheriff's sale of the slaves, under the judgment, was void, because they were adjudicated for a bid not exceeding the anterior mortgages, because there was no appraisal, because "other forms and requisites of law were not complied with," and because *Judson* slandered her title to the property at the time of the sale, and thereby depressed the price.

The defendant maintains that the judgment in the attachment suit is not now open to be questioned by the plaintiffs, and in this he is clearly right.

A personal citation addressed to *Mrs. Waddell*, together with a copy of the petition, having been served upon her husband, from whom she was not separated, she was thereby brought into court. C. P., 192.

Moreover, her property was attached, which of itself gave jurisdiction to the court. Her remedy, if aggrieved by the judgment, was either by an action of rescission or by appeal, both of which were barred by the lapse of two years from the 12th February, 1849, when the judgment was signed.

"The absent debtor, against whom judgment has been so rendered, may, within two years after such judgment, obtain the reversal of the same, if he proves that the distance at which he lived from the place where the attachment was obtained, has prevented his being apprised of the proceedings had against him, and that the plaintiff has availed himself of his absence to obtain payment of a debt, either already paid in totality or partly discharged, or which did not exist." C. P., 267.

"A judgment may be reversed if it has been rendered on an attachment obtained against a person absent, and who had no knowledge of the action having been brought against him; if such person show that he was not indebted either for the whole, or for part of the sum for which the judgment was obtained and his property sold. But this action shall be prescribed after two years have elapsed from the date of the judgment." C. P., 614.

"No appeal will lie, except as regards minors, after a year has expired, to be computed from the day on which the final judgment was rendered, if the party claiming the same reside in the State, and after two years if he be absent therefrom." C. P., 593.

The plaintiff, therefore, when she brought this action, was concluded by the judgment of the Fourth District Court as to her original indebtedness to *Judson*.

She then appears in the attitude of a party whose property has been sold under a valid judgment for a debt of her own, seeking to set aside the adjudication and to get back her property, solely on the ground of certain specified informalities and irregularities in the sale.

But every specific allegation she makes of irregularities in the Sheriff's sale, is unsustained by the evidence. The price bid exceeded the amount of mortgages and privileges preferred to the judgment creditor; the Sheriff's return recites that the property was duly appraised, a recital which no evidence was offered to rebut, as required by the rule in *Hewitt v. Stephens*, 6 An., 640. There is no proof whatever of a slander of her title on the part of Judson for the purpose of deterring competition in bidding; and the allegation of other informalities is too vague to require notice, the petition merely asserting, "nor were the other forms and requirements of the law for Sheriff's sales complied with."

It is therefore ordered that the judgment of the District Court be affirmed with costs.

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#### J. F. WILDE v. CITY OF NEW ORLEANS.

The city is responsible for damages occasioned by the tortious acts of municipal officers, done within the scope of their employment and ratified by their superiors.

In such a case, when the evidence is unsatisfactory as to the amount of damages, and the property of the use of which the plaintiff had been deprived, is of trifling value, only nominal damages will be awarded.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Durant & Horner*, for plaintiff and appellant. *J. J. Michel*, for defendant.

**SPOFFORD, J.** The city of New Orleans is sued for damages done to the plaintiff by the illegal seizure and the detention of his horse and dray for several months.

The defence is that the city is not liable, because these acts were done by the police officers and a Recorder, for whose trespasses the city is not responsible.

This defence might prevail had the officers alluded to gone out of the scope of their employment and done acts which the city had never authorized or ratified.

But it seems that the present plaintiff brought a former suit against the city for the recovery of his horse and dray; to that suit, the city filed an answer which involved a ratification of the acts of the officers in question, and an admission that they were the acts of the city. The city was cast in that suit.

This brings the case within the rule laid down in *McGary v. Lafayette*, 4 An., 440.

As to the amount of damages, the evidence is quite unsatisfactory. We cannot be governed by the mere conjectures of witnesses in such a case. The horse and dray were of very trifling value.

Under the facts disclosed, we think only nominal damages should be awarded.

It is, therefore, ordered that the judgment appealed from be reversed; it is further ordered, adjudged and decreed, that the plaintiff recover of the defendant the sum of ten dollars as damages, and the costs of suit in both courts.

WADDELL  
&  
JUDSON.

## JOSIAH COLE v. C. J. LOVENSKIOLD.

When the price of property was paid in cash, with money borrowed by the purchaser, but at the same time the purchaser executed his note for the amount to the order of the vendor, and consented, in the act of sale, to a mortgage upon the property, in favor of the vendor, or any *bona fide* holder of the note, the transaction cannot be considered simulated, and the lender of the money, as holder of the note, will be protected in his right of mortgage.

**A**PPEAL from the District Court of Jefferson, *Burthe, J.*  
*H. C. Miller*, for plaintiff. *A. W. Jordan*, for defendant and appellant.

**LEA, J.** The plaintiff, who is a judgment creditor of *C. G. Lovenskiold*, with a right of mortgage upon certain property in the parish of Jefferson, caused the same to be seized and sold under execution, at a credit of twelve months, for \$790. *Mrs. Weicke*, being the holder of a note secured by a mortgage upon the same property, of a prior date and registry, has been made a defendant in a rule taken herein upon her by the plaintiff to show cause why the twelve months' bond should not be executed in favor of the plaintiff for the full amount of his claims, on the ground that the mortgage stipulated in her favor by the act referred to was simulated and false, never having any real existence.

All objections to the form of the proceeding having been waived, there was judgment decreeing that the rule be made absolute, in accordance with the prayer of the plaintiff.

It appears from the evidence that *Lovenskiold*, being anxious to purchase the property which is subject to the conflicting mortgages in this case, borrowed the money from one *Frederick Weicke*, with the understanding that its reimbursement should be secured by a mortgage upon the property purchased. As between the purchaser and *Kuntz*, the vendor, it was agreed that the price should be paid in cash, (as in fact it was, with the money furnished by *Weicke*), but the form given to the transaction was intended to subserve the double purpose of a sale and a mortgage. The consideration of the sale was, therefore, represented by a note payable in one year, secured by mortgage upon the property sold, in favor of the vendor or of any *bona fide* holder of the note.

The act of sale thus drawn was signed by *Kuntz*, the vendor, with a full knowledge of its contents. The giving of the note, the signing of the act, and the payment of the money, were all done at one time, *Kuntz, Lovenskiold* and *Weicke* being all present. Under the circumstances, we do not think the transaction can be considered as simulated. There was an actual loan made by *Weicke*, for which a note was given.

It was the intention of the parties that the loan so made should be secured by a mortgage. The note thus secured was identified with the act of sale. *Kuntz* himself accepted of the mortgage, being, it is true, the nominal mortgagee; but the transaction itself was really what it purported to be, so far as the mortgage is concerned, and although *Kuntz* did not make a manual transfer of the note to *Weicke*, he must, under the circumstances, be considered as having assented thereto. The mortgage is made in favor of any *bona fide* holder of the note. It cannot be disputed that *Weicke* was a holder in good faith, as he advanced the money which was paid as the price of the property.

The defendant, in our opinion, presents an equitable claim based upon a real transaction, entered into in good faith, carried out in due form of law, and having all the essential ingredients of a valid contract of mortgage.

We think the defendant is entitled to a judgment in her favor.

It is ordered, that the judgment appealed from be reversed; that upon the rule taken herein there be judgment for the defendant, *Mrs. Weicke*, in her capacity of administratrix of the succession of her deceased husband, *F. Weicke*, and that the proceeds of the sale of the property referred to in the rule be appropriated to the payment of the note held by her and secured by mortgage upon the said property; it is further ordered that the appellee pay costs in both courts.

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LOVINGKIELD.

### J. F. ROHRBACKER v. JOSEPH SCHILLING.

The defendant, in his answer to a suit for money loaned to him, averred that the money was not loaned but given to him, partly in payment of an antecedent indebtedness, and partly as a remunerative donation for services rendered. *Held*: That this was not an admission that the defendant was ever indebted to the plaintiff, and that the burden of proof rested on the plaintiff to establish that the transaction was a loan.

The bare fact that *A.* handed a certain sum of money to *B.* unexplained will not authorize *A.* to recover it back, on the allegation that it was a loan; it is the presumptive evidence of either the payment of an antecedent debt or of a gift.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*

*A. McCarty* and *S. Myers*, for plaintiff. *J. M. Dirrhammer*, for defendant and appellant.

SPORFORD, J. The plaintiff, administrator of the succession of *Charles Wunsch*, deceased, sued the defendant, *Schilling*, for the sum of \$1000, alleging that the deceased had "loaned that sum to the said *Schilling* for the purpose of assisting him in his business."

The defendant answered that the deceased did not loan but gave the sum in question to him, partly in payment of an antecedent indebtedness and partly as a remunerative donation for services rendered.

The first question is, upon whom does the burden of proof rest under this state of the pleadings? Clearly upon the plaintiff, for there is no admission in the answer that the defendant ever owed the plaintiff anything. If the cause had been submitted upon the pleadings alone, the plaintiff must inevitably have become non-suited.

In *Barry v. Kimball*, 10 An. 787, we declared the rule to be, both upon principle and authority, that a consistent answer, which does not admit that the defendant ever incurred a legal liability to the plaintiff, could not relieve the latter from the necessity of proving his demand; but that an answer which admitted the former existence of such an obligation, and averred its extinguishment or discharge, would dispense the plaintiff from any preliminary proof of the obligation and impose upon the defendant the burden of proving the matters pleaded in discharge.

The question then arises, has the plaintiff proved that the deceased loaned \$1000 to the defendant?

There is no written evidence of such a contract.

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v.  
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Four witnesses only were examined: one of them as to what took place at the time of the alleged loan, two as to certain admissions of the defendant, and one who said he knew nothing about the matter.

There being no literal proof, the testimony of the single witness who saw the money handed by the deceased to the defendant becomes very important. He says that *Mr. Rohrbacker* was the only other person present, but he was not examined. Now all that this witness says, which has any material bearing, is that he saw *Wunsch* give *Schilling* a bank note for \$1000. They had a conversation at the time, but the conversation was in the German tongue, and the witness did not understand a word of it.

The other two witnesses, who say anything, say only that they heard *Mr. Schilling* admit that he had received \$1000 from *Mr. Wunsch*, but he did not say for what purpose he got it. One of them declares that he said he had paid bills for *Wunsch*, and then the money that was left he paid out when there was a family meeting.

Upon this evidence we are compelled to decide whether proof of the bare fact that *A.* handed a certain sum of money to *B.* unexplained will authorize *A.* to recover it back on the allegation that it was a loan.

The highest authorities have decided this question in the negative. "The mere delivery of money by one to another, or of a bank check, or the transfer of stock unexplained, is presumptive evidence of the payment of an antecedent debt and not of a loan." 1 Green. Ev. § 38.

"Præsumitur quisque solvisse quod erat debitum, ac indebitum a se solum asserens probare debet." Voet ad Pandectas, lib. xxii, tit. iii, § 15.

Again, if *Wunsch* handed *Schilling* this money, knowing that he did not owe it, and if there is no proof of his intention, the presumption of law is that it was a gift, and he could not succeed in a suit for its repetition without disproving the presumption. Ita Paulus: "Cujus per error em dati repetitio est, ejus consulto dati donatio est." L. 53, Dig. De regulis et cet.

"He who pays through error what he does not owe has an action for the repetition of what he has thus paid, unless there was a natural obligation to make such payment; but he must prove that he paid through error, otherwise it shall be presumed that he intended to give." C. P. 18.

The fatal defect of the proof in this case is, that the common intent of the parties, when *Wunsch* handed the bank note to *Schilling*, is left entirely in the dark. We are called upon to presume a loan, when the presumption of the law is that it was either a payment or a gift. If we were informed what was said at the time, we could then affix a legal character to the contract from the evidence. In the absence of all evidence, we are not permitted to presume that a loan was intended, and if it was not, the plaintiff must fail in his action.

As it is possible that *Mr. Rohrbacker*, who was present, may be able to state the conversation of the parties at the time the money passed from the deceased to the defendant, we will not conclude the plaintiff by our judgment.

It is ordered, that the judgment of the District Court be avoided and reversed, and that there be judgment against the plaintiff, as in case of non-suit, he paying costs in both courts.

## KEYS, MALTBY &amp; Co. et al. v. J. C. RILEY et al.

Where property is under seizure at the suit of several attaching creditors, and judgment is rendered in favor of the plaintiff in the prior attachment, the others have a right of appeal from such judgment under Art. 571 of the Code of Practice, notwithstanding there had been no issue joined and no curator *ad hoc* appointed to represent the defendant in the subsequent attachment. The prescription of one year, under Art. 3499 of the Civil Code, as to workmen, laborers and servants, only applies where the employment has been by the day or by the month; it does not apply in claims for the value of work done by the job, and of materials furnished for such.

**A**PPPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*Thomas Hunton*, for plaintiff and appellee. *Mott & Frazer*, for appellants.  
**VOORHIES, J.** The steamer Dick Keys and barge Pythias were seized under a writ of attachment sued out by the plaintiffs, *Keys, Maltby & Co.*, against *John C. Riley, Frank Stein* and *Thomas Trunnell*. Twenty-four other writs of attachment were subsequently sued out by other creditors against the defendants, and levied upon the same property. There was, besides, a number of oppositions filed by other creditors in this suit, in which privileges on the property attached were claimed. During the pendency of this suit the property attached was sold by the Sheriff, and the proceeds thereof ordered to be distributed in accordance to a judgment rendered by the court below.

*Alexander Norton & Co., John E. Hyde & Co., Edward Hollister* and *Wm. N. Nuvall* are the only appellants from that judgment.

The record shows that they sued out separate writs of attachment, which were levied on the property already attached by the plaintiffs.

A plea of prescription was filed by them as a bar to the plaintiffs' claim against the defendants.

It does not appear that issue was ever joined in any of the cases instituted by them against the defendants by attachment, either by answer or default, nor that a curator *ad hoc* was appointed to represent the defendants as absentees. This is urged as an objection to their right of appeal in this instance.

In their petition praying for the appeal, they allege that there is error to their prejudice in the judgment rendered in this and other cases in the distribution of the funds arising from the sale of the steamboat Dick Keys.

We think this is sufficient, under Article 571 of the Code of Practice, to entitle them to the right of appeal.

On the merits, the plaintiffs' demand against the defendants appears to us to be sufficiently sustained by the evidence.

The prescription interposed by the appellants as a bar to the plaintiffs' claim against the defendants, is, in our opinion, inapplicable. It only applies to the wages of workmen, laborers and servants who are employed by the day or by the month, and not to claims for the value of work done by the job, and of materials furnished for such work, whether it be under a specific agreement, or on a *quantum meruit*. C. C. 3499; 5 A. 571; 19 L. 413.

It is, therefore, ordered, that the judgment of the court below be affirmed, with costs.

## HENRY KEANE v. W. L. BRANDEN and ROBERT SEMPLE.

Since the Statute of 1844, money paid for usurious interest can be reclaimed if suit is brought within one year after the payment.

Where an account has been rendered and a balance struck and acquiesced in by the debtor, the imputed credits are to be considered as payments, but the credits must first be imputed to the payment of such charges as the debtor was legally bound to pay and not to such as he was under no obligation to pay.

An acquiescence in an account containing illegal charges, will not estop the debtor from pleading their illegality--the only effect of such acknowledgment is to dispense the creditor from any affirmative proof. A mere charge in an account of interest beyond the legal rate which has not been acknowledged or acquiesced in, will not preclude the creditor from the recovery of legal interest.

Interest may be charged on the balance of an account rendered and acquiesced in, although the account was made up in part of interest, provided the interest so charged was not usurious.

An agent who has been instructed to insure, cannot take the risk upon himself as insurer; he cannot, if he does, recover from his principal premiums for insurance, but in case of loss he would be bound to indemnify his principal not as insurer but on the ground of having failed to comply with his instructions.

Where the factor has made advances to the planter from his own resources, all charges for negotiations, discounts and commissions, if charged in addition to eight per cent. per annum, are illegal.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J. Race & Foster and Durant & Horner*, for plaintiff. *J. M. Chilton and Benjamin, Bradford & Finney*, for defendants and appellants.

**LEA, J.** The plaintiff sues for an alleged balance due upon an account current for supplies and advances made to the defendants, as shown by accounts annexed to the petition. In a supplemental petition a claim is made for commissions upon the defendants' crop, which the plaintiff alleges he would have earned, had the defendant complied with his contract to ship the same to him after having been furnished by the plaintiff with supplies for his plantation, with the understanding that the petitioner should have the commissions for selling the crops.

The defendants pleaded the general issue, and further they alleged that the plaintiff, being the factor and commission merchant of *Brandon*, received his crops in that capacity, and from time to time since the year 1847, rendered him accounts which they aver are incorrect and fraudulent, "containing overcharges, false entries, miscalculations and errors, also illegal and unauthorized charges for interest, and discount for moneys raised by said plaintiff for his own use, and without the consent or authority of the defendants.

A special jury of merchants was empanelled to try the issues involved in the case, who found a verdict in favor of the plaintiff for the sum of \$6,184 80, with interest at five per cent. per annum from the 9th of March, 1854.

From a judgment based upon this verdict, the defendants have appealed.

On the trial of the case the court was asked to instruct the jury:

1st. That an agreement to pay usurious interest, or any other charges at a higher rate of commission, discount, or insurance, &c., than the law allows, is a natural obligation, and money paid under it could not be recovered back, until since the passage of the Act of the Legislature of this State in 1844, p. 15, and that now under said Act, money paid, or accounts acknowledged to be correct, cannot be reopened and inquired into by the party who pleads *usury*, ex-

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cept to the extent of *one year*, dating from the time such plea was filed in court, and that said law applies equally to a defendant who resists payment of a balance on account, as to a plaintiff who brings a direct action to recover back any such charges.

2d. That where no objections are made to the rate of interest, commissions, discount, exchange, insurance, &c., for a long time after the account current was rendered, and the balance finally settled, or acquiesced in by the debtor, or planter, he will be estopped from objecting to any usurious charges contained in said accounts thus rendered.

3d. That if the jury find that there was, in the spring of 1853, or at any other time, an acknowledgment of, and an acquiescence in the accounts current rendered up to that time; in that event, their inquiry into any and all usurious charges will be restricted to *one year* from the date of the defendants' filing their answer in this suit, setting up usury, &c.

4th. That if the jury find from the evidence, and particularly from the act of sale, that the "Arcole" plantation was sold to *Colonel Robert Semple*, and that *General W. L. Brandon* managed said plantation as the agent of said *Semple*—in that event, any acknowledgment of the correctness of said accounts by *Brandon*, during the continuance of his agency, are binding upon *Semple*, his principal.

5th. That when an account current, showing the balance, has been rendered and acknowledged, it is not then necessary to show any of the items thereof.

6th. That where a factor renders his account current showing a balance due, which balance is made up in part by *interest charges*, which have been acquiesced in, *interest* may be charged on such *balance*.

7th. That a factor, by charging in his account current usurious interest, &c., does not thereby forfeit his right to recover legal interest.

8th. That if the jury find from the evidence, that supplies were furnished by the plaintiff to defendants, under a promise or agreement that the crop of 1853 should be consigned to him for sale; and that said crop was not shipped to him, but to the house of *Payne & Harrison*, then said plaintiff is entitled to full commissions upon the whole of said crop.

9th. That fraud is never to be presumed, but must be proved by the party who alleges it.

10th. That if the jury should disagree with counsel for plaintiff, and not find a sufficient acknowledgment of, or acquiescence in said accounts current by said defendants or either of them, to restrict their investigation to *one year*, then it will be their duty to correct all errors against plaintiff, as well as those in his favor.

The district Judge charged the jury on all the foregoing points in accordance with the prayer of the plaintiff's counsel, making a verbal but immaterial change in the form of the charge on the first point.

We think there was error in the charge of the court so far as it relates to the right of the defendant to recover the sums paid for usurious interest, and other illegal charges.

Formerly, money paid for usurious interest could not be recovered; but since the Statute of 1844, money so paid can be reclaimed if suit is brought for its recovery within one year subsequent to the date of the payment; and when once an account has been rendered and the balance struck, and acquiesced in by the debtor, the imputed credits in the account will be considered as pay-

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ments; but in such case, the credits must be imputed, first, to the payment of such portion of the charges as the debtor was legally bound to pay; not to such, as he was under no obligation to pay, as for instance usurious interest. The prescription for the recovery of usurious interest which has been paid, does not extend to any other charges for which the debtor was not bound and which he may have paid. An acquiescence in an account containing *such charges* will not estop the party making it from his action for a recovery.

2d. When an account current showing a balance has been rendered and acknowledged, the creditor is dispensed from any further affirmative proof beyond the acknowledgment of the several items of the accounts; but such acknowledgment is not conclusive, its effect being merely to throw the burthen of proof of the inaccuracy of the account upon the debtor who alleges it.

3d. A mere *charge* in an account, of interest beyond the legal rate, which has not been acknowledged or acquiesced in, will not preclude the creditor from the recovery of legal interest; and where an account has been rendered and a balance struck which *has been acquiesced* in by the debtor, interest may be charged subsequently on such balance, though formed in part of anterior interest, provided such anterior interest be not usurious.

Our attention has also been called to the bills of exception taken to the charge of the court to the jury, as given upon the request of the defendants' counsel.

The counsel of defendants asked the court to charge as follows:

1st. If the jury believe from the evidence before them, that no insurance was actually paid by the plaintiff, as charged in the accounts on file, but that the plaintiff assumed the risk of insurance himself, and charged for the risk so assumed, then all the charges for insurance so made are illegal and must be stricken from the accounts on file, unless the jury find that the plaintiff assumed the risk of insurance, and charged for the risk so assumed with the knowledge of and by agreement with the defendants.

2d. That if the jury believe from the evidence on file that the negotiations charged in the accounts on file were not actually made, but that the funds advanced to the defendants were raised by the plaintiff from his own resources, then that all charges of commission, discount, &c., for such negotiations are illegal and must be disallowed.

3d. That all charges for the commission upon funds advanced by the plaintiff are illegal and must be disallowed, if claimed and charged in addition to interest at the rate of eight per cent. per annum.

4th. That the rate of legal interest is five per cent. per annum. That the highest rate of conventional interest is eight per cent. per annum. That conventional interest cannot be charged in any case without an agreement in writing to authorize it; and that no greater compensation for the use of money than eight per cent. per annum, can be lawfully charged in any case, whether disguised as commissions for advancing, commissions for negotiating, discount upon exchange or otherwise.

5th. That if an account current contain charges for interest beyond the highest conventional rate of eight per cent. per annum, whether disguised as commissions for advancing, commissions for negotiating, discount upon exchange or otherwise, or if the said account current contains any other illegal charges, and the account current is closed by striking a balance and bringing down the balance to the debit of the account, but without any special imputation of the

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credits in the account to any particular items of debit, then the credits must be imputed to the sums legally due, and not to the illegal charges for interest or otherwise—and that all the illegal charges aforesaid must be treated by the jury as contained in the balance so brought down.

6th. That if an account current showing a balance due to the plaintiff, but which balance results from illegal charges for interest or otherwise, be transmitted to the debtor and received without objection, yet that such acquiescence and consent to the account cannot preclude the debtor from subsequently contesting it.

7th. That if there has been fraud or undue concealment amounting to fraud practiced by a factor in his account current or in his dealings with a planter, for one or more years, *prescription* cannot be pleaded or set up in bar to the planter's right to inquire into and demand a correction and relief from such fraud, except from the date of the discovery of such fraud by the planter.

8th. That if there are gross errors in fact, or mistakes as to the legal rights of the parties in accounts between factor and planter, the planter will not be barred by acquiescence or lapse of time from inquiring into and correction of said errors and mistakes, except from the date of the discovery by the planter of such gross error or mistake.

9th. That if the jury are of opinion from the evidence on file that the defendants had just cause for withdrawing his business from the plaintiff, then he, the plaintiff, is not entitled for commissions on the crop of 1853.

10th. That the jury are at liberty to give a general verdict by pronouncing on the law and the facts, in the case submitted to them.

We think there was no error in the charge which the court was called upon to give to the jury, except as respects the fifth item, which should have been in some respects modified. The court refused to charge as requested upon the first, fourth and sixth points specified.

1st. An agent who is instructed to insure cannot take the risk upon himself as an insurer, without the previous consent of his principal. He cannot contract with himself, and if he could, the rule is as consonant with public policy as with a sound morality, that he should not be permitted to do so. He cannot, therefore, recover the premiums for insurance which he has charged, for there has been no contract of insurance; but in case of loss, he would not the less have been bound to indemnify his principal, not as an insurer, but as an agent who had failed to comply with his instructions.

2d. Conventional interest cannot be charged without an agreement in writing to authorize it, and by no evasion in the form of the contract, can the creditor lawfully obtain more than eight per cent. for the use of his money.

3d. We have already considered the question presented in the sixth point upon which the court was requested to instruct the jury.

Upon the question of imputation of payments we have already stated, that where an account had been presented, and a balance struck, which had been acquiesced in by the debtor, that the imputed credits in the account would be considered as payments; but in the absence of any special imputation of the credits to any particular items of debit, they were to be imputed, *first*, to the payment of such portion of the charges as the debtor was legally bound to pay, and not to such as he was not bound to pay; but should the payments, or the amount imputed as such, be *in excess* of the amount *actually* due, the surplus, under such circumstances, may fairly be considered as imputed to the

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usurious interest, or other illegal charges specified in the account; and after such imputation shall have been made, we think so far as relates to the recovery of the usurious interest thus paid, that the prescription of one year would be applicable.

We think that a restatement of the several accounts rendered by the plaintiff in accordance with the foregoing principles, would make a material change in the result. The district Judge was of the opinion that substantial justice had been done by the verdict of the jury; but we must presume that the jury acted upon the instructions of the court, and that had the instructions been different, there would have been a corresponding difference in the verdict of the jury.

If the record were complete, we might refer the accounts to an auditor to be restated in accordance with the foregoing views, but portions of the record are wanting, which can only be supplied by evidence offered on a new trial, and though such portions may have no very important bearing upon the merits of the case, we think it unsafe, under the circumstances, to adjudicate upon an incomplete record.

It is proper to add, that we think the bill of exceptions to the admission of the account marked (W. X) was well taken. There should have been other evidence, besides the affidavit of the plaintiff, that the original account had been transmitted to the defendants; and that the copy offered in evidence was a correct copy of said original. Under the circumstances, the affidavit did not furnish a sufficient basis for the introduction of the copy in evidence.

It is ordered, that the judgment appealed from be reversed, and that the case be remanded for further proceedings to be had in accordance with the principles announced in this opinion, and in other respects according to law. It is further ordered, that the plaintiff and appellee pay the costs of this appeal.

MERRICK, C. J., took no part in the decision of this case.

#### SUCCESSION OF WILLIAM D. SMITH.

Where the defence set up to a recovery upon a contract is the insanity of the obligor, it must be shown that the mental derangement was notorious when the contract was entered into, where there had been no interdiction of the party sought to be charged. C. C., 1781.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*W. H. Hunt*, for executrix and appellant. *J. W. Duncan, Horner, Eggleston and McConnell*, for opponents and appellees.

BUCHANAN, J. Various persons claim to be creditors of this succession, whose claims are not recognized by the executrix as just. Their oppositions to a provisional account of administration having been sustained by the District Court, the executrix has appealed in relation to two of the claims thus allowed.

1st. *Battersly and Watson* claim \$7774 56, amount (including costs of protest) of a bond subscribed by the deceased *William B. Smith* at Liverpool, on the 10th August, 1854. This claim is evidenced by the production of the bond, the signature of which is not disputed, and by correspondence of *Smith*.

ed. *Sybrandt* and *Necins* claim \$437 83 by book account against one *Gale*, which the deceased *Smith* assumed and promised to pay—as proved by two witnesses, *Hopkins* and *Andrews*.

The defence set up by the executrix is insanity of *Smith*. But the evidence does not make out this defence. It is clear that the mental derangement which some of the witnesses attribute to him was not notorious, as required by the 3d rule of Article 1781 of the Code, in cases where there has been no interdiction. Neither is it shown that the persons who contracted with *Smith* were aware of a derangement of his intellects when they so contracted.

The contracts in themselves contain no indication of insanity on the part of *Smith*. That of *Battersly* and *Watson*, at least, was much more than thirty days previous to the death of *Smith*, and no application was ever made for *Smith's* interdiction. C. C., Art. 396; Art. 1781, rules 5 and 6.

It is, therefore, adjudged and decreed that the judgment of the District Court be affirmed, with costs.

Succession of  
SMITH.

#### P. E. TRASTOUR v. B. FALLON et als.

The defendants were appointed a "Permanent Committee" to forward a scheme proposed at a public meeting of the citizens of New Orleans, of establishing a railway across the Isthmus of Tehuantepec, and in that capacity contracted with the plaintiff. It was held that the burden of proof, as to the terms of the contract, rested upon the plaintiff, and that to hold the defendants liable, he must show that he contracted with them personally, or that they misled him by assuming to act for others without sufficient authority.

In cases of this character, the controlling question is, whom did the employee trust? If no artifice or deception was used in making the contract, and the employee knew the capacity in which his immediate employer acted and looked to a special fund or to a projected company to reward him, he cannot hold the honest agent personally liable.

**A** PPEAL from the Fourth District Court of New Orleans; *Reynolds, J.* Tried by a jury. *J. Seghers, J. L. Tissot* and *W. D. Hennen*, for plaintiff and appellant. *J. P. Benjamin*, for defendants.

**SPOFFORD, J.** In the fall of 1849, the attention of this section of the United States, and especially of the city of New Orleans, was directed to the project of establishing a communication between the Atlantic States and our new possessions on the Pacific coast, by means of a railway across the Isthmus of Tehuantepec. A privilege conceded by the Government of Mexico to *Señor Don José de Garay*, was supposed by many to afford greater facilities for the contemplated work than could be obtained in any other mode.

A public meeting of the citizens of New Orleans was held to devise ways and means for furthering this project, which was supposed to promise great advantages to the city, by bringing to it a new tide of commerce and travel. The meeting appointed a "Permanent Committee" of twenty-one citizens of New Orleans to take charge of the business and to forward the scheme.

This committee held frequent meetings, of which they kept a record open to public inspection; entered into correspondence with parties interested in the *Garay* grant, and procured subscriptions to defray preliminary expenses incurred for the purpose of informing themselves and the public as to the advantages of the proposed line of transit.

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Their own services appear to have been gratuitously given, and the object of their appointment by the citizens, as interpreted by the whole course of their procedure, was to awaken interest in the subject of a Tehuantepec railroad, to demonstrate its facility, to procure the advantages of the Garay grant for New Orleans, and to lead to the organization of a company in Louisiana, which, availing itself of the privileges of the grant for which negotiations were to be made, should finally achieve the great enterprise of connecting the two oceans by this route.

It appears by the journal of the Permanent Committee that, early in 1850, they succeeded in making a conditional arrangement with *Mr. P. A. Hargous*, of New York, (who had become the assignee of the Garay grant,) by which the latter agreed to transfer the grant with all its privileges to a few citizens of New Orleans, to be by them held in trust for a company to be organized as soon as it should become practicable, with a capital of nine millions of dollars, one-third of which was to belong to *Mr. Hargous* as the consideration of the transfer; two years were given from the date of the agreement, within which the railroad company was to be organized, and in default of such organization, the grant was to revert to *Hargous*.

A sub-committee called the "Managing Committee," was appointed by the "Permanent Committee," who constantly reported to the latter their proceedings for approval.

Early in 1850, steps were also taken by the Permanent Committee to have an authentic survey of the Isthmus of Tehuantepec made with reference to the future location of a railroad. The committee were anxious to procure a government engineer of general reputation to take charge of this survey, in order to inspire confidence in his report. At length, they succeeded in securing a promise of the services of *Major Barnard*, of the United States Engineer Corps. His mission was to make a thorough survey of the whole route, and he was to be provided with the requisite assistance and materials; but his departure was postponed to the end of the rainy season in the fall.

Meanwhile, it was proposed to employ the plaintiff *Trastour*, an engineer by profession, to make a preliminary survey for certain special objects. *Trastour* had previously been upon the Isthmus and had prepared certain maps which, at their instance, he exhibited and explained before the Permanent Committee. Being a resident of New Orleans, he had also, at the solicitation of the Permanent Committee, been appointed by the Governor of Louisiana a delegate to a general convention held in the spring of 1850 at Memphis to promote the cause of internal improvements, with reference to a more complete intercourse with our possessions on the Pacific—an appointment which he accepted.

The only contemporaneous evidence of the engagement of the committee with *Trastour*, is contained in the following minutes of their proceedings, at a meeting held upon the 6th June, 1850.

"*Mr. Benjamin* communicated the object of the calling of this meeting, which was to report that the Managing Committee, of which he is Chairman, had concluded that it would be interesting and highly advantageous to send a mission immediately to the Isthmus to obtain all information about the Pacific coast, the point most disattended and hardly commented upon in the surveys, memoirs and sources of information that have been attainable, and yet a point most necessary to be known for the prosecution of the undertaking. *Mr. Benjamin* represented that the acquisition of this knowledge would be very valua-

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ble before expediting or organizing a survey for fuller service, or taking any other material action in the matter. Also, that *Mr. Trastour* had engaged to accomplish the desired object, making all arrangements himself, and at a cost of about \$5000, to the committee, and four months time.

"On this point being referred by the Chairman to the committee, it was unanimously decided that *Mr. Trastour* should be engaged for the service proffered by him, and that the funds raised by subscription among our citizens, and existing in the Treasurer's hands, should be applied for that purpose.

"*Mr. Benjamin* further stated that *Mr. Trastour* had informed him of the desire of *Dr. Kovaleski*, a scientific and worthy gentleman, well known to *Mr. Trastour*, to accompany the latter in his expedition, provided expenses only were defrayed by him, and estimating them at \$300 to \$500.

"The Chairman having asked the sense of the committee, consent was unanimously given, with full consideration of the advantages that might be obtained by the accompaniment of the Doctor to the expedition of *Mr. Trastour*."

By the report of the Treasurer of the committee, of date 15th October, 1850, it appears that, out of \$9455 subscribed by liberal individuals as a preliminary fund to forward the purposes for which the citizens of New Orleans had appointed this committee, \$5000 had been paid to *Trastour*, \$500 to his wife and \$300 to *Dr. Kovaleski*.

To pay for the expenses of *Major Barnard's* survey, which was to be more costly and complete, a *projet* of an organization in the form of a company, as agreed upon with *Haryous*, was, at a later day, drawn up; and the subscribers to its stock entered into the express stipulation to pay in cash five dollars per share at the time of their subscription, the money to be devoted to the purposes of *Major Barnard's* expedition.

Meanwhile, on the 13th June, 1850, *Trastour* had departed from New Orleans to make his preliminary survey of the Isthmus. He was gone nearly twelve months, instead of four, and expended an amount considerably above that expressed in the conditions of his undertaking, as recorded in the minutes of the Permanent Committee. This occasioned trouble to the committee, who complained to *Trastour*, but at the same time they acknowledged the very meritorious nature of his services, and gave directions to *Major Barnard* who went out in the winter of 1850, to assume his contracts so far as practicable, and to relieve him from the embarrassments occasioned by his having gone in debt beyond the funds placed at his disposal. He was also offered a place in the committee's service, under *Major Barnard*, which he seems to have declined, preferring to return with the notes and materials provided in his explorations, in order to construct the requisite maps and charts in New Orleans. His principal services upon the Isthmus consisted in the soundings of the Boca Barra, in ascertaining that La Ventosa, on the Pacific coast, was a safe and commodious port, and in surveying that coast from the Boca Barra to the village of Huamelulo.

In his journey he was exposed to many hardships, and he displayed throughout great fortitude, perseverance and scientific skill.

Immediately upon his return to New Orleans, he commenced the necessary work upon his maps and charts, and the expenses of assistants, as well as an office for the purpose, were, from time to time, advanced by the committee out of funds received by them in their official capacity.

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*Major Barnard* and his party had not completed their survey when the Mexican Government, having taken an unexpected step in opposition to the validity of the Garay grant, drove them from the Isthmus.

A diplomatic correspondence between the Governments of Mexico and of the U. States ensued, the committee still having hopes that the Garay grant would be finally sustained, until late in 1852, when every prospect of prosecuting the original scheme of a railroad under the grant appears to have failed, and they abandoned it to *Hargous*, and turned their attention to the subject of procuring an indemnity from the Mexican Government for past outlays by the citizens of New Orleans. In this also they failed. In August, 1852, *Mr. Trastour* was notified that as the proposed Tehuantepec Company had been subjected entirely to political negotiations, the issue of which it was necessary to wait, and as the funds were exhausted, he must suspend work in the service of the committee.

In March, 1854, *Trastour* brought the present suit against the members of the Permanent Committee and their Secretary *B. Fallon* personally, claiming of them *in solido* \$116,546 72, as a balance due for his services aforesaid.

The case of *Fallon* was tried first and separately before a jury. It resulted in a verdict and judgment in his favor, and the plaintiff waiving the jury as to the other defendants, there was judgment in their favor, and the plaintiff has appealed from both judgments.

He declared upon an express contract, but he seeks to recover upon a *quantum meruit*.

The burden of proof, as to the terms of the contract, is upon the plaintiff. To hold the defendants liable, he must show that he contracted with them personally, or that they misled him by assuming to act for others without sufficient authority.

We find no evidence whatever of an engagement on the part of the defendants in their personal capacities, to pay the plaintiff anything. Indeed, the argument of his counsel seems to waive this point and to rest wholly upon the assumption that their personal liability flows as a legal consequence from their having assumed to act for an irresponsible principal.

The extract we have already made from the minutes of the Permanent Committee, is the written evidence of their original contract introduced by *Trastour* himself. This repels every inference of a personal obligation assumed by the members of the committee. It recites the estimated cost of the work for which *Trastour* was employed, and designates the special fund which was to meet the cost. If the committee had appropriated that fund otherwise, they would then have become liable themselves to *Trastour* for the amount thus diverted from his use. But they did more for him than they engaged to do. He not only received the fund on hand at the time of his engagement, but he and his *employés* were paid large sums besides, collected from other subscriptions. Between May, 1850, and August, 1852, his own account shows that he received \$15,578 85. He states that of this sum he disbursed for necessary expenses \$12,615 55, and used privately only \$2,963 28.

But the question is not whether the plaintiff's time and services were worth a more liberal compensation, but whether the committee have complied with the contract they made with him.

After judgment in the court below, upon a motion for a new trial, the plaintiff seems to have taken a position somewhat inconsistent with his petition, to

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wit: that he made two distinct contracts at different times with the defendants, one to survey the Isthmus, and another to supply the maps and charts. But his petition refers to but one contract, and speaks of the maps and charts as necessary to show the result of the survey. And his allegation is that the committee agreed not only to defray the expenses of the survey and supply his family with \$100 per month while he was engaged in it, but to pay him besides for the survey and the charts necessary to embody its results, "such sums as they should be liberally worth, and also what should be a very high and extraordinary reward if he should succeed in discovering a good harbor for the terminus on the Pacific coast."

It is as to this latter portion of the alleged contract, the liberal compensation promised by the committee individually, and the extraordinary reward for discovering the port, that the evidence is entirely lacking.

Does the law imply such a promise from the contract which is proved?

That the plaintiff hoped to get a liberal reward in case of his own success, and that he would have obtained it if the grant had been sustained and the contemplated company successfully organized under it, we think is extremely probable. But he would have obtained it from the company so organized, not from the committee individually. Did the committee deceive or mislead him? We see no evidence of it.

All their proceedings were public and notorious. The representative capacity in which they acted was known to the plaintiff. Notwithstanding they were, individually, men of wealth, the plaintiff never seems to have applied to one of them to pay any portion of the claims out of his own pocket. If they had been contracting on their own account the "high and extraordinary reward" in case of his success, would have been stipulated at a fixed sum in the ordinary course of business dealings. The fact that it was left open in this loose manner shows that they were not binding themselves, but that the plaintiff was looking to the generosity of a future company, which every one was confident would be formed, but for which the committee could not promise. His whole intercourse with the committee confirms this view. We think it results from the evidence that he always looked to the fund and to the liberality of the future company to be benefited by his services, and that he never looked to the individual members of the committee until the whole scheme had exploded.

And in cases of this character, the controlling question is, whom did the *employé* trust? See Story's Agency, § 288. If no artifice or deception was used in making the contract, and the *employé* knew the capacity in which his immediate employers acted, and looked to a special fund or to a projected company to reward him, he cannot hold the honest agent personally liable. The minutes of the Permanent Committee, and the letters of the defendants *Fallon* and *Benjamin*, relied upon by the plaintiff as proofs of his contract, all show that he had no right to look to the members of the committee personally for a reward. His own letters advance no such pretension, even at a time when he had gone in debt beyond the sum appropriated to him, and he was most pressed for money. And the hopes held out to him occasionally by *Fallon* and *Benjamin*, as testified to by some of his witnesses, are evidently predicated upon the presumed success of the project of a company, or at least upon the expectation that an indemnity would be procured by our Government from the Government of Mexico, for what was supposed by the committee to be a breach of national faith and a violation of vested rights; and that some portion of this indemnity

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would be appropriated to the plaintiff as a recompense for his skill and enterprise devoted to the furtherance of a brilliant but unsuccessful project.

Leaving out of view the testimony of *Fallon*, to the admission of which a bill of exceptions was reserved by the plaintiff, we do not find that a case of personal liability is made out against any of the defendants. Upon the competency of *Fallon* to testify for the other defendants, after a verdict in his own favor, we need not express an opinion.

The judgment of the District Court is, therefore, affirmed with costs.

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E. R. DELOGNÉ v. J. S. DAVID.

Where real property is sold by written title, it is to the written will of the parties at the time of the sale that we must refer, to ascertain the object sold; we are not permitted to defeat the plain and ordinary meaning of their language by theories deduced from a presumed inadequacy of price or a comparison of the business talents of the vendor and vendee, even supposing such matters to be properly in evidence.

Where a particular claim comes precisely within the written description of the object sold, the vendor is estopped by the very distinct terms of his act of sale from saying he never meant to sell that claim, and the writing is conclusive upon the parties unless impeached for fraud.

MERRICK, C. J., dissenting. The object of construction of an instrument is to ascertain the intention of the parties. That intention, when ascertained, is the act itself; the notarial instrument is but the evidence of it.

One of the first rules of construction is that the instrument must be understood according to the subject matter of the contract, *verbo debeat intelligi, secundum subjectam materiam*.

It is the common intent of the parties—that is the intent of *all* the parties that is to be sought; for if there was a difference in this intent, there was no common consent and consequently no contract.

**A**PPEAL from the Second District Court of New Orleans, *Lea, J.*  
*S. L. Johnson*, for plaintiff and appellant. *Benjamin, Bradford & Finney*, for defendant.

SPOFFORD, J. The plaintiff and the wife of the defendant succeeded to all the property, movable and immovable, composing the community between the father and mother. The property remained in a state of indivision for many years. Afterwards, on the 18th February, 1837, the plaintiff made a notarial act of sale to the defendant, *John S. David*, (whose wife had meanwhile died,) of his undivided half of the property of the succession, situated in the faubourg Lacourse, for the sum of \$15,000. The body of the act of sale specified nine distinct parcels of ground in the faubourg Lacourse as the objects of sale, but before the act was closed the vendor added the following clause in explanation of his intent, upon the interpretation of which this cause must turn.

“*Avant la signature du présent acte, le dit sieur Edouard Robin Delogny a déclaré que son intention a été et est encore de vendre au dit sieur John S. David, par les présentes, tous les droits qu'il a ou peut avoir sur toutes espèces de lots de terre au faubourg Lacourse, et lui appartenant du même chef que ceux dont il est question dans le corps de cet acte, à l'exception cependant de ceux qu'il a ou peut avoir conjointement avec les héritiers de sa défunte sœur, sur la batture du dit faubourg Lacourse et dont il réserve sa part.*”

Amongst the property belonging to the community between *Robin Delogny* père and his wife, to which the plaintiff and the defendant's deceased wife, suc-

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ceded, were portions of two rectangular spaces in the squares known as "la place de l'Annonciation" and "la place du Marché," a portion of both of those squares being within the faubourg Lacourse.

In 1807 or 1808 *Delogny père*, owner of faubourg Lacourse, and *Livaudais*, owner of faubourg Annonciation, had caused a plan to be made laying off these faubourgs into squares, lots and streets, upon which these places figured with the designations before mentioned, as may be seen in part by reference to the case of *Xiques v. Bujac*, 7 An. 500.

At the date of the sale from the plaintiff to the defendant, it seems these squares were, by a sort of tacit consent, treated as *loci publici*, and were actually in possession of the Municipality No. Two.

Many years afterwards, *Livaudais* and *David* (the present defendant) sued the Municipality, and recovered each an undivided portion of square No. 34, in the centre of Annonciation Square, on the ground that there had been no dedication of it to the public. The case will be found reported in 5 An. p. 8. The same parties were afterwards equally successful in suing for the recovery of an undivided portion of Market Square. See 8 An. 397.

The plaintiff has now sued *David* for an undivided half of the land thus recovered by *David* in the two suits just cited, to wit: an undivided half of that portion of the tract which lies within the faubourg Lacourse.

*David* resists this demand, on the ground that the plaintiff sold him all his rights therein by the notarial act of the 18th February, 1837, from which we have quoted the clause said to be decisive of this controversy.

The plaintiff has proved that shortly before this act of sale was passed the defendant, in his capacity of tutor to the minor children of his deceased wife, (plaintiff's sister,) had caused an inventory to be made of their interest in the property ceded to their mother and the plaintiff by *Delogny père*, which was appraised at \$16,000, not including the pieces of land now in controversy, and that the defendant declared, under oath, in the inventory, that he knew of no other property belonging to the succession.

The plaintiff also offered a witness to prove that the land now in dispute was worth in 1837 more than \$15,000, and another to prove that the defendant was better acquainted with matters of business (except planting) than the plaintiff. This testimony was rejected, as going against and beyond what was contained in the act of sale, and thus falling within the inhibition of Article 2256 of the Civil Code.

It is not necessary to notice the bill of exceptions taken to the rejection of this evidence, as we do not conceive it would overthrow our construction of the act of sale, even if it were admitted.

The sale is not attacked for lesion beyond moiety, nor for any misrepresentation or concealment on the part of the vendee.

It may be conceded that at the date of the sale both parties were ignorant of the fact that the squares in question were the property of the heirs of *Livaudais* and *Delogny père*. Still we think that the chance of recovering them was conveyed by the plaintiff to the defendant under the unambiguous and explicit terms of the deed of sale.

When real property is sold by written title, it is to the written will of the parties at the time of the sale that we must refer to ascertain the object sold; we are not permitted to defeat the plain and ordinary meaning of their language by theories deduced from a presumed inadequacy of price, or a compari-

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son of the business talents of the vendor and vendee, even supposing such matters to be properly in evidence.

It is only by assuming that there is ambiguity in the deed that the plaintiff and appellant seeks to derive any benefit from his parol testimony. He argues that in the phrase "*toutes espèces de lots de terre*," the word "*lots*" was used in its technical English sense, meaning the uniform divisions of a square that had been subdivided into regular building spaces. But this supposition is repelled by the use of the same term in other parts of the deed, showing that it was employed in its more loose and general sense of "tract" or "portion." Thus, among the "*lots de terre situés au faubourg Lacourse et ci-après décrits*," there figures one described as "*une portion irrégulière de terrain, désigné*," &c.

Again, in the clause where the expression occurs, and upon the meaning of which this case turns, we find a refutation of the theory that the word "*lots*" was used in its restricted and technical sense, for a special reservation is made of those "*lots de terre sur la batture du dit faubourg Lacourse*." The batture was not then divided into building lots.

The expression "*toutes espèces de lots de terre au faubourg Lacourse*," is a very broad expression, sufficient of itself to embrace the squares in controversy. But this is not all. The meaning of the parties is still more distinctly enunciated; the vendor adds to the former words the phrase "*lui appartenant du même chef que ceux dont il est question dans le corps de cet acte*." Having specified certain pieces of land in the body of the act as the objects of sale, he adds that it was and is his intention to sell by this act to the defendant all the rights which he had or might have to all sorts of parcels of land in the faubourg Lacourse, and belonging to him by the same title as those named in the body of the act. An idle and uncalled for addition if he intended to sell nothing but the specified lots; but a meaning addition if he intended to sell more, and one quite comprehensive of the squares now in dispute.

It implies the possibility of the existence of claims to land in the faubourg Lacourse, descended from Delogny père, which were then unknown to the contracting parties; and it specially conveyed the rights of the vendor to all such unknown claims; *tous les droits qu'il a ou peut avoir*; all the chances of recovering land in the faubourg coming to the vendor *du même chef* with the known and specified tracts.

After thirteen years, the defendant, by means of litigation, succeeded in recovering an interest in certain tracts of land in the faubourg Lacourse which had once been supposed to be public, but which were decreed not to be so but to have descended to him from Delogny père; the plaintiff is estopped by the very distinct terms of his act of sale from saying he never meant to sell this claim, for it comes precisely within the written description of the object sold. And the writing is conclusive upon the parties, unless impeached for fraud. *Boner v. Mahle*, 3 An.

It is, therefore, decreed, that the judgment be affirmed, with costs.

MERRICK, C. J., dissenting. I have doubts as to the correctness of the conclusions of my colleagues.

The plaintiff sold to the defendant his interest in certain lots, which he described in the deed of conveyance by their numbers and dimensions, and the squares in which they were to be found. Some of them are described as fronting on the Annunciation Square.

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The act of sale was in the French language, and the parties, by using the word "lots," must be understood as using the word in its English sense—that is, as a lot of ground, a subdivision of a square—for the word has a very different signification in the French, the language of the act.

Every one of the lots specially described formed but a subdivision of a square. The price of the undivided interest in the lots sold was \$15,000. At the time of the sale the interest of plaintiff in the two squares then supposed to be public was worth \$15,000 more.

Now the object of construction of an instrument is to ascertain the intention of the parties. That intention, when ascertained, is the act itself. The notarial instrument is but the evidence of it.

One of the first rules of construction is that the instrument must be understood according to the subject matter of the contract. *Verba debent intelligi secundum subjectam materiam*. The subject matter of the contract was the conveyance to the defendant of plaintiff's undivided interest in the lots of ground in the faubourg Lacourse, and not squares, (*îlots*) of which neither party at that time supposed the plaintiff to be the owner.

That the plaintiff did not intend to sell the interest in Annunciation Square is evident from his describing other lots as bounded on that square; that the defendant did not suppose he was buying the square is evident from the fact that sometime before his purchase he caused the interest in the "lots" to be inventoried as belonging to her succession, and he made no mention of the square, although he gave in the property under oath. Moreover the two squares were manifestly in the possession of the public, and appeared to be dedicated to public uses, and consequently the parties must have supposed, as it is evident from their conduct, that they were *extra commercium*, things impossible to sell.

No. 4 of Article 1940 says: "It is the common intent of the parties, that is, the intent \* (interest) of all the parties, that is to be sought for; if there was a difference in this intent, there was no common consent, and consequently no contract."

Article 1954 of the Civil Code declares that "However general be the terms in which a contract is couched, it extends only to things concerning which it appears the parties intended to contract." See also C. C. 3040, and the case of *Payler v. Hamershaw*, 4 M. & S. 423.

This rule is taken word for word from No. 98 of Pothier on Obligations, with the exception of the concluding phrase, which is, however, implied in what precedes it.

It reads, as I translate it: "However general may be the terms in which a contract may be couched, it comprehended only the things concerning which it appears the contracting parties intended to contract, and not those of which the parties have not thought."

If we apply this rule to the case before us, we find the parties contracting in reference to city lots which were in commerce, lots which were fractional parts and subdivisions of squares. It may, therefore, very well be supposed that the plaintiff intended to convey to the defendant his interest in any similar lots which he had omitted in his description or enumeration, and nothing more. For language appears to me to be somewhat forced and equity injured and this principle of law violated, when we extend the term "lots" to squares of ground or public places which bore technically another name, or which were at that

\* "Intention" in the French text.—*REP.*

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time of equal value to all the *lots* enumerated, and which appeared to be out of commerce, and which the parties themselves did not suppose it possible to sell.

The allusion to the levee in the act of sale does not, I think, materially weaken the view here taken; for the levee, not having been laid out into squares, might well bear the name of lot or lots, particularly if any part of it was inclosed or used, while it could not be applied with the same propriety to a public place.

With the grave doubts resting upon my mind which these considerations have raised, I am not at present able to yield my full assent to the decree.

### W. L. CAMPBELL v. THE CITY OF NEW ORLEANS.

Where a tax, levied under a municipal ordinance passed without the legal formalities, has been voluntarily paid, it cannot be recovered back on the ground of error.

There being no law exempting the plaintiff's property from taxation, for the purposes contemplated by the ordinance, he was under a natural obligation to contribute his quota to the support of the municipal government from which he derived protection. No suit will lie to recover what has been paid or given in compliance with a natural obligation.

BUCHANAN, J., dissenting. There is no natural obligation to pay a tax illegally imposed.

**A**PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
A. Robert, for plaintiff and appellant. J. J. Michel, for defendant.

SPOFFORD, J. It appears that the plaintiff in 1851 paid to the Tax Collector of the late Municipality No. 3 of New Orleans, without protest or objection, the sum of \$403, as his city tax for the year 1850, upon certain property designated on the tax receipt. It does not appear that the Tax Collector had any compulsory warrant or execution in his hands against the plaintiff.

In 1855 plaintiff brought this suit against the city of New Orleans, which had succeeded to the rights and obligations of the Third Municipality, to recover the sum thus paid, upon the allegation that it was paid through error.

The only proof of error adduced by the plaintiff is the fact that one *Philippi* refused to pay a similar tax assessed against him by the Third Municipality for the same year, and when sued therefor, succeeded in defeating its collection, on the ground of certain informalities in the mode of passing the ordinance by which it was levied. See the case of *City of New Orleans v. Oscar Philippi*, 9 An. 44, decided in January, 1854.

It does not appear that any other person assessed under the ordinance has refused or failed to pay the tax.

It is not denied that the money paid by the plaintiff was necessary for the purpose of defraying the expenses of the Municipality for the year 1850; that it was faithfully appropriated to that purpose, or that the plaintiff has received his proportionate share of the benefit derived therefrom in protection to his person and property.

As there was no law exempting the plaintiff's property from taxation for the purposes contemplated by the ordinance in question, and under the general law it was thus liable to taxation, he was under a natural obligation to contribute his quota to the support of the municipal government from which he derived protection. Although it may be true that a perfect obligation to pay did not arise for want of regularity in the ordinance imposing the tax, still, as the plaintiff voluntarily paid, without protest, a sum naturally due, he cannot now reclaim it on the plea of error.

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"Such obligations as the law has rendered invalid for the want of certain forms, or for some reason of general policy, but which are not in themselves immoral or unjust," form one class of natural obligations. C. C. 1751, No. 1.

The municipal authorities were virtually the plaintiff's agents for the purpose of laying such an assessment upon his taxable property as would defray his share of the necessary expenses of police, &c. They laid the assessment upon property legally liable to taxation, but in doing so neglected to pursue certain prescribed forms—a neglect which would have rendered the plaintiff's obligation to pay invalid *in foro legis*, if he had raised the objection in time and in the proper manner.

But his obligation to pay subsisted in conscience, and according to natural justice, because it was neither immoral nor unjust, although informally contracted. And "no suit will lie to recover what has been paid, or given in compliance with a natural obligation. C. C. 1752, No. 1; see also Acts, 2280, 2281; C. P. 18.

The case would present quite a different aspect if the tax had been paid upon property not subject to taxation at all. The doctrine settled in the cases of the *Catholic Society v. City of New Orleans*, 10 An. 73, and *Sumner v. Dorchester*, 4 Pick. 363, would then be applicable.

Judgment affirmed.

BUCHANAN, J., dissenting. For the reasons given in the decision of the court in the case of the *City v. Philippi*, 9 An. 44, I am of the opinion that the judgment of the District Court herein should be reversed. I cannot recognize a natural obligation to pay a tax illegally imposed.

FRANCIS KATHEMAN v. GENERAL MUTUAL INSURANCE Co and CRESCENT  
MUTUAL INSURANCE Co.

In an action on a valued policy of insurance the plaintiff is not put on proof of interest in the object insured by a plea of the general issue.

When the shipper has insured the freight, unless there is a special denial in the answer that he paid the freight in advance the fact need not be proved.

Freight paid in advance is a lawful object of insurance, and the underwriter cannot avoid liability on the ground that freight thus paid in advance might be recovered back in consequence of the loss of the cargo.

APPEAL from the Third District Court of New Orleans, *Kennedy J.*

*P. E. Bonford & T. W. Collins*, for plaintiff and appellant. *M. M. Cohen, E. Briggs and George Eustis*, for defendants.

MERRICK, C. J. This suit is brought against the defendants upon two valued policies.

In the policy of the General Mutual Insurance Company the insurance is stated to be upon goods and merchandise valued at "eighty-seven hundred dollars." In another part of the instrument the insurance is declared to be on

" $\frac{1}{2}$  of merchandise, valued at \$5500..... to amount of \$2750.

$\frac{1}{2}$  of freight, " \$3200..... " \$1600.

\$4350.

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In case of loss or damage under this insurance the settlement to be on the principle of salvage loss. A similar policy with the Crescent Mutual Insurance Company" to the extent of "forty-three hundred and fifty dollars." The passages marked with inverted commas were written in the blanks of the printed contract.

The policy of the Crescent Mutual was similar, with the exception that it contained no reference to the policy of the General Mutual Insurance Company.

The voyage contemplated was from this city to Monterey, California, on a schooner called the Louisiana.

The plaintiffs in their petition allege the sea-worthiness of the schooner, and their interest in the merchandise shipped, and aver that "they did, through their agent, T. C. Kathman, cause said goods and merchandise and the amount of the freight, money paid in advance for carrying the same, to be insured in said companies."

Among other things, the petitioners further allege, in substance, that the schooner became leaky at her arrival at the Cape de Verde Islands, and put into Port Praya, where she was caulked; that in pursuing her voyage from thence she encountered storms in weathering Cape Horn, by which the vessel was so much damaged that she was obliged, for safety, to put into the port of Valparaiso on her arrival in order to repair damages and be enabled to proceed on her voyage; that the captain, in order to convert the greater part of the proceeds of the vessel and cargo to his own use, barratrously exaggerated the injury which the vessel had sustained, caused repeated surveys to be made as a pretext for ruinous delays, thus purposely involving said vessel in debt, and fraudulently using said indebtedness as an excuse for causing or permitting the sale of the cargo and vessel to meet such indebtedness, and having by said fraudulent means caused the sale of the said vessel and cargo to take place, he obtained payment to himself of the balance of proceeds amounting to several thousand dollars, and having thus accomplished his criminal design he absconded and has not been heard of since, and that plaintiffs on learning the facts abandoned to the underwriters.

The defendants simply pleaded the general issue.

The Judge of the lower court being of the opinion that as to the cargo there was a partial loss by sea damage, converted into a total loss by the barratry of the master, and that no abandonment was necessary, but also being of opinion, as to the freight, that there was no proof that the plaintiffs had ever paid it, or, that, if paid, the same was not to be returned if the goods were not delivered according to the bill of lading; he gave judgment in favor of the plaintiff to the amount of the merchandise specified in the policies respectively, and against them as to the items of freight.

The plaintiffs appealed, their appeal being returnable on the first Monday of November, 1855. The defendants filed on the 28th day of October, 1856, nearly a year after the day the appeal was made returnable, an answer to the appeal, praying for an amendment of the judgment in their favor.

The plaintiffs and appellants contend that, inasmuch as there is no answer in the record denying the interest of the plaintiffs in the object of the policy which the parties have respectively valued, they are not now at liberty to contest the same, and in support of this position the plaintiffs cite the case of *Kennedy v. The New York Life Insurance Company*, 10 An., 809.

The defendants reply that this last case ought not to be considered as authority, inasmuch as it violates the well-settled rules of pleading as to cases arising under the law of insurance, and the court is requested to re-consider the case, and if it be found wrong to overrule the same.

That case being out of the way then, the defendants urge that the plaintiffs were not interested in *the freight*, and that the warranty of sea-worthiness was violated, inasmuch as, in the short run to the Cape de Verde Islands the vessel, without any stress of weather, required caulking, and at Valparaiso she was found to require coppering a-new, and that there is no proof that the premium was paid and that there was a deviation. The earnestness with which the counsel for the defendants have contested the correctness of the rule laid down in the case of *Kennedy*, namely: that the defendants will not be permitted, in an insurance upon lives and in a valued policy, to put the plaintiff upon proof of the interest of the insured in the life insured, or the interest in the object valued in the valued policy without specially pleading such want of interest, induces us to reconsider the question and review the reasons upon which that decision rests.

Counsel, as much alive to the interests of an insurance company as the company itself, would hardly assert that there was to be one rule of proceeding for the ordinary suitor in our courts and another for the insurance company, and he would only expect that in the event there is something different from ordinary contracts in the contract of insurance, that his case should be excepted from the rules governing other cases in such particular.

The learned counsel, therefore, for the defendants, candidly admit that as a general proposition it is undeniably true that "our law presumes every contract which does not appear illegal or immoral on its face to be made for a valid cause and upon a sufficient consideration, and it is incumbent upon him who would put the opposite party upon the proof of the sufficiency of the cause to do so specially by his pleadings," but they say that by Article No. 2952 of the Civil Code actions to recover the payment of what has been won at gaming or by a bet, except for games tending to promote skill in the use of arms, such as the exercise of the gun, foot, horse and chariot racing, have been taken away, and, inasmuch as an insurance of an object in which the assured has no interest, is but a wager, therefore it is necessary for the plaintiff to allege and prove interest in order to take his case out of the general rule established by law, and show that his contract is lawful.

This reasoning appears to us to be fallacious:

First—There are but few contracts more useful or of more frequent occurrence than contracts of insurance. When we consider the frequency of these contracts and the magnitude of the interest involved in them, the number of companies chartered under the general law of the State, the number of the special charters formerly granted by the Legislature, and the number of agencies established in this city by companies from other States, and when we further consider that the common course of dealing of men with each other is to act honestly and not fraudulently; we say when we consider these things we may safely affirm that the contract of insurance is, in the eye of the law, presumed to be a *bona fide* contract and not a fictitious one; and that as a general rule the contract is real, and that the wager policy is the rare case and the exception to the general rule. The law says no action is given to recover money won by a bet, but the contract of insurance becomes a bet only when it is ficti-

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tious and not real. It is, therefore, more logical and more consonant to the spirit of our jurisprudence to say that the contract of insurance is lawful, and he who would show it to be unlawful should allege its illegality. *Ut res magis valeat quam pereat.*

Second—It does not necessarily follow that because a thing is proper to be alleged in the petition that, therefore, the defendant by his general denial can put the plaintiff upon proof of it.

The plaintiff who would sue in a representative capacity, such as heir, administrator, executor, &c., must allege that capacity, but he is not bound to prove it unless specially denied. The party suing upon a written contract must allege its execution, but he is not compelled to prove it unless it is specially denied. This is also illustrated by the English law (under the new rules of pleading), on the subject before us. There should (in England) be some averment of interest in the declaration, but if the defendant would dispute the interest he must in his plea traverse it *modo et forma* as alleged. 2 Arnould, 1264, 1289.

So under our law, if upon a promissory note the plaintiff in his petition alleges its consideration it will not dispense the defendant from putting the consideration at issue by his pleadings, if he relies upon a want of consideration for his defence.

Much more, therefore, when the contract set up in plaintiff's petition appears on its face to be illegal, ought the defendant who would take advantage of its illegality specially to plead it. *Harvey v. Fitzgerald*, 6 M. R., 549.

It is true that the law of insurance depends upon that general custom adopted by commercial usage which has been sanctioned by our courts, and not upon any positive provisions of the lawgiver. But that by no means exempts this class of contracts from the law of the *forum* where they are sought to be enforced, any more than commercial contracts, such as promissory notes and bills of exchange, are exempt from the like law.

It being admitted that in an open policy of insurance a party can only recover to the extent of the loss which he proves he has sustained, the question arises what is the effect of a valuation in a policy of insurance? *Mr. J. Lawrence* answers the question in the case of *Shawe v. Felton*, 2 East. 109, in these words: "The effect of a valued policy was not to preclude the underwriters from showing that the assured had no interest, but that in order to avoid disputes as to the quantum of the assured's interest the parties agreed that it should be estimated at a certain value." See also 1 Arnould, 307. Then the object is to relieve the assured from the necessity of proving the extent of his interest in the object of which the valuation has been made. 1 Bouvier Inst., 1223, 1230; 2 Greenleaf, 381. It is unreasonable to allow the underwriter who has the money of the assured, the consideration for his engagement, in his hands and who has agreed with the assured as to the value of the thing insured to govern both parties in case of a loss, to contest his engagement without specially traversing the interest of the party assured by his pleadings." The assured may well suppose, until put upon his guard by a special allegation to that effect, that his interest in the thing insured is recognized by the receipt from him of the premium by the underwriter, and his agreement as to the amount of liquidated damages to be allowed in case of a loss. But it is said that the answer in this case was drawn out by an experienced, accurate and precise practitioner, one well versed in this branch of the law, and that if the

rule adopted in the case of *Kennedy v. The New York Life Insurance Co.* be extended to cases of valued policies it will take the insurance companies by surprise. While we acknowledge the ability of the experienced counsel who drafted the answer in this case we cannot admit that the reasoning has very great force. The learned counsel may have been led into error by the too close pursuit of the common law authorities, applicable as they are to entirely different rules of pleading, and evidence so far modified by such pleadings. But counsel of equal experience have heretofore thought it necessary to plead specially such defences as tended to invalidate the contract of insurance for such a want of interest or other cause. See 3 R. R. 424; 4 R. R. 234; 11 Rob. 265; 11 R. R. 222; 2 R. R. 267, 457; 1 R. R. 192, 438; 8 R. R. 443; 10 R. R. 165; 6 An. 432, 762; 10 An. 738.

The argument attempted to be drawn from the practice of certain members of the profession is therefore inconclusive. The maxim of *communis error facit jus* does not apply. So long as parties are willing to try their cases, and admit evidence upon defective pleadings, this court will not insist upon strict rules but decide upon the evidence adduced. Still the court has not sanctioned a loose practice even in regard to the commercial contract of insurance. In the 9th An. Rep., 591, in the case of *Matthews v. The General Mutual Insurance Co. of New York* this court said, "Under the English practice, which has certainly not often been more indulgent than ours, the plea of the general issue to an action on a policy of insurance was formerly sufficient to let in evidence of illegality, misrepresentation, breach of warranties, or almost every matter which would discharge underwriters; 2 Arnould Ins. 1286. By the new rules of pleading adopted in the King's Bench in 1834, matters showing the transaction to be void or voidable on the ground of fraud must be specially pleaded. In the present case notice of the intention to prove fraud on the part of the assured was given in defendant's answer. Probably it would have been better to specify the mode and circumstances of the fraud. But if the plaintiff was surprised by the evidence offered, the discretion of the court of the first instance could have afforded him relief by granting him a continuance." We, therefore, conclude that there is no reason to disturb the doctrine laid down in the case of *Kennedy* against *The New York Life Insurance Co.*, and that under the general issue in this case the defendants cannot, for the want of testimony on that part of plaintiff's case, contest his interest in the object insured. The same principle governs as to the objection that the premium was not paid. As it regards the question of sea-worthiness and deviation, these questions are open so far as the testimony which has been offered by the plaintiffs tends to establish the one or the other.

We do not think the caulking of the schooner at the Cape de Verde Islands, or the condition of her copper at Valparaiso sufficient to rebut the presumption of sea-worthiness at the commencement of the voyage. The detention at Valparaiso was barratrous, and the defendants by their warranty against the barratry of the master are precluded from setting up the same as a deviation. The judgment of the lower court must be reversed, and judgment rendered for the whole amount of the insurance.

It is, therefore, ordered, adjudged and decreed by the court that the judgment of the lower court be avoided and reversed, and this court now proceeding to render such judgment as ought to have been rendered by the lower court do order, adjudge and decree that the plaintiffs do have and recover judgment

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against the defendants, the General Mutual Insurance Company of New York, for the sum of four thousand three hundred and fifty dollars, with legal interest thereon from the 24th day of March, 1853, till paid; and also against the defendant, the Crescent Mutual Insurance Company of New Orleans, for the like sum of money, viz—four thousand three hundred and fifty dollars, with the like legal interest from the said 24th day of March, 1853, until paid, and it is further ordered that the defendants pay the costs of both courts.

SPOFFORD, J., dissenting. *Primâ facie* a shipper of merchandise has not an insurable interest in the freight he contracts to pay for its transportation. For if the voyage be not accomplished the freight is not due.

Both policies disclose that one of the subjects of insurance in this case was "freight" insured *eo nomine* on behalf of the shipper. There is a distinct valuation of this risk in the policies.

So far, they appear on their face to be wager policies. The general issue, in my judgment, put the plaintiff upon explanatory proof of the feature in the policies declared upon, and he should have shown circumstances which would enable us to say that he had an insurable interest in the item thus separately valued. He thought it necessary to allege in his petition that the freight money was "paid in advance" by him. But he has not proved the fact, so that we are unable to decide whether this circumstance would of itself give him an insurable interest in the subject.

I, therefore, think the judgment should be affirmed.

LEA, J., dissenting. I see no reason to change the views expressed in the dissenting opinion rendered in the case of *Kennedy v. The New York Life Insurance Company*. I think that where the obligation sued upon is conditional upon its face, as in the case of a policy of insurance, that the general denial puts the plaintiff upon the proof of all the facts which are essential to convert the conditional obligation into one which is absolute. The contract of insurance is one of indemnity. If there was no loss there is no liability. Unless the plaintiff paid the freight in advance he has sustained no loss which can be the object of indemnity. The case would be different in a suit upon a promissory note, or other obligation importing an absolute liability on its face where, in the absence of a special defence, the document proves itself, and in most cases the mere possession is proof of title.

As respects the insurance of freight, I can see no good reason why money paid by a shipper of goods on account of freight to the owner of a ship should not be protected by insurance as constituting fairly an insurable interest, and though it may have been insured as freight, *eo nomine*, still I think that evidence of a custom to insure such an interest under the term "freight" would be admissible. The underwriters certainly intended to insure something when they received the premium, and they cannot consistently urge as a matter of defence that they were assuring an impossible risk. In the case at bar, however, it is not conclusively shown that the freight was paid in advance; and, in my opinion, there should be judgment as in case of non-suit upon the claim for insurance upon freight. In other respects I think the judgment should be affirmed.

## SHAW &amp; ZUNTZ v. ANDREW KNOX.

Payments made by a factor of debts due by his principal, are considered as money advanced by the factor and without a subrogation to the rights of the creditor, the factor cannot claim any privilege arising from the nature of the debts thus paid.

The terms "necessary supplies" furnished to a plantation, include such supplies only as are essential to the subsistence and management of the plantation.

Factors who have furnished supplies to a plantation, as regards creditors having an equal privilege with themselves, can only claim a ratable proportion of the proceeds of the whole crop.

**A**PPPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
C. Roselius and J. Vanmaitre, for plaintiffs and appellees. Chilton & Harrison, for defendants.

LEA, J. The plaintiffs in this case have sued for the recovery of \$13,531 80, being a balance due for supplies alleged to have been furnished for the use of the plantation of the defendant, and for advances made upon his crop during the years 1854 and 1855. For the purpose of enforcing the privilege which they claim, they have caused to be sequestered forty hogsheads of sugar and one hundred and fifty barrels of molasses, consigned to Geo. M. Pinkard & Co.

C. W. Muncester, Geo. M. Pinckard & Co. and other creditors, including the overseer on Knox's plantation, have intervened in this litigation, claiming privileges superior to that of the plaintiffs upon the property sequestered. The indebtedness of the defendant is not disputed. The only issue between the parties is that which has reference to the conflict of privileges, and in determining this issue, our inquiry is restricted to an examination of the plaintiffs' claim, as they have not, by an answer to the appeal, asked for any change of the judgment in their favor. By the 3184th Article of the Civil Code, a privilege is given upon the planter's crop to those who have "*furnished necessary supplies to any farm or plantation.*"

There is no other Article of the Code under which the plaintiffs can assert a privilege. The payments made by them for debts due by Knox, even though they may have been contracted for supplies, can be considered only as so much money advanced, and this remark will apply as well to payments made for labor and for the price of machinery furnished to the plantation, as to payments made to furnishers of supplies. Subrogation by operation of law does not take place in favor of one who pays a privileged debt in the absence of any legal obligation so to do, and it is not pretended that the plaintiffs have acquired any rights by conventional subrogation. Nor are they entitled to any privilege as factors who have made advances. The privilege conferred by the 3214th Article of the Civil Code, operates only in favor of consignees, upon goods consigned to them.

The privilege of the plaintiffs is therefore restricted to "*necessary supplies furnished by them*" to the plantation, and this term we consider as intended to include such supplies only as are essential to the subsistence and management of the plantation. Tested by this rule, that portion of the claim sued upon, which would under any circumstances be entitled to a privilege, would be reduced to an amount even less than the balance shown to be due by the account marked C. It is unnecessary however to scrutinize this account in detail, as even admitting all the items charged to have been for "*plantation supplies,*"

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the amount (i. e. \$2940 92) falls far short of the proceeds of the crops received by the plaintiffs, upon which they are entitled to a privilege. It appears from the credits allowed in the plaintiffs' account, that the proceeds of sales of sugar, subject alike to the privileges of the plaintiffs and of the intervenors, amount to \$9279, but this amount was subject to the superior privilege of *Prigge*, the overseer, and to the concurrent privilege of *Muncaster* for slave hire, and of *Felt & Reid* and *G. M. Pinckard & Co.*, for supplies.

It is true this amount has been credited generally in the plaintiffs' account, no special imputation of payment having been made; and as between the plaintiffs and the defendant probably such a general credit cannot be disturbed: but the plaintiffs are now seeking to assert a privilege upon property in the hands of the intervenors, upon which these intervenors have a concurrent privilege with themselves, and the question is not whether the imputation can be disturbed, but whether they (the plaintiffs) can be permitted to receive a larger distributive share in the proceeds of the property seized, than they would have been entitled to receive had the whole fund arising from the sale of the crop been applied ratably to the payment of all the privileged claims.

If the plaintiffs have already received more than their proportionate share of a fund upon which the intervenors have a common privilege with themselves, they cannot interfere with the distribution of that portion in the hands of the intervenors, except for the purpose of claiming a pro rata distribution of the whole fund, including that which they have themselves received; but as they have already received more than enough to satisfy the whole of their privileged claim, it is impossible that they can receive a larger amount upon a ratable distribution.

We would remark again, that the appellees not having appealed from the judgment of the court, nor filed an answer to the appeal taken by the appellants, we could not, even if the testimony justified the change, make any alteration in the judgment to the *prejudice* of the appellants. The only enquiry which is admissible, as the case is presented to us, being whether the plaintiffs can, under the circumstances, claim a privilege upon the property sequestered to the *prejudice* of the intervening creditors who have also a privilege. But although the rights of the intervening creditors having a privilege upon the property sequestered, cannot be destroyed so far as that property or its proceeds are affected, the imputation of payment would nevertheless not be without effect as to ordinary creditors. In other words, although under the peculiar state of the pleadings and evidence in this case, the plaintiffs can, as against the *recognized privileged creditors*, claim only a ratable proportion of the whole of the proceeds of the crop subject to their privilege, they are not precluded from asserting *their privilege* as against *ordinary* creditors for the balance remaining due to them as furnishers of supplies. For this purpose, it may be necessary to consider the effect of the general credit by which the proceeds of sales are imputed equally to the liquidation of the entire indebtedness of the defendant to the plaintiffs. The indebtedness for supplies having been ascertained, it becomes a mere matter of calculation to determine the proportion of the *privileged* claim of the plaintiffs remaining unliquidated.

The total indebtedness of the defendant to the plaintiffs amounted to \$23,617 27 cts., which has been reduced by payments imputed generally upon the whole indebtedness, to the sum of \$13,531 80. An examination of the items for supplies furnished has satisfied us that the total indebtedness of this character did

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not exceed \$2903 82, which, by a ratable imputation of the credits allowed, would be reduced to \$1672 40. For the payment of this balance thus ascertained, the plaintiffs are entitled to a privilege and priority upon the proceeds of the property sequestered, over the ordinary creditors, and for the balance of their claim remaining unpaid they are entitled to rank as ordinary creditors.

It is ordered that the judgment appealed from be amended and that the proceeds of the property sequestered herein be distributed among the several creditors in the following order, viz :

|      |                                 |          |
|------|---------------------------------|----------|
| 1st. | Clerk's and Sheriff's fees..... | .....    |
| 2d.  | Adolphe Prigge (overseer.....   | \$223 00 |
| 3d.  | Felt & Reid .....               | 148 00   |
|      | C. W. Muncaster.....            | 650 00   |
|      | Geo. M. Pinckard & Co.....      | 300 00   |

The claims of the three last named creditors to be recognized as of equal rank for the respective sums attached to their names.

|      |                   |            |
|------|-------------------|------------|
| 4th. | Shaw & Zuntz..... | \$1,672 40 |
|------|-------------------|------------|

5th. It is further ordered that the following named parties be recognized as ordinary creditors of equal rank, for the following sums, to wit :

|  |                       |             |
|--|-----------------------|-------------|
|  | Shaw & Zuntz .....    | \$11,860 40 |
|  | Felt & Reid .....     | 41 00       |
|  | Brewer & Co.....      | 57 00       |
|  | Sampson & Keene ..... | 100 00      |
|  | Bridge & Brother..... | 165 00      |
|  | Warner & Co.....      | 60 00       |
|  | S. T. Taylor .....    | 124 00      |

It is further ordered that the judgment appealed from, except so far as it is herein amended, be affirmed, and that the costs of this appeal be paid by the plaintiffs and appellees.

#### SAME CASE ON A RE-HEARING.

LEA, J. Our attention has been called, in the brief for a re-hearing, to a remark made in the decision that was rendered in this case, which requires correction.

In stating that "subrogation by operation of law does not take place in favor of one who pays a privileged debt in the absence of any legal obligation so to do," it was not intended to restrict in any manner the application of the Article 2157 of the Civil Code. The reading of the Article is plain and free from ambiguity. It was thought necessary, however, to refer only to such portion of the Article as might be considered applicable to the case at bar. Upon a review of the case, we see no reason to make any change in the judgment heretofore rendered. We do not consider payments made by a factor upon the order of a planter such payments as are contemplated in Article 2157 of the Code. They can be considered only as so much money advanced.

Re-hearing refused.

## LOUIS COUSSY et als. v. ADELAIDE VIVANT et als.

*A.*, executrix of the estate of *B.*, left the State, after having appointed *C.* as her agent. Certain property of the estate was afterwards sold by order of court, and the price in cash and notes paid over to *C.* as the agent of the executrix. Shortly after *A.* died, and *C.*, the agent, was appointed executor of *B.*'s estate, and in that capacity collected the part of the price unpaid. No account of the price was rendered to the heirs of *B.* by the representatives of *A.*, and her successor in office rendered no account thereof.

**Held:** That the failure to deposit the power of attorney of the executrix in the office of the Recorder of Mortgages did not affect the validity of the proceedings under which the property was sold. That the heirs of the executrix, at whose instance the property was sold, could not be made liable for the price: 1st, because the part of the price unpaid at her death was properly paid to her successor in office, and 2d, because the cash payment having been made to *C.*, as agent of *A.*, in her capacity as executrix, he is presumed to have been in possession of the amount at the death of *A.*, and when afterwards appointed the successor in office of *A.*, to have kept possession of the fund in that capacity.

**A** PPEAL from the Second District Court of New Orleans, *Lea, J.*  
*E. Filleul*, for plaintiffs and appellants. *J. Seghers*, for *A. Vivant*, appellee. *S. L. Johnson*, for *Faught et al.*, appellees.

**MERRICK, C. J.** The plaintiffs allege that they are the testamentary heirs of *Victoire Marcos Tio*, a free woman of color, their aunt, who departed this life in June, 1837. That petitioners have been recognized as her heirs, and put in possession of her estate. That she appointed *Marie Lavaux*, f. w. c., separated in bed and board from her husband, *François Auguste*, testamentary executrix. That the executrix took the oath, and received letters testamentary, June 28th, 1837. That about the end of March, 1839, the said executrix left the city of New Orleans, and the State of Louisiana, without informing or obtaining leave of the court, or having been discharged, or having filed an account of her administration. That before she left she made a power of attorney to *L. Ferrand*, f. m. c., but did not deposit and record said power in the office of the Judge who had appointed her, and before whom the succession was opened. That during her absence the proceedings were conducted by an attorney at law in the same manner as if she were present in court and within the jurisdiction and control of the court of probates. That when she was absent, upon such petition, the sale of all the immovables was ordered, and on the 13th day of May, 1839, a certain lot of ground, belonging to said succession, was sold and adjudicated to *Adelaide Vivant*, for \$3200, payable one-third cash, the balance in two equal instalments, at six and twelve months' credit. That in the act of sale, *Louis Ferrand*, under the power of attorney referred to, appeared as the agent of *Marie Lavaux*. That the price was not brought into court and placed under the jurisdiction of the court, and was not paid under the sanction and authority of the court. That said payment, if it ever took place, was made without the authorization of the court which controls every act of the executor and administrator, or of his duly authorized agent. That said *Ferrand* had no authority to divest the succession of title to its property, or to receive payment of the sum due the succession by *Adelaide Vivant*, and such payment is null. That *Adelaide Vivant* cannot avail herself of the plea of good faith, because she was well aware of the incapacity of *Ferrand*, and of the absence of the executrix at the time of said pretended payment. That at the time of the

alleged payment petitioners were minors unable to attend to their interests. That said *Marie Lavaux* died in the city of Paris, France, ten days after the said sale, to wit: on the 22d day of June, 1839. That she or her heirs never rendered an account of her administration. That no part of the price of said property has ever been accounted for or placed under the control of the court. That the succession of *Marie Lavaux* has been opened, and the defendants (except said *Adelaide Vivant*) are her heirs, and that they and said *Adelaide Vivant* are responsible to petitioners for said price, with five per cent. interest thereon per annum.

The petition concludes with a prayer that the heirs of said *Marie Lavaux*, each for their verile shares, and said *Adelaide Vivant*, in *solido* with them, be decreed to pay petitioners \$3200, with five per cent. interest from the 13th day of April, 1839, with a privilege and a mortgage upon the property sold.

From the petition, therefore, it appears that plaintiffs expect to recover from the defendant, *Adelaide Vivant*, because she was not justified in making payment to *Ferrand*, and from the heirs of *Marie Lavaux*, because she (*Marie Lavaux*) left the State and did not cause her power of attorney to be deposited in the office of the Judge who appointed her; because the receipt of the money and notes by *Ferrand* was the receipt of money by herself, and because she did not render any account.

The plaintiffs, previously to the institution of this suit, brought an action to have the lot of ground, the price of which is the object of the present suit, declared to be the property of the plaintiffs, on account of certain alleged irregularities in the sale. That case was finally decided against the plaintiffs by the decree of this court in December, 1854. The present action for the price was also decided against the plaintiffs by the lower court, and they have appealed.

There is no ground for the action against *Adelaide Vivant*. The letters testamentary conferred upon *Marie Lavaux* the power to administer the estate as executrix. Her departure from the State, after making her power of attorney, did not, as the law then stood, have the effect *ipso facto* to deprive her of her office, notwithstanding the copy of the power of attorney does not appear to have been deposited with the Judge. It required some action of the court appointing her to declare the office to be vacant. But the court, so far from making such order, recognized her acts, and at her instance ordered the sale of the property, the price of which is in question in this case. She was, therefore, in office, and the receipt of the money due by the debtor of the succession, by *Ferrand*, her agent, was a valid payment, and discharged the debtor for the \$1066 66½, the instalment in cash made during the lifetime of *Marie Lavaux*, the executrix.

The two promissory notes were paid to *Ferrand* whilst he was executor, and had capacity to receive the money. Those payments were also valid.

Now, are the heirs of *Marie Lavaux* bound for these payments? It is shown that the executrix died in Paris, on the 22d day of June, 1839, just twelve days after *Ferrand*, the agent, acknowledged, by notarial act of sale, to have received the first instalment of the price in cash, and the promissory notes falling due in six and twelve months thereafter.

*Ferrand* was appointed dative testamentary executor, and qualified as such on the 2d day of December, 1839. As to the two notes not matured at the time of the death of *Marie Lavaux*, it cannot be seriously contended that her heirs are responsible for the payment made by *Adelaide Vivant* to *Ferrand*,

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who was at that time executor. The payment of the notes we have already said was valid.

But in regard to the instalment in cash, it is possibly not so clear at the first view who is bound to account for it to the plaintiffs, *Ferrand* or the heirs of *Marie Lavauz*. We will, therefore, consider how the matter stands. It is certain that, after the death of *Marie Lavauz*, her heirs did not represent the succession of *Victoire Marcos Tio*. They were, so far as the latter succession was concerned, third persons. It is equally clear that, after the appointment of *Ferrand* as dative testamentary executor, he did represent the succession of the testatrix, *Tio*, for the purpose of collecting the property sold for the payment of debts, and to pay such debts. It is equally clear that in collecting the instalment of cash, *Ferrand* was not the agent of *Marie Lavauz* in her individual capacity but as executrix. The fund, therefore, which he had collected belonged to the estate. It was not the private property of *Marie Lavauz*, but the property of the succession.

The agent who has the fund of his principal in his hands is *quoad* the fund only a depositary. He cannot use it (which is presumed to exist in his hands in *specie*) without committing a crime.

Now, suppose the heirs of *Lavauz* had sued *Ferrand* immediately after his appointment as executor for the \$1066 66 $\frac{2}{3}$ , received by him as agent for *Marie Lavauz*, executrix, alleging that they were bound to account to the succession of *Victoire Marcos Tio* for this money, could not *Ferrand* have replied successfully: "It is true that this money is in my hands, but I did not receive it for your mother in her individual capacity, which you alone represent; I received it for the executrix of the last will and testament of *Tio*, and as I am now executor of her will, I am bound to account to no one but myself."

It would seem that the heirs of *Lavauz* could no more take this money out of the hands of the dative testamentary executor who had possession of and, by his appointment, title to the money, than they could a slave or a piece of real estate. If the heirs could not recover this money from the dative testamentary executor, they are not bound to the heirs of *Tio* for it.

As the money is by law presumed to be in the hands of the agent, who is not supposed to have committed the crime of embezzlement, it must follow that his sureties are *prima facie* bound with him for its faithful administration. If the surety would relieve himself from such objection, he should at least show that the agent had not only embezzled the fund before his appointment as executor, but also that he was insolvent at that time. Finding, therefore, that the fund in controversy has gone into the hands of *Ferrand* as executor, the plaintiff must be left to such remedy as they have against him and his surety. There is no reason to disturb the judgment of the lower court, and we consider what we have here said a sufficient answer to the other questions raised by plaintiffs' counsel.

Judgment affirmed.

## CITY OF NEW ORLEANS v. ESTATE OF ARTHUR McARTHUR.

Where defendant admits a part of the plaintiff's claim and deposits the amount in court, and the balance for which judgment is rendered is less than \$300, the judgment being an entirety and the whole amount claimed in the suit being over \$300, the court has jurisdiction of an appeal. One can only be bound by the assessment rolls of the parish or district within which one has taxable property, after having failed to appeal without a sufficient excuse.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*Durant & Horner*, for defendant and appellant. *Laville & Morell*, for plaintiff.

SPOFFORD, J. In the cases of the *City of New Orleans v. Lacroix*, *The Same v. Rousseau*, and *The Same v. Lesseps*, 11 Ann. pp. 193, 195 and 251, we held, that a tax payer sued for city taxes, before being allowed to establish errors in the assessment roll to his prejudice, should allege and show that he has applied in vain to the proper authorities for a correction thereof within the time limited by law for such an appeal, or in default of such an application, that there existed some sufficient reason for his apparent negligence.

Upon the authority of those cases, the district Judge in this instance excluded all evidence to establish the allegations of the defendant's answer, and rendered a judgment against her for all the taxes claimed, from which she has appealed.

The judgment sought to be reversed is an entirety, and exceeds three hundred dollars. We think we have jurisdiction of the case.

The defendant, whose answer is full, explicit and carefully framed, does not contest the correctness of the doctrine laid down in the cases above cited, but maintains that she has brought herself within the exception to the rule, by alleging a state of facts which exonerates her from the charge of *laches*, and excuses her for her failure to apply for a correction of the assessment roll.

If her answer is true, (and in this inquiry we must assume its truth,) she gave in faithfully all her property in the city of New Orleans to the Assessors of the respective districts where it was situated; she had no property subject to taxation, except that which was situated in the Second and Third Districts; she admits herself bound by the assessments rolls of those districts; but she avers, that the assessment against her in the *First District* of "twenty-four slaves in square No. 220, comprised within Dryades, Melpomene, Thalia and Bacchus streets, assessed at \$12,000," is a gross error, as she never owned any property either in that square or in the First District; that during the year for which the taxes sued on are levied, all of her slaves were assessed in the Second District, and are regularly included in her bill; that she is entitled to relief from the gross error and fraudulent assessment made by the Assessor of the First District, to swell up the amount of the taxable property, because as she owned no property whatever in that district, and was rightfully assessed for all her property elsewhere, she was not bound to look over the eight hundred squares on the assessment roll of the First District, to see whether she was there taxed for any slaves or property she did not own.

This state of facts discloses a reasonable and valid excuse for what we should otherwise regard as an apparent neglect on the part of the defendant, to examine the assessment roll and apply for its correction in the mode pointed out by statutory regulations upon that subject.

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One can only be bound by the assessment rolls of the parish or district, within which one has taxable property, after having failed to appeal without a sufficient excuse. A different rule would subject parties to constant surprises, or oblige them to employ agents in every parish or assessment district in the State.

It is therefore ordered, that the judgment appealed from be avoided and reversed, and that this cause be remanded to the district court, with directions to permit the defendant to offer evidence in support of the allegations of her answer, and further to proceed as the law may require; the costs of this appeal to be borne by the plaintiff and appellee.

#### STATE v. THE JUDGE OF THE SEVENTH JUDICIAL DISTRICT.

Where property is seized under execution and the sale is enjoined by a third person claiming to be the owner, it is the value of the property under seizure, and not the amount for which the writ issued, which determines the right of appeal.

ON the application of *Mills & Cleveland* for a *mandamus* to the Judge of the District Court of East Feliciana, *C. Ratliff, J. Muse & Hardy* and *Bowman & De Lee*, for appellants.

VOORHIES, J. (MERRICK, C. J., declined sitting.) This is an application for a writ of *mandamus* to compel the district Judge to grant to the relators an appeal from a judgment rendered by him in favor of *Thomas P. Simpson* against *Mills & Cleveland*.

In his answer accompanying the petition praying for the writ, the Judge has waived the usual notice, and consented that the matter shall be submitted instantaneously to the decision of this court.

The ground upon which he justifies his refusal to grant the appeal is, that the matter in dispute does not exceed the sum of \$300.

It is in evidence that in 1855, the relators, *Mills & Cleveland*, obtained a judgment against *Thomas Albritton*, for the sum of \$136, with eight per cent per annum interest on \$90 83 thereof from the 1st of January, 1853, and on the residue from the 1st of January, 1854, until paid. A writ of *fieri facias* thereon, issued on the 18th of October, 1855, was executed by the seizure of a negro woman named *Lucy*, as the property of *Albritton*. *Thomas P. Simpson* enjoined the sale, on the ground that the property seized belonged to him and not to the defendant in execution. After the joinder of issue, judgment was rendered in favor of *Simpson*, perpetuating the injunction. It is from the judgment thus rendered against them that the relators claim the right of appeal.

We think it is clear that the title to the slave *Lucy*, and not the judgment in favor of the relators against *Albritton*, was the matter in dispute between the litigating parties in the injunction suit. As the evidence shows that the value of the slave exceeded the sum of \$300, it is obvious that the relators were entitled to an appeal from the judgment thus rendered against them. See 5 Ann. 31.

It is therefore ordered that a writ of *mandamus* issue as prayed for, directing the district Judge to grant an appeal to the relators from the judgment thus rendered against them in favor of said *Simpson*, on complying with the requirements of the law.

## W. H. HOGAN v. G. W. CARRAS.

In every sale of a seaworthy steamer, where time is given for the payment of the price, it is to be considered as having been in the contemplation of the parties, that the vessel was to be employed in navigation, and even if that navigation extends beyond the waters of the State, in the absence of any allegation of fraud or insolvency, the vendor will not be permitted to attach the boat where the price is not yet due, by swearing that the debtor is about to remove his property out of the State before the debt becomes due.

**A**PPEAL from the Fourth District of New Orleans, *Reynolds, J.*  
*Chilton & Harrison*, for plaintiff and appellant. *R. & H. Marr*, for defendant.

**LEA, J.** The plaintiff, who is a resident of the State of Mississippi, acting as the agent of third parties, sold to the defendant, who is also a resident of the State of Mississippi, the steamboat *P. C. Wallis*, and in part payment of the price, received a note dated March 10th, 1856, payable on the 22d September following. On the 22d March, 1856, twelve days after the date of the note and six months before its maturity, the plaintiff caused the steamer to be attached, on the ground that the defendant was a non-resident and was about to remove the said boat out of the State of Louisiana, before the note should become due. Upon a rule taken for that purpose, there was a judgment setting aside the attachment, from which judgment the plaintiff has appealed.

The only question which it is necessary to determine, is whether the nature of the contract was one which made it an exception to the general rule regulating attachments based upon unmatured obligations. It may be assumed that the allegations of the petition, supported by the plaintiff's affidavit, are such as bring the case within the letter of the law, authorizing an attachment, but there is no allegation of fraud or bad faith on the part of the defendant, and it is shown that, at the date of the seizure, the defendant had made arrangements for the employment of the vessel permanently in a trade confined exclusively to the waters of the State. Apart from this, however, we think that on every sale of a seaworthy steamer where time is given for the payment of the price, it must have been in contemplation of the parties that the vessel was to be employed in navigation; and even if that navigation extended beyond the waters of the State, it would, in the absence of any allegation of fraud or insolvency, be a breach of faith to interrupt an employment from which it was anticipated that the purchaser would derive the means of meeting his engagements.

We think, as was ruled in the case of *Russel v. Wilson*, 18 La. 367, "that it would be unreasonable to extend the application of the Act of 1826, to a species of property which from its nature and destination must necessarily be taken out of the State, and which the creditors of the owner could not have believed would remain continually within its limits." By selling property of this kind upon terms of credit, there is an implied permission on the part of the vendor, as incident to the contract, that it may be employed in accordance with its destination in whatever manner may be most remunerative to the owner, and the plaintiff cannot be permitted before the maturity of his demand, to interrupt such use of the vessel as must have been in contemplation of both parties at the time the sale was effected.

Judgment affirmed.

## CHARLES S. FARWELL v. HARRIS &amp; MORGAN.

In an action against the owners of a ship for the value of a slave carried away in the ship, the plaintiff, under the general denial, is bound to prove that he is the owner of the slave carried away.

It is a good defence to such an action, that another person than the plaintiff is the owner of the slave, and that the defendant was authorized and employed by such other person to receive the slave and carry him to another port.

The Clerk of the ship is a competent witness for his employers to prove the instructions given by the owner to the Clerk, in shipping the slave.

A formal release of a witness from any liability over to the party interrogating him, annexed to the interrogatories and transmitted with the commission under which he was examined, is sufficient to remove the objection to his testimony on the score of interest.

In an action against a common carrier upon the penal statute for taking slaves out of the State without the consent of the owner, the ostensible owner in whose name the slave was shipped, and the vendor of such owner, have no interest in the suit, and are competent witnesses for the defendant. The judgment in such an action is not conclusive as to the title to the slave.

The common carrier is not required, upon his own responsibility, to decide upon the validity of the title of shippers to property which is shipped, but the shipowner has complied with the law, if he has in good faith received the slave from a person claiming to be owner, and holding under an apparent title.

The court takes judicial knowledge that slaves are personal property in other States.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
H. Gaither, for plaintiff. Race & Foster, for defendants and appellants.

BUCHANAN, J. On the 29th of December, 1853, a slave man named *Charles* was shipped by one *C. H. Hughes* on board the steamship *Perseverance*, belonging to the defendants, at the port of New Orleans, for transportation to Galveston, in the State of Texas; and a clearance for said slave was granted by the Collector of this port, upon oath being made, as directed by the Act of Congress of 2d March, 1807, by the shipper and by the master of the ship, that, to the best of their knowledge and belief, the said *Charles* was not imported into the United States since the 1st of January, 1808, and that, under the laws of this State, he was held to service and labor.

The present action is instituted by a person who alleges himself to have been, at the time of said shipment, the owner of said slave *Charles*, and that said slave was taken out of the State, on board the steamship *Perseverance*, without his consent and against his wishes, by means of which taking the slave has been altogether lost to him. Plaintiff claims the value of said slave, stated at twelve hundred dollars; hire from the time of his abduction at the rate of twenty-five dollars per month; and in addition, a penalty of five hundred dollars, under the statute.

The first question which arises, under the pleadings and bills of exception, is the right of defendants to plead, and to prove, that the slave *Charles* belonged to another person than the plaintiff.

In all the statutes, four in number, which give an action against the owners of a ship for the value of a slave carried away in the ship, the action is in terms given to the owner of a slave. See Acts of 1816, p. 8; Acts of 1835, p. 152; Acts of 1839, p. 120; Acts of 1840, p. 90.

It is, therefore, an essential averment of the petition, that the plaintiff is the owner of the slave carried away; and the general denial puts him on the proof

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of this fact. It is, consequently, a good defence to such an action, that another person than the plaintiff is the owner, and that the defendant was authorized and employed by that other person to receive the slave on board his vessel, and convey him to another port. The case of *Buel v. The steamer New York*, in 17 La. Rep., cited by plaintiff, is not inconsistent with this ruling. In that case the plaintiff offered in evidence his title (a bill of sale made in Florida,) in support of his allegation of ownership; and the objection made by defendant was, that the same had not been recorded in New Orleans. But the court held this ground of objection to be untenable; and observed, "there was no adverse title set up against that of plaintiff; the defendant did not pretend to own the slave, nor to have any right contradictory with the plaintiffs."

But here, the case is directly the reverse. The defendants plead specially that "they received on board the said ship *Perseverance* a negro man named *Charles*, represented at the time to be a slave belonging to one *James L. McKeon*, residing in Galveston, Texas; but that said slave was duly passed at the customhouse by said *McKeon*, or his agent, and the regular customhouse clearance given before the said man *Charles* was taken on board, and which is the only precaution and protection the law affords and points out to common carriers, and your respondents are unable to know to whom slaves may belong—but as common carriers, when properly cleared at the customhouse, they are bound to receive and transport the same as required. That they did thus legally receive a certain negro *Charles*, properly cleared at the customhouse, as the property of one *James L. McKeon*, of Galveston, to whom, on the arrival of the ship *Perseverance* at that port, he was delivered and properly receipted for, and charges paid."

The answer of defendants next proceeds to aver, with circumstantial detail, that *James L. McKeon*, of Galveston, Texas, is the owner of the slave *Charles*, by two distinct titles; one derived from *Leonidas B. Harper*, (who is likewise the vendor of plaintiff,) and the other from *Richard Harper*, the father of *Leonidas*, whom the answer avers to have been the real original owner of the slave, and whose title was never divested, until the conveyance by said *Richard* to *McKeon*.

It is evident that the outstanding title in another than the plaintiff, thus pleaded, is a matter which had a direct pertinency to the defendants' liability to plaintiff in the manner and form as charged. The court did not err, therefore, in refusing to strike out those pleas, upon plaintiff's application, or to put defendants upon making an election.

The customhouse manifest and clearance of slave *Charles* by *Hughes*, were given in evidence by plaintiff; and *Hughes* was offered by defendant, and properly received by the court, to prove that in shipping the slave he acted as the agent of and by special instructions from *James L. McKeon*. The circumstance of *Hughes* being in the defendants' employ, as Clerk of the ship, did not render him incompetent. C. C. 2261. His testimony is corroborated by that of *McKeon*. *McKeon* and *Richard Harper* were examined under commission in Texas, and their depositions, with exhibits annexed, were offered by defendants. *Harper* was objected to as incompetent, on the ground of interest, and that it would be proving title to the slave by parol. *McKeon* was also objected to on the score of interest.

The objection to *Harper* was sustained by the court, and his deposition ruled out. That of *McKeon* was admitted by the court "only to show that said *Mc-*

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*Keon* placed the negro on board the defendants' ship, claimed to be the owner of the negro, and paid charges for bringing him to Galveston, and for no other purpose."

We think these rulings of the court erroneous. A formal release of *McKeon* from any liability over to the defendants was annexed to the defendants' interrogatories, and transmitted with the commission under which he was examined. But he would have been competent, even without the release. Neither he nor *Richard Harper* have any interest in the result of this suit, which is an action against a common carrier, upon a penal statute, for taking a slave out of the State without the consent of his owner.

We do not understand this statute as requiring the common carrier to decide, upon his own responsibility, upon the validity of the title of shippers to property which is shipped. We fully appreciate the considerations of public policy, which have dictated the laws under review, in relation to the particular kind of property in question. But the shipowner has complied with the law, if he has in good faith received the slave from a person claiming to be owner, and holding an apparent title to the slave; and we take the very best witness, in support of such a defence, to be the party from whom he has thus received the slave. It is to be observed, that neither in the pleadings, nor in the evidence, is the slightest imputation thrown upon the good faith of the defendants. On the contrary, the evidence on both sides shows that the plaintiff has himself to blame, in a great measure, for the jeopardy, if not the loss, of the money advanced by him to *Leonidas Harper* upon the sale à réméré of this slave; inasmuch as he imprudently trusted his vendor with the possession of the slave, and allowed him, on a previous occasion, to take him to Texas, where he pledged the slave for the security of money borrowed.

We have further to observe, upon the objections made to *Richard Harper's* evidence, that we take judicial knowledge that slaves are personal property in Texas. Indeed, the sort of title to the slave *Charles*, which *Richard Harper* proves, could only be proved by parol in Louisiana. He swears that the said boy was born and raised his own slave, and that he never parted with the title to him until he made the bill of sale of him to *Dr. McKeon* of Galveston.

The depositions of *McKeon* and of *Richard Harper*, which come up with the bill of exceptions, and the exhibits annexed to those depositions, completely make out the defendants' case.

In dismissing the defendants from this action, we are not to be understood, however, as concluding plaintiff in relation to the title to the slave *Charles*. We do not consider that the proper parties are before us for such a purpose.

It is therefore adjudged and decreed, that the judgment of the District Court be reversed; and that there be judgment in favor of defendants, with costs in both courts.

## MRS. P. McCORMICK v. ROBERT CONWAY.

An action for damages for malicious prosecution should not be maintained without proof of malice or bad faith on the part of the prosecutor.

Malice may be inferred from an utter absence of probable cause, but in such case, the absence of probable cause, to form the basis of a presumption of malice, should be shown affirmatively and positively.

APPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Michel, Gillmore & Semmes and Labatt*, for plaintiff and appellee. *Budd & Lambert*, for defendant and appellant.

LEA, J. The plaintiff sues to recover damages for an alleged malicious arrest, made at the instance of the defendant, who charged her under oath with passing a counterfeit bank note, knowing it to be such. There is no proof in the record showing that any actual damage was sustained by the plaintiff, or that she was imprisoned. The jury, however, found a verdict in her favor for the sum of \$500, probably as vindictive damages.

We searched the evidence carefully, and find no proof of malice or of bad faith on the part of the defendant. It is true that malice may be inferred from an utter absence of probable cause, but in such case the absence of probable cause to form the basis of a presumption of malice should be shown affirmatively and positively.

In the case at bar, the defendant is shown to be a man of good character, and no fact has been brought to our notice which could induce the belief that he had a motive which could prompt him to make a false accusation against the plaintiff. "The public interest and the proper administration of justice in criminal matters requires that actions for a malicious arrest should not be maintained without clear proof of malice and the absence of probable cause." See *Maloney v. Doane*, 15 L. R. 281.

It is ordered, that the judgment appealed from be reversed, and that there be judgment for the defendant, the plaintiff and appellee paying costs in both courts.

## HUGH LACKEY v. CLAYTON TIFFIN.

The transfer of a judgment rendered in another State, which is final between the parties, cannot be resisted when sued on by the assignee in this State, as being the sale of a litigious right.

APPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*Ad. Rozier*, for plaintiff and appellee. *W. S. Upton and C. Roselius*, for defendant and appellant.

SPORFORD, J. The only question here is, did the plaintiff buy a litigious right?

"A right is said to be litigious when there exists a suit and contestation on the same." C. C. 2623.

On the 19th July, 1854, when the plaintiff, *Hugh Lackey*, bought of *Armistead Lawless* a final judgment which the latter had obtained many years be-

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fore, in the State of Missouri, against *Clayton Tiffin*, the right of *Armistead Lawless* was nowhere in contestation. Not in Missouri, for there it was fixed by irrevocable decree; not here, for *Lawless* had asserted no right here.

If *Lackey* did not own this judgment before the 19th July, 1854, he had unadvisedly brought a suit in New Orleans upon a claim to which he was a stranger, and as to which he was incompetent to stand in court. The fact that the defendant, *Tiffin*, had joined issue with him as to his rights, did not preclude him from buying *Lawless's* right, touching which there was no litigation pending whereby such right could be affected.

Judgment affirmed.

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WILLIAM MASSEY v. THOMAS HACKETT et al.

A copy of a sale or deed of conveyance made and executed by any Sheriff in this State, certified to be a correct copy by the Clerk, has the same effect as evidence in every respect as a duly certified copy of an authentic act.

Parol evidence is inadmissible either to create or to destroy title to real estate.

A witness can only refer to memoranda made by himself to refresh his memory.

APPEAL from the Second District Court of New Orleans, *Lea, J.*  
*Duncan & McConnell*, for plaintiff and appellant. *Clarke & Bayne, M. M. Cohen, S. L. Johnson and G. Schmidt*, for various defendants and appellees.

VOORHIES, J. This is a petitory action, in which the plaintiff claims the ownership of a certain square of ground situated in the city of New Orleans, bounded by Common, Gravier, St. Adeline and St. Magdeline streets. He alleges that a certain tract of land, divided into squares, was seized under several executions and sold by the Sheriff, as the property of *Jean Gravier*, on the 29th of January, 1825, said squares being designated by numbers according to a plan thereof which was then exhibited by the Sheriff; that the square in question, known and described as number nine, was adjudicated to *Howard Henderson*; and that the following conveyances of the same were subsequently made by authentic acts, namely: from *Howard Henderson* to *Solon Hill* for the account of *Artemon Hill* on the 10th of June, 1831, from *Artemon Hill* to petitioner and *Timothy Donnellan* on the 9th of March, 1836, and from the latter to petitioner, on the 3d of March, 1849. It is further alleged that the conveyances from *Artemon Hill* to petitioner and *Donnellan*, and from the latter to petitioner, contain a clerical error in the description of the square thus sold, which should have been described as bounded by Common, Gravier, St. Adeline and St. Magdeline, instead of Common, Gravier, St. Adeline and St. Jeanne streets; and that said error was rectified by an authentic act, executed by *Artemon Hill* in favor of the petitioner, on the 18th of May, 1853.

The defendants pleaded the general issue, and set forth in their answer the various conveyances from their respective vendors, whom they called in warranty. They aver, in this answer, that those under whom their vendors more immediately hold acquired their title to the property in question by purchase from *Benjamin Rodriguez*, by authentic act executed on the 7th of June, 1843; that the lots thus conveyed to them formed part of the square of ground bounded by Common, Gravier, St. Adeline and St. Magdeline streets, which

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was seized and sold by the Sheriff, as the property of *Jean Gravier*, to *Pierre Caillou*, on the 17th of December, 1824; and that the following conveyances constitute this chain of title to *Benjamin Rodriguez*, to wit: *Pierre Caillou* sold to *Jules LeBlanc*, on the 26th of March, 1831; *Jules LeBlanc* conveyed to *Mathew Rea*, on the 31st of December, 1831; *Mathew Rea* conveyed to *Henry D. Richardson*, a member of the firm of *S. T. Hobson & Co.*, on the 1st of August, 1838, and on the 29th of April, 1843, *Rodriguez* acquired *Richardson's* title by purchase at a Sheriff's sale, in the suit of *Jonathan Montgomery*, testamentary executor of the late *William Nott*, subrogated to the rights of the Citizens' Bank of Louisiana, against *S. T. Hobson & Co.* It is further alleged by the defendants, that *LeBlanc* and *Caillou* were, together with *Solon Hill*, under whom the plaintiff claims, parties to an act of compromise executed on the 14th of July, 1831, in which the parties declared that they accepted a plan drawn by *Louis Bringier*, on the 19th of May, 1831, dividing anew the *Gravier* property thus conveyed by the Sheriff, and that it should thenceforth be binding upon them, and the *Gravier* plan which was considered erroneous was to be null and void; that the plaintiff, claiming under *Solon Hill*, is estopped by said agreement, &c. We consider it unnecessary to notice the other grounds of defence.

It is in evidence that *John Gravier* was the owner of a certain tract of land situated in the suburb *St. Mary*, which was partially laid out into squares, designated by numbers, according to a plan made by him in 1820; that the squares thus laid out were sold by the Sheriff by virtue of an execution against him to different persons, among others, *John McDonogh*, *John Longpré*, *Pierre Caillou*, *François Dubuc*, *François Marie Périlliat*, *James Irwin*, *Henry de Ende*, *Alexander W. S. Palmer* and *Howard Henderson*; that subsequently, on the 27th of April, 1831, *John McDonogh* acquired, by purchase at Sheriff's sale, under an execution against *Jean Gravier*, the residuary interest of the latter to said tract of land situated within the following limits, to wit: "in front, or to the east by the line of *St. Paul* street, in its whole length from *Périlliat's* line above to *Common* street below, on the upper side or to the south of *Périlliat's* line, running back from its intersection with *St. Paul* street to its intersection with *Bertrand* street, on the lower side, or to the north by *Common* street from its intersection with *St. Paul* street and a line parallel with *Common* street, continued until it intersects the line of *Bertrand* street, and in the rear, or to the west, by *Bertrand* street in its whole length." It would seem that in attempting to take possession of their respective squares, under the Sheriff's sales, it was discovered by the purchasers that *Gravier's* plan was erroneous, inasmuch, as it encroached upon a tract of land belonging to *François Marie Périlliat*. On the 19th of May, 1831, a new plan of the squares embraced between *St. Paul*, *Common*, *Bertrand* and *Hevia* streets was made by *Louis Bringier*, Surveyor General of the State.

Under a written agreement entered into between the parties, or purchasers at the Sheriff's sale, on the 14th of July, 1831, the plan thus made by *Bringier* was accepted as binding upon them, without any exception or reservation, and the *Gravier* plan declared to be null and void. *Solon Hill*, under whom the plaintiff claims, was a party to that agreement, in which the square claimed by him was described as "number nine, measuring 320 feet 2 inches front on *Gravier* street, 402 feet 6 inches front on *St. Jeanne* street, 230 feet 2 inches front on *Common* street and 402 feet 6 inches front on *St. Adeline* street;" and the

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square in controversy, to which the defendants derive their title from *Pierre Caillou*, was described as "number thirteen, measuring 230 feet 2 inches front on Gravier, 402 feet 6 inches front on St. Adeline, 230 feet 2 inches front on common and 402 feet 6 inches front on St. Magdeline street." *Jules LeBlanc*, the vendee of *Pierre Caillou*, was also a party to the agreement. The claim of title from *Pierre Caillou* to *Benjamin Rodriguez* is satisfactorily shown by the evidence as set forth in the defendants' answer. The square thus acquired by *Rodriguez* was divided into lots and sold by him at auction, on the 7th of June, 1843. The testimony of the auctioneer shows that the square was sold as represented on *Louis Bringier's* plan, which he says is in accordance with the general description of all the property there, the present location of the streets, and the measurement made at the time.

Under this state of the case we are enabled to examine understandingly the various questions presented by the bill of exceptions contained in the record.

1st and 2d. The first two bills of exception present the same question. The defendant objected to questions propounded to two of the witnesses on the stand, on the ground of being leading questions. The object of the testimony was to prove the loss of the Gravier plan. As we consider the plaintiff estopped by the Act of the 14th of July, 1831, from setting up this plan as a monument of title, it is, therefore, unnecessary to determine the question presented by these bills of exceptions; 18 L. 1; 4 R. 299; 5 R. 200; 2 An. 28; 2 L. 600.

3d. We do not think the Judge erred in overruling the plaintiff's objection to the introduction of a copy of the Sheriff's deed of sale to *Benjamin Rodriguez*, on the ground that the original should have been accounted for or the impossibility of producing it shown. The 11th section of the Act of 1828, declares that a copy of any sale or deed of conveyance made and executed by any Sheriff of this State, certified to be a correct copy by the Clerk, &c., shall be received as evidence in the same manner and have the same effect in every respect as a duly certified copy of an authentic act. Under this enactment, the copy offered was clearly admissible as evidence. Session Acts of 1828, 154.

4th. The plaintiff objected to the introduction of an act of conveyance from *Bernard McCarty* to *Thomas Hackett* on the following grounds: 1st, that it was as to him *res inter alios acta*, unless given in evidence to prove *rem ipsam* only; 2d, that it was imperfect on its face, as it referred to a plan as part of it for the description of the lot therein mentioned, the said plan being the primary evidence of the location as well as the dimensions of the said lot, and 3d, that it also contained enunciations of certain judicial proceedings, of which an authentic copy could alone be received as the best evidence. The act was clearly admissible as proof of one of the links of defendant's chain of title. As the property is fully described in the act, the second objection is, therefore, untenable. It is a sufficient answer to the third objection to say, that it was incumbent upon the plaintiff to state specifically the recitals in the deed to which he objected as inadmissible against him, and to request the Judge to charge the jury accordingly.

5th. Parol evidence is clearly inadmissible either to create or to destroy title to real estate. In this respect the testimony of *Louis Bringier* was properly excluded. So far as its tendency was to give effect to the Gravier plan it was also inadmissible, for the reasons which we have already stated. *Hen. Dig.* 525; 11 L. 251; 4 An. 441; 3 An. 193.

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6th. The Judge did not err in ruling out conveyances offered in evidence to which the defendants were neither parties nor privies, on the ground of *res inter alios acta*. Besides, the object of the evidence was to destroy or change the limits which were assigned to the property in controversy under the Act of 14th July, 1831, which could not be done.

7th. The question presented by this bill of exceptions is the same as that decided in the preceding one.

8th. The plan offered as secondary evidence to prove the contents of the Gravier plan was, in our opinion, properly rejected. It was certainly entitled to no effect unless shown to be a correct copy of the original. Moreover, it was inadmissible to affect the location of the square under *Bringier's* survey.

9th. We do not think the Judge erred in refusing to permit the question referred to in this bill of exceptions to be answered by the witness. The object of the question was to elicit the opinion of the witness, a surveyor, in relation to the location of the square of ground in controversy, which was clearly inadmissible. See 7 L. 111.

10th. As the survey made by *Albert G. Blanchard*, to which the defendants were neither parties nor privies, could not affect the location under *Bringier's* survey, it is obvious that the exclusion of the evidence offered to prove its genuineness was immaterial.

11th. The Judge did not err in overruling the objection to the introduction of the document referred to in the bill of exceptions. In regard to the loss or destruction of the original *Bringier* plan and the document offered as a correct copy thereof, the proof appears to us to be conclusive.

12th, 13th and 14th. The Judge did not err in overruling the objection to the introduction of certain conveyances set forth in the bills of exception, on the ground that the documents therein referred to should be introduced at the same time. The plaintiff, as before observed, could have required the Judge to instruct the jury that recitals contained in acts were only binding upon the parties or privies to such acts.

15th. Considering the testimony referred to in the bill of exception immaterial to the decision of the case, the solution of the question which it presents becomes, therefore, unnecessary.

16th. We are of opinion that the Judge did not err in sustaining the objection to the introduction of the record of the suit of *John McDonogh v. Le-Breton*, curator, &c., on the ground of *res inter alios acta*. See the case reported in 9th L. R. 531.

17th. The Judge did not err in sustaining the objection to the introduction of the supplemental answer of *Howard Henderson* in the suit of *William Massey v. Heirs of Herman*, on the ground that the defendants were not parties to that suit nor claimed under *Howard Henderson*.

18th. The plaintiff objected to the introduction of a deed of sale from *W. W. Hoffman*, as agent of *Artemon Hill*, on the following grounds: 1st, because the act extended beyond the power granted, and was therefore void; 2d, because the act itself did not profess to have any reference to the square in controversy, but appeared to be the contrary; and 3d, because the power of attorney was not authenticated according to law, and the whole document was irrelevant to the issue. These objections could only go to the effect and not to the admissibility of the evidence.

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19th. The plaintiff offered to prove by the testimony of *L. H. Pilié* that a plan in the handwriting of *Joseph Pilié*, the witness's father, was the same which was referred to by *Joseph Pilié* as a copy of the original, in the testimony given by him in the matter of the *Succession of T. C. Bates*. The defendants objected to the showing of the testimony of *Joseph Pilié*, then deceased, to the witness, on the ground that the latter could not refer to it, but could only refer to memoranda made by himself to refresh his memory. We think the objection was well taken. See the case of *Pargoud v. Grice*, 6 L. 77.

20th. We think it is clear that the conveyance from *Levi Pierce* and *William Lambeth* to *Jane Placide* on the 29th of April, 1833, was admissible to prove their ratification of the Act of the 14th of July, 1831. The plaintiff offered in evidence a deed of conveyance from the estate of *J. C. Bates* to *Pierce* and *Lambeth* of the same property. We think it was properly rejected on the ground that the property therein conveyed formed no part of the matter in dispute, and could not affect the rights of the defendants.

21st. We concur in opinion with the Judge, that the documents purporting to be copies of original plans (not authentic) were not such as were admissible under the rule invoked by the plaintiff in relation to ancient documents. But, conceding for a moment their admissibility, still we do not think they could avail the plaintiff for the purpose of affecting or changing the location which was made under *Bringier's* survey.

22d and 23d. We consider the questions presented by these bills of exceptions similar to some of those upon which we have passed in the other bills of exceptions.

On the merits, we think the evidence shows clearly that neither the plaintiff nor any one of those under whom he claims ever had the actual possession of the property in controversy. Whilst on the other hand it appears that the location of said property was in accordance to the Act of 14th July, 1831; that some of the defendants acquired possession by actual occupation immediately after the sale from *Rodriguez* and others shortly thereafter; that the vendees of *Rodriguez* and those claiming under them have continued ever since to hold openly and uninterruptedly the possession thus acquired by them; that there was another square contiguous to the one in controversy which was designated at the time as the plaintiff's property, and the only one which was then claimed by him; that in several of the conveyances forming the plaintiff's chain of title, the square conveyed to him is described as being bounded by *Gravier*, *Common*, *St. Adeline* and *St. Jeanne* streets, a square distinct from the one in controversy; that in the pleadings of a suit instituted by plaintiff against the heirs of *Herman* he claimed as his property the square of ground situated between *Common*, *Gravier*, *St. Adeline* and *St. Jeanne* streets, according to the calls of his title; and that on the 18th of May, 1853, about three weeks previous to the institution of this suit, *Artemon Hill* executed an authentic act in favor of the plaintiff, declaring that he had, by an Act passed on the 9th March, 1836, sold to *Timothy Donnellan* and *William Massey* a square of ground designated by the number nine on a plan made by *John Gravier*, bounded by *Common*, *Gravier*, *St. Jeanne* and *St. Adeline* streets in the faubourg *St. Mary*, when in point of fact the said square is bounded according to the original plan of *Jean Gravier* by *Common*, *Gravier*, *St. Magdeline* and *St. Adeline* streets.

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Under these and other circumstances described by the record, we think it is clear that the defendants' title should prevail over that of the plaintiff to the property in controversy.

It is, therefore, ordered that the judgment of the court below be affirmed, with costs.

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REUBEN KNIGHT v. MELINDA KNIGHT.

*On motion to dismiss the appeal—*

The Supreme Court derives its jurisdiction from the Constitution, and the repeal of a statute which had conferred jurisdiction on it does not affect its powers.

The affidavit of the appellant, in a suit for divorce, that his interests involved in the suit exceed three hundred dollars, is sufficient to give the Supreme Court jurisdiction.

*On the merits—*

The plaintiff had filed a supplemental petition, after answer and reconventional demand by the defendant. A default was taken on the supplemental petition, which was afterwards confirmed *ex parte* upon the deposition of a witness examined under commission. The case did not stand fixed for trial at the time. *Held*: That such a proceeding was irregular and that no judgment should have been rendered on the supplemental petition, until the whole case had been regularly tried.

APPEAL from the Sixth District Court of New Orleans, Cotton, J.

Cotton & Dorsey and A. Lothrop, for plaintiff. Larue & Whitaker, for defendant and appellant.

MERRICK, C. J. This is an action for a separation of bed and board and for a divorce.

A motion has been made in this court to dismiss the appeal, on the ground that the amount involved in controversy does not exceed three hundred dollars, and the further ground that the Act of the Legislature of 1855, No. 307, having repealed all former laws on the subject of divorce, leaves this court without jurisdiction.

As the Constitution confers upon this court its jurisdiction, it is only necessary to notice the first of these grounds. An affidavit has been filed showing that the interests of the appellant involved in this suit exceed three hundred dollars. Under the authority of the following cases we think this sufficient to sustain the appeal: *Prieur et al. v. Commercial Bank*, 7 L. R. 510; *Perkins v. Nettles, administrator*, 17 L. R. 253; *State v. Hackett*, 5 An. 92.

The motion to dismiss is, therefore, overruled.

BUCHANAN, J. This suit commenced by a petition for separation of bed and board, and for a divorce, in case the defendant, who was alleged to have abandoned the matrimonial domicile, should not return after three summonses, according to the provisions of the Civil Code.

An answer and petition in reconvention was next filed by defendant, denying the allegations of the plaintiff's petition, (except the marriage,) averring that plaintiff had cruelly and brutally treated defendant, that he had laid violent hands on her person, slandered her character, and deliberately attempted to poison her; and praying for separation of bed and board and for divorce, and that the care and custody of a child born of the marriage should be given to defendant.

Afterwards the plaintiff, with leave of court, filed an amended and supplemental petition, charging the defendant with adultery, and praying for a divorce.

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No answer having been filed to this supplemental petition, a judgment by default was taken therefrom, which, on motion of plaintiff's counsel, was confirmed *ex parte*, upon the deposition of a witness examined under commission, and judgment of divorce pronounced against defendant. It was admitted that the case did not stand fixed for trial at the time the judgment was entered up.

This proceeding was irregular. An issue was joined upon the original demand, and defendant had pleaded in reconvention; which cross action is also considered to be at issue, as no replication is required in our practice. The amended petition of plaintiff, alleging an additional ground of divorce to those already alleged on both sides, was properly allowed by the court, and the plaintiff was bound to take a default upon the amended petition, for want of an answer, in order to complete the *constatio litis*. See *Freeland v. Landfear*, 2 N. S. But it is very evident the final judgment was rendered upon the amended petition alone, leaving out of view the previous pleadings. The plaintiff had no right to divide the cause in this manner. *Lanusse v. Massicot*, 3 M. R. The case should have been regularly set for trial upon the issue made by the pleas of defendant filed, and the feigned issue presented by the judgment by default.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and the cause remanded for a new trial according to law, the plaintiff and appellee to pay the costs of appeal.

LEA, J. I think that the pleadings in this case, when considered together, presented an issue upon the question of divorce which could not be disposed of by a confirmation of the judgment by default. I, therefore, concur in the conclusion to remand the case.

#### EDWARD P. CHAMBERLAIN v. C. M. CHAMBERLAIN et al.

The principles of law involved in this case were settled in the cases of the *State of Louisiana v. Judge Bermudes*, 14 La. 478; *Same v. Same*, 2 Rob. 160; *Same v. Same*, 2 Rob. 420; *Succession of Richard Winn*, 3 Rob. 309; *Buller v. Her Creditors*, 6 N. S. 625; *E. Gonsoulin et al. v. Salvador Migue et al.*, 5 Ann. 565; C. C. 332.

**A** PPEAL from the Second District Court of New Orleans, *Lea, J.*  
*Hunton & Pike*, for plaintiff. *H. D. Ogden*, and *Coze & Breauz*, for defendants and appellants:

VOORHIES, J. *William McCawley* was appointed tutor to the plaintiff, *Edward P. Chamberlain*, by the late Probate Court of the parish of Jefferson. He was subsequently interdicted as an insane person. After his interdiction he was removed from the tutorship, at the instance of the under-tutor, by judgment of the Second District Court of New Orleans, the place of his domicile. The defendant, *C. M. Chamberlain*, was thereupon appointed tutor by the same court to fill the vacancy. *McCawley* through his curator, *William E. Leverich*, on rendering an account of his tutorship and delivering over to his successor the estate of his ward, was fully discharged and his official bond cancelled.

The present suit was brought to compel *C. M. Chamberlain* to render an account of his tutorship, in which the plaintiff also asserted his right of mortgage on certain property held by the other defendants as third possessors.

Two of the third possessors have taken an appeal from the judgment rendered by the court below in favor of the plaintiff.

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The action is resisted by them on the ground, that the Second District Court of New Orleans was without jurisdiction, *ratione materiae*, to remove *McCawley* from the tutorship, the succession of the minor's father having been opened in the parish of Jefferson, where the appointment was made; and that the proceedings relating to the appointment of *Chamberlain*, were consequently null and void and could produce no legal effect. It is also contended by them, that *Chamberlain* could not be considered as tutor, even conceding the jurisdiction assumed by the court, inasmuch as he had failed to furnish the requisite bond and security.

We think the questions involved in both propositions may be considered as settled in our jurisprudence. See 14 La. 478; 2 Rob. 160 and 420; 3 Rob. 300; 5 N. S. 625; 5 Ann. 565.

In relation to the right of subrogation in favor of the third possessors, resulting from the payment of certain claims secured by privilege or mortgage, having priority over that of the plaintiff, it is clear, as held by the Judge *a quo*, that such claims must be allowed and paid by preference out of the proceeds of the sale of the property thus mortgaged.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be affirmed, with costs.

*C. Roselius*, one of the third possessors and appellant in the case, on application for a re-hearing, argued as follows:

That he had not advanced the proposition, "that *Chamberlain* could not be considered as tutor, inasmuch as he had failed to furnish the requisite bond and security." What he contended for was that the payment made by *Leverich* to *Chamberlain*, before the latter had furnished his bond and security, was not a valid payment; and that, therefore, when he became of age, his money was still in the hands of *Leverich*. It would not be denied by any one, that if the plaintiff had sued *Leverich*, he would have been entitled to recover; indeed, it was difficult to imagine what defence could have been made to such an action. The pretended payment to *Chamberlain* would have afforded no ground of defence. When he bought the property of *Chamberlain*, it is obvious that the plaintiff's money was still due by *Leverich*, as the curator of the interdicted *McCawley*; and the question to be determined by the court is whether the plaintiff could, after he attained the age of majority, by ratifying the illegal payment made by *Leverich* to his brother, subject his property, purchased previously in good faith, to the operation of a tacit mortgage in favor of minors? It is not intimated that *Leverich* is not perfectly solvent, so that the claim of the plaintiff against him was unquestionably good and available. Under this state of facts, it is humbly submitted that if a loss is to fall on one of two innocent persons, it must be borne by him who was most in fault. It can certainly not be said that he committed any negligence or fault in buying the property; but *Leverich* was guilty of a gross error in paying to a person who had no authority to receive payment. It may be said that the plaintiff has no longer any recourse against *Leverich*, but it is clear, that if he has lost that recourse, it is by his own act, in bringing the present action against him, which is a tacit ratification of the payment to his brother. Who is to bear the consequences of that act?

No doubt, the tutor cannot take advantage of his neglect to furnish the bond and security required by law; such a pretension would be preposterous in the extreme; no one can take advantage of his own wrong. This is all that was decided in the cases of *Butler v. Her Creditors*, 5 N. S. 625, and in that of *E. Gonsoulin et al. v. Salvador Miguez et al.*, 5 Ann. 565.

As to the question whether a payment made to a tutor who has not given security is valid or not, it is free from all difficulty: the law is express in its provisions on this point. C. C. 332. Judge Mathews, as the organ of the court in the case of *Verret et al. v. Aubert*, 6 La. 354 *et seq.*, says:

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"Tutors are bound by law to obtain the confirmation of their appointments by the Judges of probates; to take an oath faithfully to discharge their duties, and to give security. The only exception, with regard to any of these requisites, has relation to tutors by nature, and no others.

"Until a tutor complies with them, however he may render himself responsible for damages on account of an interference, or intermeddling in a succession, he can do nothing binding and conclusive on the rights of minors whom he represents. Now, as it is not shown that *Godfroi Verret* was either confirmed in his office of tutor, took the oath prescribed by law, or gave security, the payment was made to him through error on the part of the defendant, and he is still liable to pay to the plaintiffs the amount of their portion of their grandmother's estate."

This decision has never been overruled, and no one will undertake to question its correctness.

The position assumed in argument that the intermeddling in a minor's property, produced the same legal mortgage on the property of the intermeddler as that which attached to the property of the tutor, can be of no avail to the present plaintiff; *first*, because he does not place his right to subject the property to that mortgage on any such ground; but expressly and exclusively on the foundation that *Charles M. Chamberlain* was his tutor; and in the *second place*, it is certain that if he had alleged, that the payment by *Leverich* to *C. M. Chamberlain* was illegal and constituted an act of intermeddling on the part of the latter, is it not clear that on paying the debt, he, the appellant, would have been subrogated to his claim against *Leverich*? But, instead of pursuing this course, he has, by the institution of the present action, released all recourse against *Leverich*, and seeks to throw the loss on the appellant. He waits until his brother and pretended tutor has sold all his property, and absconded to California, then he commences these proceedings under the facts and circumstances disclosed by this record.

Re-hearing refused.

#### SOCIETY FOR THE RELIEF OF DESTITUTE ORPHAN BOYS v. THE CITIES OF NEW ORLEANS AND BALTIMORE.

*John McDonogh*, by his will, instituted as his universal heirs the city of New Orleans and the city of Baltimore; he gave as an annuity to the *Society for the Relief of Destitute Orphan Boys*, one eighth part of the nett yearly revenues of the rents of the whole of his estate, until \$400,000 was realized; the said one-eighth part of the revenues to be set apart yearly or half yearly by the Commissioners and Agents of the general estate, (for whose appointment the will provided,) and deposited in some one or more of the banks of New Orleans until the same should amount to \$400,000. The will provided that the said amount should be invested in the purchase of real estate, from which a perpetual revenue from the rents of said estate should be drawn for the support of the Institution; that the Directors of the said society, assisted by the Mayor and Aldermen of the city of New Orleans should make the investments, and that the Mayor and Aldermen should approve of the purchases of real estate and become parties to the deeds by which the property should be acquired. *Held*: That the pendency of a suit between the cities for a partition of the succession, was no bar to an action for such instalments of the annuity as had fallen due; that the mode of investment was a matter of mere form which could not operate to annul or defeat the bequest; that it was not in the power of the testator to compel the city, through its Mayor and Aldermen, to become a party to the purchases in real estate in which it was to have no interest, it being the intention of the testator that the *Society for the Relief of Destitute Orphan Boys* should be the recipient of the bounty; that the liability of the defendants to discharge the legacy was not affected by the control over the estate given in the will to the Commissioners and Agents whose appointment was directed; that it was contrary to public law and policy that the simple tenures by which alone our laws permit property to be held, should be so complicated; and that such illegal modes, conditions and charges imposed by the will are to be disregarded.

**A**PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Duncan & McConnell*, for plaintiffs and appellees. *R. Hunt* and *J. J. Michel*, for city of New Orleans. *Eustis* and *Roselius*, for city of Baltimore.

SPOTFORD, J. This is a new controversy growing out of the will of the late John McDonogh. For a copy of the will and a history of the litigation concerning it hitherto, we refer to the case of *The State of Louisiana v. The Executors of John McDonogh*, 8 An., 174, and the case of *The Executors of John McDonogh et al. v. Murdoch et al.*, 15 Howard, 367.

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In those cases, it was finally adjudged that the cities of New Orleans and Baltimore were the universal testamentary heirs of John McDonogh.

In instituting these cities his heirs, the testator declared that he bequeathed his property to them "subject to the payment of the several annuities or sums of money hereinafter directed and set forth, which said annuities or sums of money are to be paid by the devisees of this my general estate, out of the rents of said estate."

The present demand is for the third in order of these annuities which the testator left to the plaintiff in the following language:

"Thirdly. I give and bequeath to the *Society for the Relief of Destitute Orphan Boys*, of the city of New Orleans, in the State of Louisiana, (of which institution *Beverly Chew* was President on the 28th day of April last, 1838,) for the express and sole purpose (and of no other) of being invested in the purchase of real estate, say lots of ground and houses situated in the city of New Orleans and its suburbs, from which a perpetual revenue from the rents of said real estate may be drawn for the support of said institution, an annuity of the one-eighth part (or twelve and a half per cent.) of the nett yearly revenue of rents of the whole of the general estate, as herein before willed and bequeathed to the Mayors, Aldermen and inhabitants of the cities of New Orleans, in the State of Louisiana, and of Baltimore, in the State of Maryland, which annuity of the one-eighth part of the nett revenues of rents, as above stated, shall be set apart yearly or half yearly by the Commissioners and Agents of the general estate, (to be appointed as hereinafter set forth,) and deposited in some one or more of the banks of the city of New Orleans (which pay interest on money deposited with them) until such time as said annuity shall amount to the sum of *four hundred thousand dollars*, (exclusive of any interest which may have accrued on it,) when it shall cease and be no longer paid. And, as the said fund of four hundred thousand dollars accumulates in bank, the Directors of the said *Society for the Relief of Destitute Orphan Boys*, assisted by the Mayor and Aldermen of the city of New Orleans, who (the said Mayor and Aldermen) shall approve of the purchases of real estate and become parties to the deeds by which it is acquired, *may*, from time to time, (as good purchases offer,) invest it in purchases of real estate, (as aforesaid,) lots and houses, and lots of ground lying within the city of New Orleans and its suburbs, yielding rents or likely to yield rents and to increase greatly in value, which real estate, once acquired, shall never thereafter be alienated or sold by said institution, but shall forever be retained and held by it, and remain its property. The title deeds of purchase, by which said institution shall acquire said real estate, shall set forth that it is made from funds of this bequest, and that said real estate cannot be sold or alienated by said *Society for the Relief of Destitute Orphan Boys*. The funds, (when accumulated,) as wanted for the payment of the real estate when purchased, (but for no other purpose,) shall be drawn from bank by the Commissioners and Agents of the general estate, and paid over to the Directors of said *Society for the Relief of Destitute Orphan Boys*, and the Mayor and Aldermen of the city of New Orleans. I recommend to the Direc-

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tors of the *Society for the Relief of Destitute Orphan Boys* to keep such houses as may be purchased or built with the funds from this bequest regularly insured against all risk by fire, by which means, in case of accident, they would have the means to reconstruct them."

The prayer of the petition is for an absolute judgment against the cities *in solido* for the sum of four hundred thousand dollars, with interest from the testator's death; or if that cannot be allowed, for a judgment for said sum and interest, to be paid in manner and form as prescribed in the will, and that it be decreed that the sum of seventy thousand dollars is now due as one-eighth part of the revenues hitherto accrued; there is also a prayer that the money arising from the judgment asked for may be ordered to be paid into bank, that the directions of the testator might be carried into effect in exact terms; and the petition closes with a prayer for general relief by such orders and decrees as may comport with law and equity and secure the rights of the plaintiff under the will.

To these somewhat confused demands, the cities filed separate answers. The city of New Orleans denied the plaintiff's capacity, and after pleading the general issue, averred that, by the terms of the will under which alone the plaintiff has any claim, the annuity demanded was to be set aside by the Commissioners and Agents of the general estate until it should amount to four hundred thousand dollars, and that no portion of it was to be paid over to the Directors of the *Society for Orphan Boys* until then, but that it was to remain under the exclusive control and management of the Agents and Commissioners, and that the plaintiff could not ask that any of the conditions annexed to the legacy should be disregarded or modified; that the respondent did not have under its control any part of said annuity, and could not, under the will, take it from the possession and control of the said Commissioners and Agents; finally, this city denied its solidary liability.

The city of Baltimore, after a general denial, except as to the alleged provisions of the will, pleaded that the action could not be maintained on the face of the proceedings, and that a suit between the two defendants for a partition of the property of the succession, had been instituted, under a law of the State, in the Fifth District Court of New Orleans and transferred to the Circuit Court of the United States for the Eastern District of Louisiana, the pendency of which suit was a sufficient reason why the present action could not be maintained.

A trial having been had under these pleadings, the District Judge gave a decree in favor of the plaintiff for the sum of four hundred thousand dollars, with the qualification that, until the further order of the court, the execution of this judgment should be confined to the mode pointed out in the will, to wit: by the application of one-eighth part of the nett yearly revenue or rents of the general estate of *John McDonogh* to be set apart yearly by the defendants, through their Agents or Commissioners, or such other department of administration as they may, from time to time, confide the administration of said property to; the same to be deposited in some regular chartered bank in the city of New Orleans, which will pay an interest on deposits, if any such there be, and if none, then in some duly incorporated bank, until such time as the whole sum should amount to \$400,000; it was further adjudged that, as the eighth part of the yearly revenues which had been received by the defendants up to the 30th June, 1856, was found, under the evidence, to amount to the sum of

\$12,534 09½, the defendants should forthwith deposit said sum in bank as directed, to be withdrawn in the manner prescribed by the testator; it was further ordered, that if the defendants should divert any part of the said estate from the uses to which it was destined by the will by partition between themselves, or otherwise destroy said estate, or so administer the same that it could not be ascertained what the nett yearly revenues were, that, in such case, the plaintiff should immediately have execution for the sum of \$400,000, or such part thereof as might be due thereon.

The defendants have appealed. The plaintiffs, joining issue on the appeal, have prayed that the judgment be amended in their favor, first, by making it absolute and executory for \$400,000 and interest as prayed for; or, secondly, by ordering the defendants to deposit immediately in bank the sum of \$75,000.

The plaintiff's demand for \$400,000, to be levied immediately by execution out of the property of the universal legatees, is not in accordance with the testator's will.

The defendants' refusal to do anything towards carrying into effect the charitable bequest in favor of the plaintiff, because some portions of the testator's scheme for executing the charity are impracticable, is also repugnant to the testator's intention as well as to protestations made by the cities while their own claims under the will were in jeopardy.

The testator has not bequeathed the sum of four hundred thousand dollars absolutely to the plaintiff. All he ever intended to give the society was an annuity, not of any fixed sum, but which should fluctuate with the profits of the estate left to his universal heirs, under a charge to pay the annuity out of such profits. It may happen that the eighth part of the yearly revenues will never reach the sum of \$400,000; if they should, the annuity is to cease when that amount shall have been paid over. The estate left to the cities may perish or become fruitless before that amount can be realized. If so, the charge upon the cities in favor of the plaintiff will also perish. There being no fixed and liquidated debt due by the cities to the *Society for the Relief of Orphan Boys*, except so far as the past revenues are concerned, which alone are susceptible of ascertainment, it would be idle for us to endeavor to pierce the future and to regulate the rights of the parties hereafter. Those rights will depend upon facts which time alone can develop. There may be various causes which will operate eventually to defeat the annuity.

All that portion of the judgment which prescribes for the future claims of the society, must therefore be reversed; and our attention will be restricted to a consideration of this question: what legal claim has the plaintiff to a present judgment against the cities, predicated upon past facts which are in evidence before us?

The utmost limit of this claim is the one-eighth of the annual revenues accrued up to the time the evidence was closed in the court below. That sum, ending with the 30th June, 1856, was estimated, upon the report of an auditor, at \$12,534 09½, and we are not satisfied that there was manifest error in the calculation. We are less disposed to question its correctness, as it was the duty of the defendants so to have kept their accounts as to disclose the true state of the revenue. If there is any uncertainty, it is attributable to them, and they should not profit by their own neglect.

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The capacity of the plaintiff to take a bequest is undeniable, and we do not understand that point to have been controverted in this court. The *Society for the Relief of Destitute Orphan Boys* existed as a legal corporation at the time of the opening of the succession. See Acts 1825, p. 92; do. 1837, p. 6.

The pendency of a suit between the two cities for a partition of the succession, is no bar to an action for such instalments of the annuity bequeathed to the plaintiff as have fallen due. As our inquiries are limited to this branch of the plaintiff's demand, we need not speculate upon the consequences of a partition, should it be decreed, nor determine whether the cities will still be bound to pay *pro rata* out of the revenues of their respective shares of the property after a partition, without regard to the transmutations of form which the property may undergo.

All the other defences pleaded may be considered under our general question: is the bequest to the plaintiff such a one as the defendants may be compelled by a decree of the court to execute with regard to such instalments of the annuity as have fallen due?

We have no hesitation in answering this question affirmatively.

A comparison of all the parts of the will, touching this bequest, will show that the testator intended the *Society for the Relief of Destitute Orphan Boys* to be the sole recipient of this portion of his bounty. The legacy is made directly to that institution for the purpose of enabling it to invest the money in real estate for the benefit of the institution. The society was forbidden to alienate the lands acquired by the fund proceeding from the bequest, a prohibition entirely unmeaning if the testator did not intend the property thus acquired to belong exclusively to the society. Indeed, he expressly declared that the real estate so acquired should forever be retained and held by the institution and remain its property. The direction, therefore, that the Mayor and Aldermen of the city of New Orleans should assist in making the investments, approve the purchases, and become parties to the title deeds, was a matter of mere form, not intended to clothe the city with a beneficial interest in any portion of this bequest.

The inquiry then arises, whether this provision of the will, respecting the mode of investment, can operate to annul or defeat the bequest? If it be regarded as a mere recommendation to the city to lend its advice to the society in investing the funds, it is plain that no such result could follow. If, on the other hand, it be regarded as mandatory, and as imposing a condition, charge or mode upon the testamentary disposition in favor of the society, we are equally clear that it cannot operate to defeat the legacy. It was not in the power of the testator to compel the city, through its Mayor and Aldermen, to become a party to purchases in real estate in which it was to have no interest. The condition, charge or mode was therefore contrary to law and is to be reputed as not written. C. C., 1506. The refusal of the city hitherto to take any steps toward the fulfilment of the testator's wishes in this regard, shows that a voluntary compliance therewith is not intended.

In the vain hope of erecting his succession into a juridical person and endowing it with immortality, the testator sought to remove it from the direct control of his instituted heirs, by requiring the city of New Orleans to elect annually three Commissioners and the city of Baltimore three Agents, to whom he gave the seizin of his real estate, and who were to have the sole management of the property, collect the rents, pay the annuities, &c. The cities, accordingly, in

defending this suit, seem to disclaim the right to depart in any particular from the injunctions of the testator in this respect, and to intimate that they are not responsible for the acts of these Commissioners and Agents, and have no powers independent of them. This line of defence is inconsistent with the course of reasoning by which alone the cities were able to succeed in maintaining their title as testamentary heirs against the heirs at law and the alternate legatees, the States of Louisiana and Maryland. It was an idle conceit of the testator that he could thus split up the title to his property, forever separate the seizin and the ownership, and constitute a perpetual Board of Commissioners and Agents, deriving their powers from his sovereign will, to keep watch over the cities whom he made his heirs.

It was contrary to law and to public policy thus to fetter the dominion of the cities over property which has been adjudged to be theirs. It was beyond the power of the deceased so to complicate the simple tenures by which alone our laws permit property to be held. No man's will is above the law.

The cities have followed the recommendation of the testator so far as to appoint Commissioners and Agents, and, in so doing, we do not intend to say they have violated any law. But it was their voluntary act, and it does not release them from the obligation to pay the lawful annuities out of the revenues of property which they received and hold as absolute owners, *subject only to the payment of the annuities*. Those Commissioners and Agents derive all their powers solely from the cities which appointed them, and not from the testator's will. All those portions of the will which might be construed as making it compulsory upon the universal legatees to appoint such agents, and all those provisions which purport to give the agents seizin, or to confer upon them any powers emanating from the testator's volition, are as if they were never written; because such provisions defy the law, they are annihilated by the law.

In adjudicating upon this case, therefore, we leave out of view the Agents whom the cities have seen fit to appoint, the principals themselves being parties before us.

The cities then cannot escape the plaintiff's demand, by saying it is the duty of the Commissioners and Agents to deposit the moneys in bank; for, if it is, it is no less the duty of the cities to make them do so.

But the money was only to be deposited in bank until such time as the *Society for the Relief of Orphans* should want it for investment, not, as erroneously suggested in one of the answers, until the full sum of \$400,000 should be realized from this portion of the revenues. We think the intention was that the funds should be demandable by the society as often as once a year, if the Directors should see fit to make investments as often as that. We infer from the present petition that they now wish to invest what has accrued out of the revenues, towards the payment of their annuity; and, disregarding all the illegal modes, charges and conditions to which we have adverted, we think the plaintiff is entitled to an absolute judgment against the defendants for the sum of \$12,534 09½, as constituting the eighth part of the revenues of the *McDonogh* estate up to the 30th June, 1856, and that in all other respects the plaintiff's demand should be dismissed.

We have not deemed it necessary to enter upon the enquiry, whether this bequest of an annuity may be considered as an usufruct *sub modo* under the Article 602 of the Civil Code. If it be, it is a very peculiar usufruct, unaccompanied by any right of possession in the usufructuary as to the real estate

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burdened with it, and therefore not subjected to the rules of usufruct in general. It would be premature to decide now whether the annuity will cease at the expiration of thirty years by reason of the rule laid down in Article 607 of the Civil Code.

It is, therefore, ordered that the judgment of the District Court be avoided and reversed; and, proceeding to render such judgment as, in our opinion, should have been pronounced below, it is ordered, adjudged and decreed, that the plaintiff, the *Society for the Relief of Destitute Orphan Boys*, do have and recover of the defendants, the cities of New Orleans and Baltimore, the sum of twelve thousand five hundred and thirty-four dollars and nine and five-eighths cents, the same being the amount of the annuity bequeathed to the plaintiff by the will of the late *John McDonogh*, estimated to have fallen due up to the 30th June, 1856; and it is further ordered and adjudged, that all other portions of the plaintiff's demand be dismissed as in case of non-suit, and that the costs of the District Court be borne by the defendants and appellants, and the costs of this appeal by the plaintiff and appellee.

#### JOHN P. MASON, Ex'r, v. E. B. FULLER and G. M. WILLIAMS, Sheriff.

A judicial bond must be construed by reference to the order of court, in pursuance of which it was given.

When, by a clerical inadvertence, at the time of signing the bond, it was not filled up with the amount fixed as the penalty, but a blank space left for its insertion, the law implies that the bond was given for the sum fixed by the order, and the principal and sureties will be bound thereby for that amount.

Clerks of court have not the power to grant orders of seizure and sale.

The power conferred on Clerks of court (out of the parish of Orleans) to grant orders for the sale of succession property is confined to such orders as are required and asked for by Curators, Administrators and Executors in the regular course of their administration. Such orders cannot be made by the Clerk, at the instance of creditors, to enforce the payment of a debt.

#### APPEAL from the District Court of Tensas, *Snyder, J.*

*Thomas P. Farrar*, for plaintiff and appellant. *Stacy & Sparrow*, for defendants.

**SPOFFORD, J.** The plaintiff has appealed from a judgment dissolving an injunction he had sued out against an order of sale.

The injunction was dissolved below upon the ground that no legal bond was given.

The District Judge granted the order of injunction "upon petitioner giving bond and security, conditioned according to law, in the sum of fifteen hundred dollars."

Thereupon, and on the same day, the petitioner, with two sureties, signed a bond reciting the cause for which it was given, and conditioned to pay all such damages as might be sustained by the defendant, *Eera B. Fuller*, in case it be decided that said order of injunction was improperly obtained.

By a clerical inadvertence the sum of fifteen hundred dollars was not stated in the instrument as the penalty of the bond, a blank space being left where the penalty was referred to.

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The District Judge thought this omission fatal to the validity of the bond.

We are of the opposite opinion. The principal and sureties could not have escaped from liability upon this bond on the ground of such omission. It being a judicial bond, it must be constructed by reference to the order in pursuance of which it was given. The order fixed the penalty at the sum of fifteen hundred dollars. The law, therefore, implies that the bond given under the order was given for that sum; no specific sum being named therein, but a hiatus left for its insertion.

It has been said by our predecessors that, in a judicial bond, "any clause which is superadded must be rejected, and any that is omitted supplied." *Glocumb v. Robert*, 16 L. R. 174; *Welsh v. Thorn*, *Ib.* 196. And it has been several times held that a clerical omission of this character may be supplied afterwards, so as to bind the parties who sign a judicial bond with a blank space left for the penalty. See *Breedlove v. Johnston*, 2 N. S. 517; *State of Louisiana v. Judge of First District*, 19 L. R. 179; *Eyssallenne v. Citizens' Bank*, 3 An. 663.

We think the blank in this bond could have been filled up at any time with the sum for which it was given, and that the motion to dissolve on this ground should be overruled.

But the appellee contends that the injunction should be dissolved upon its merits; that is, that the allegations and proofs did not authorize a stay of the proceedings enjoined. And it seems, from another injunction sued out by the same plaintiff, now before us, that the District Judge was of this opinion.

In this view of the case we are also unable to concur.

The order granted and enjoined was in effect an order of seizure and sale, an executory process of the most summary and stringent kind. An order and process which it was incompetent for the Clerk of the District Court for the parish of Tensas to grant, in this form, and under the petition filed by the creditor *Fuller*.

In pursuance of the Article 76 of our present Constitution, the Act of April 30th, 1853, (Sess. Acts, 294,) empowered Clerks of courts (out of the parish of Orleans) amongst other things, "to grant orders for the sale of succession property." We interpret this to mean such orders as are required or asked for by Curators, Administrators and Executors in the regular course of their administration; such orders as they ask for the sale of so much of the property as may be necessary to pay the debts in general which are exigible, orders which are therefore properly granted *ex parte*.

Here the applicant for the order is not the executor, but a creditor who is really acting adversely to the executor, that is, he seeks to compel a sale of property under the administration of the executor which the executor is unwilling to have sold in the mode ordered; a proceeding which should be had contradictorily with the executor, and would, therefore, require, in passing upon it, a judicial discretion which has not been vested in the Clerk of the District Court; and finally the order is not to sell property of the succession to pay debts in general, but to sell a specific piece of property on which a vendor's privilege is claimed, to pay by preference a specific debt held by the creditor who seeks to procure the order, in a petition drawn up nearly in the form of a petition for a seizure and sale.

The creditor should have resorted to the District Court, either to procure an order of seizure and sale or a rule on the executor to show cause why the pro-

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perty should not be sold according to the Articles 990, 991 and 992 of the Code of Practice.

It is, therefore, ordered that the judgment of the District Court be avoided and reversed, and that the injunction sued out in this case be reinstated and made perpetual, with costs in both courts.

#### CHARLES GOTTSCHALK v. HIS CREDITORS.

A syndic who has a surplus in his hands, after paying all the debts placed upon his tableau of distribution, is not bound to pay over such balance to the ceding debtor, if subsequent to the filing of the tableau new debts were discovered to exist. The syndic is bound to administer any surplus in his hands for the benefit of such newly discovered creditors, and until all the creditors are paid the assets in the hands of the syndic must be applied to the payment of the debts of the insolvent.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*St. Paul & Bouny*, for plaintiff and appellant. *A. & A. Pitot*, for defendants.

**LEA, J.** *Charles Gottschalk*, being embarrassed in his affairs, made an application to his creditors for a respite, which being refused, his application, in accordance with the provisions of the law, was converted into a surrender of his property. *B. Rodriguez*, who was appointed syndic, sold the surrendered assets and filed a tableau of distribution, showing a surplus of \$1541 25, after paying all the debts on the tableau; several oppositions were made, and after trial, the tableau was reformed by the judgment of the court. From this judgment no appeal was taken.

To enforce the payment of the balance apparently due to the insolvent, as ascertained and recognized by the judgment of homologation, he obtained a writ of *fi. fa.* against the syndic personally. The syndic obtained an injunction restraining the execution of this judgment, on the ground that, subsequent to the filing of the tableau, new debts had been discovered, of which the syndic had no previous knowledge, and which, as syndic he was bound to protect, and which, when paid, would absorb the balance remaining in his hands, with the exception of about \$20.

From a judgment dismissing a rule taken to set aside the injunction, *Gottschalk* has appealed. The syndic claimed the right, under the circumstances, to file another tableau before being compelled to pay over any balance to the ceding debtor.

We find no error to the prejudice of the appellant in the judgment appealed from, and the appellee has not asked for any amendment of the judgment in his favor. The District Judge abstained from rendering any judgment on the merits of the injunction suit, though the issues appear to have been presented on the trial of the rule. The only question, therefore, to be solved is whether a syndic who has a surplus in his hands after paying all the debts placed upon his tableau of distribution, duly homologated, can retain that surplus for the purpose of distributing the same among the newly discovered creditors of the insolvent.

The trust assumed by a syndic is that he will administer the assets surrendered by the insolvent for the benefit of his creditors. A tableau of distribu-

tion, duly homologated, constitutes, with some qualifications, a judgment conclusive upon the creditors, so far as it affects the fund distributed; but the rights of creditors upon any part of the assets not distributed are not affected by such judgment, and the syndic is bound to administer any surplus in his hands for their benefit; and until all the creditors who have any claims against the insolvent are paid, the syndic who has any of the surrendered assets in his hands cannot be said to have fully administered his trust.

In the case at bar, the syndic had assets in his hands which he contends were applicable to the payment of the debts of newly discovered creditors, and we find nothing in the evidence which would have justified the District Judge in setting aside the injunction on the grounds urged in the rule.

Whether the syndic has fully administered or not, and whether there are debts due by the ceding debtor yet unpaid, are questions of fact, which, under the pleadings, we think should be disposed of on the final adjudication, upon the issues in the injunction suit. At any rate, we think, under the pleadings and evidence, as presented in the record, the District Judge could not with propriety have set aside the injunction. The case of *Laforest v. His Creditors*, quoted in the brief of counsel is not in point. In that case the judgment was based upon the fact that all the assets surrendered had been distributed among the creditors, and that the functions of the syndic were consequently at an end.

Judgment affirmed.

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P. F. NOUVET, Syndic, v. HEIRS OF J. B. ARMANT.

When the defendant in a petitory action has called in his warrantor with whom issue is joined, the plaintiff cannot appeal from a judgment against him without making the warrantor a party to the appeal. If there be no appeal bond given in favor of the warrantor the appeal will be dismissed. If the appeal bond was insufficient at the time the appeal was brought up, the defect cannot be subsequently cured by the substitution of another bond.

**A** PPEAL from the District court of the parish of St. James, *Ratliff, J.*, presiding. *Collins*, for plaintiff and appellant. *Berault & Legendre*, for defendant.

**VOORHIES, J.** The defendants and appellees claim the dismissal of the appeal in this case, on the ground that no appeal bond has been given in favor of the defendants' warrantors by the plaintiff and appellant, and that said warrantors have not been made parties to the appeal.

This is a petitory action brought by the plaintiff for the recovery of a female slave and her child, in which the appellees' vendors were called in warranty, and joined issue in the case. A devolutive appeal from the judgment rendered in favor of the defendants against the plaintiff was granted, generally, on the motion of the latter, returnable to this court, according to law. The appeal bond, executed and filed by the plaintiff on the 24th of November, 1856, is in favor of the *Heirs of J. B. Armant* alone. Appeals from the parish of St. James are returnable, under the Statute, on the fourth Monday of January. The transcript in this case was filed on the 6th of January, and the motion to dismiss on the 19th of January. The next day after the return day, on the argument of the motion to dismiss, the appellant tendered a new bond, executed

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in favor of the defendants and warrantors, and also applied for a writ of *certiorari*, in order to complete the record by inserting the new bond in it.

We are of opinion that the motion to dismiss the appeal is well taken. It is well settled, that all the parties having an interest in maintaining the judgment, sought to be reversed or amended, should be made parties to the appeal. The warrantors in this case clearly have such an interest. It was, therefore, essential to give a bond in their favor. See the case of *Hewson v. Crennell*, 10 An. 232, and the authorities there quoted.

But it is insisted by the appellant that he is entitled to relief at our hands, inasmuch, as he has made an application within three days after the return day to be permitted to supply the requisite bond. The case of *Bouligny v. M. White & Co.*, 5 An. 31, on which he relies, does not, in our opinion, authorize us to grant him the relief which he asks. As the record was complete when filed in this court, it is clear, therefore, that there is no ground to authorize the issuing of the writ of *certiorari*. The only inquiry which can be made in this case is, whether the bond was, at the time the appeal was taken, such a bond as the law required. If the bond was insufficient at the time the appeal was brought up, the defect cannot be cured by the substitution of another bond. 10 An. 155; 6 L. 586.

It is, therefore, ordered that the appeal be dismissed at the appellants' costs.

#### SUCCESSION OF T. F. MINVIELLE.

Where a tableau of distribution, filed by the executor, has been advertised and published in the manner required by law, after the expiration of the delay given by such notice, if no opposition be made the law makes it the duty of the Judge to grant an order authorizing the executor to pay the creditors according to his tableau.

If, at the expiration of the legal delay, the tableau is homologated, except so far as opposed, those creditors whose claims are not contested have a right to immediate payment, without waiting for the delay for a suspensive appeal from the judgment of homologation.

The executor is bound for five per cent. interest on the dividends allowed by the tableau to the creditors whose claims are not opposed, from the date of the service of a rule on him to coerce payment.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*H. Griffon*, for appellants on rule. *C. Dufour*, for defendant and appellee.

**VOORHIES, J.** This is an appeal from a judgment dismissing a rule taken on the dative testamentary executor by several of the creditors of the succession.

The appellants were classed as ordinary creditors on the provisional tableau of distribution, filed in this case on the 13th of February, 1856, for their respective claims amounting in the aggregate to the sum of \$12,282 53.

Oppositions were made to several of the claims on the tableau, but to none of those of the appellants. The tableau, so far as not opposed, was duly homologated on the 26th of February, 1856, giving to the ordinary creditors a dividend of sixty-one per cent. But, on retaining a sum sufficient to pay certain claims in contestation, it would seem that the dividends had to be reduced, making it about fifty-seven per cent.

There was no appeal taken from the judgment thus homologating the provisional tableau.

On the refusal of the executor to pay them their respective shares in the surplus to be thus distributed among the ordinary creditors, the appellants took a rule upon him on the 29th of April, 1856, to show cause why he should not be compelled to do so.

The executor filed an answer to the rule on the 12th of May, 1856, alleging, as grounds for his refusal, that the delay for a suspensive appeal from the judgment of homologation had not then expired, so as to authorize such distribution or payment.

We consider the grounds taken by the executor to be untenable. On filing a statement or tableau of distribution by an executor, public notice thereof is required to be advertised and published in the manner prescribed under the provisions of Article 1172 of the Civil Code. After the expiration of the delay given by such notice, if no opposition be made, the law makes it the duty of the Judge to grant an order authorizing the executor to pay the creditors according to his statement or tableau. After such authorization no discretion is left to the executor, he must pay immediately the creditors whose debts or privileges are not contested. He can only retain in his hands a sufficient sum to pay such claims as are in contestation; C. C. 1173, 1174, 1175. In this case, we think, the executor was bound to pay the appellants, on the homologation of his tableau, their proportion of the surplus in his hands after making such reservation. It is true, on the trial of the rule, the executor made a proffer to distribute the funds according to the judgment, provided the creditors would give him a full receipt. But such a conditional proffer did not, in our opinion, afford a legal or equitable excuse for him to withhold the payment of the appellants' claims. We are of opinion he is bound for the payment of interest on the dividends coming to the appellants at the rate of five per cent. from the service of the rule upon him. C. P., Art. 1007; 10 R. R. 479.

It is, therefore, ordered that the judgment of the court below be reversed, that the rule so taken be reinstated and made absolute, the appellee to pay the plaintiffs interest on the dividends to which they are respectively entitled from the 29th of April, 1856, until paid, and the costs of both courts.

MERRICK, C. J., dissenting. I think the executor is not bound to pay the sums proposed to be distributed by his account until the delay for a suspensive appeal has expired. Otherwise, he might be ruined by a suspensive appeal and a reversal of the judgment on an assignment of errors. The delay having expired in this case, and the judgment having become executory, I concur in the decree, although not in the reasoning of the majority of the court in this particular.

Re-hearing refused.

## WALDO &amp; HUGHES v. E. ANGOMAR et als.

Several distinct causes of action cannot be cumulated against several defendants in one suit, unless the defendants have a common interest to be adjudicated upon in one judgment.

Proceedings, under the Act of 1840, against a defendant for fraud, may be cumulated with a revocatory action for the rescission of the alleged fraudulent sale; and in such a proceeding it is not only the right but the duty of the plaintiff to make parties to the suit all who have an interest to be affected by the judgment.

**A**PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
George L. Bright, for plaintiffs and appellants. Clarke & Bayne, Singleton & Clark and Price & Day, for defendants.

LEA, J. The plaintiffs allege that, being judgment creditors of *Eugene Angomar*, they caused to be seized on execution the steamer *Red River*, the property of said *Angomar*.

They further allege that certain judgment creditors of *James W. Moore* have seized the said steamer, by virtue of writs of *fiери facias* issued in their respective suits; that said steamer is not the property of *Moore*, but that of their judgment debtor, *Angomar*; that the sale made to *Moore*, if any such sale was made, is simulated and made to defeat the rights of the plaintiff; they pray that the steamer *Red River* be decreed, contradictorily with the judgment creditors of *Moore*, to be the property of *Angomar*, and that they be paid the amount of their judgment out of the proceeds of the sale of the boat. They further ask that *Angomar* be decreed guilty of fraud, and punished in accordance with the provisions of the Act of 1840.

To this form of proceeding the defendants have excepted, *Cooper & Neibert*, on the ground "that the allegations are too vague and general, that the judgments of the court cannot be annulled or avoided in this form, and that this is not in truth and in fact a revocatory action," wherefore they ask that the plaintiff's petition be dismissed.

The other judgment creditors of *Moore* join in the exception. *Angomar* also excepts, on the ground "that he cannot be joined with any of the defendants in this proceeding except *Moore*, and that the joining of the other parties with this defendant is contrary to the rules of pleading and inadmissible."

The defendant *Angomar*, as well as the other parties defendant, have a right to object to a cumulation of several distinct causes of action against several defendants, unless they have a common interest to be adjudicated upon in one judgment.

Upon principle, there can be no objection to the cumulation of a proceeding, under the Act of 1840, against a defendant for fraud, with a revocatory action for the rescission of the alleged fraudulent sale; and in such proceedings it is not only the right but the duty of the plaintiff to make parties to the suit all who have an interest to be affected by the judgment. To test the validity of the exceptions filed in this case, therefore, it is proper to consider how far the defendants, who are creditors of *Moore*, can be legally affected by the judgment prayed for in this case.

Though it is not distinctly averred in the petition, it has been assumed in argument, and indeed it follows necessarily from the nature of the demand, that

the judgment creditors of *Moore* have, in virtue of their execution, seized and sold the steamer *Red River* as the property of their debtor. A prayer claiming the proceeds of the sale, not only presupposes a sale, but implies a ratification of it. The creditors of *Moore* have possession, therefore, of nothing but the proceeds of a sale made under an execution against the property of their judgment debtor.

It is to be remarked that the proceedings in the suit of the plaintiffs against *Angomar* are entirely independent of those instituted against *Moore* by his creditors. Upon what principle, then, can the plaintiffs claim the proceeds realized under the execution against *Moore*. Not on the ground that they have any privilege upon the proceeds, for they have no claim whatever against *Moore*, nor indeed have they alleged any ground upon which a privilege could be recognized. Neither can they claim a participation in the proceeds, on the ground that they had a right to ratify the sale and claim the price; for, in the first place, the steamer was not sold as the property of their judgment debtor, and secondly, no one but the real owner could ratify a sale of his property made without lawful authority.

Again, if the steamer *Red River* is not the property of *Moore*, but is the property of *Angomar*, we are at a loss to perceive how any of the rights of the plaintiff have been infringed by the acts of *Moore's* creditors.

The sale of the property of another is null. The plaintiffs themselves ask that we shall decree the property in this case to be the property of *Angomar*. This is substantially asking for a judgment decreeing the nullity of the sale, though, at the same time, they virtually sue in affirmance of the sale by asking for a distribution of the proceeds.

If the steamer *Red River* belongs to *Angomar*, she is now in every respect as liable to seizure at the suit of *Angomar's* creditors as she was before proceedings were instituted by the creditors of *Moore*. It is true that, in case of an eviction, the purchaser under the judicial sale at the suit of *Moore's* creditors would have recourse for reimbursement against both the seized debtor and the seizing creditors. But the plaintiffs stand in no such relation to the defendants; there is no privity of contract between the plaintiffs and the creditors of *Moore* in reference to *Moore's* title to the steamer, nor can the plaintiff rely upon any implied warranty of a title which they are themselves attacking. We cannot perceive, therefore, upon what principle the judgment creditors of *Moore* can be made parties to this litigation, since they have no interest which can be legally affected by the proceedings.

The District Judge, therefore, was right in refusing to allow the proceedings against *Angomar* and *Moore* to be cumulated with those against *Moore's* judgment creditors. The defendant *Angomar* has joined in the appeal taken in this case, and asks that the judgment be amended in his favor by dismissing the plaintiffs' suit altogether, but we think the decree of the District Court is supported by the provisions of the statute of 1840, and is sanctioned by authority and practice.

It is ordered that the judgment be affirmed.

MERRICK, C. J. I do not think it necessarily appears from the petition that the steamboat was sold prior to the institution of the suit. Even if it did so appear, I am not prepared to say that the plaintiffs might not in a proper case claim the proceeds of the boat, where they might have claimed the boat itself, as the property of their debtor.

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ANGOMAR

Nevertheless I concur in the decree in this case, on the ground that the petition is too vague to maintain the action. The plaintiffs allege no prior seizure nor superior privilege upon the boat, neither do they allege that *Angomar* is insolvent and has no other property to satisfy their judgment. If *Angomar* has other property to meet their judgment plaintiffs are not injured.

ANTOINE AUDRICH v. CLEMENTINE LAMOTHE et al.

The wife who had obtained a separation of her property from her husband in his lifetime, in order to exercise the right of accepting the community, is bound, on the death of her husband, to cause an inventory to be made.

The law presumes the acceptance of the community by the wife, when it is dissolved by the death of the husband, but where it had been previously dissolved by a judgment of separation of property, the renunciation by the wife is presumed if, at the death of the husband, she does not cause an inventory to be made.

Notwithstanding such implied renunciation, the concealment by her, or making away with any of the effects of the community, would render her liable as a partner.

**A**PPEAL from the District Court of Lafourche, *Randall, J.*

*Beatty & Bush*, for plaintiff and appellant. *J. J. Roman* and *C. Belcher*, for defendants.

VOORHIES, J. The plaintiff, a creditor of the succession of the late *Jacques Folse*, seeks to make the defendants, the widow and heirs of the deceased, liable for the payment of his claim, on the allegation that they have taken and retained possession of the property and effects of the estate of said deceased.

It is shown by the evidence that, on the 1st of June, 1849, the widow obtained a judgment against her husband, *Jacques Folse*, for a separation of property and the recovery of a certain tract of land and slaves, which she claimed as her separate property, and also for the recovery of the sum of \$394 09, the value of her movables. Her judgment was duly published in a newspaper, but its execution was not followed by a writ of possession or *feri facias* in consequence of the death of her husband, which took place shortly afterwards. Her title to the land and slaves, recognized by the judgment as her separate property, is however not questioned in this case. The tract of land upon which she has been living upwards of twenty-five years is her patrimonial estate. Since the date of her judgment she has been making crops thereon with her own slaves, buying stock, mules, &c. For the last two years previous to his death, her husband lived apart from her on his own land. Her children continued to live with her. After his death it does not appear that his widow or children ever took any steps to have an inventory made of his property and effects, or an administrator of his estate to be appointed.

There is no evidence to show that the heirs have accepted the succession, either expressly or tacitly; hence they are clearly not liable for the payment of the debts.

But it is argued, as regards the widow, that the mere fact of not having had an inventory made within the legal delays has rendered her responsible for the debts of the community. It is clear that her judgment, not impugned by the pleadings, must have its effect. C. C. 2403. The question then arises whether, under these circumstances, it was her duty to have had an inventory made, in

order to preserve the faculty of renouncing the community of acquets and gains.

The Civil Code evidently makes, we think, a distinction between the surviving spouse who has obtained a judgment of separation of property and the one who has not. It is the duty of the former to cause an inventory to be made, in order to exercise the right of accepting the community, if such be her interest; whilst the latter must comply with this formality, in order to secure to her the privilege of renouncing it. In other words, the law presumes the acceptance of the widow when the community has been dissolved by the death of the husband; and the presumption of renunciation takes place when a judgment of separation has put an end to the community. C. C. 2382, 2404.

"Jusqu'à déclaration contraire faite par elle dans les formes et sous les conditions voulues, elle est ici présumée acceptante, et cette qualité lui est définitivement imprimée à défaut de l'accomplissement de ces conditions dans le délai fixé; tandis que, dans l'autre cas, (where a judgment of separation has been obtained,) c'est la renonciation qui se présume jusqu'à déclaration contraire, et qui demeure définitive à défaut de déclaration." 5 Marcadé, p. 597, § 1.

Article 2404 of our Code is borrowed from the Napoleon Code, and differs from it in this respect, that the former uses the words: "The wife who has obtained the *separation of property* may nevertheless," &c., whilst the latter speaks of "*la femme divorcée ou séparée de corps*." Yet Marcadé holds that this Article applies also to the wife separated in property, and that the presumption is established in her case. He says: "Nous avons dit que notre article, bien qu'il ne parle que de la *séparation de corps*, s'applique également au cas de *séparation de biens*, dont la loi paraît n'avoir pas songé à parler ici, sans doute parce qu'elle venait de s'en occuper longuement dans la section précédente, et que l'applicabilité de l'article à ce cas était d'ailleurs chose évidente et découlante par *a fortiori* du cas de *séparation du corps*." 5 Ib. p. 606. § 3.

Although there is some diversity of opinion in France, as to the application of the presumption of renunciation where the widow is separated from her husband only in property, yet there exists none in cases of separation from bed and board and divorce. The whole difficulty may be considered as done away with by the change introduced in our Code, the words "*la femme qui est séparée de biens*," being substituted for "*la divorcée ou séparée de corps*."

By presumption of law *Mrs. Folse* had renounced the community of acquets and gains, and having failed to have an inventory made, she has forfeited the right of accepting. Notwithstanding such implied renunciation, the concealment or making away with any of the effects of the community would, however, make her liable as a partner. C. C. 2387.

But there is no allegation in the plaintiff's petition of any such concealment or making away with any of the effects. Hence the objection to the evidence in relation to the sugar-mill was well taken by the defendants on the trial below, and we have disregarded it.

It is, therefore, ordered that the judgment of the court below be affirmed, with costs.

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v.  
LAMOTHE.

## WILLIAM MASSEY et al. v. J. J. STEEG et al.

The adjudication to the surviving father or mother of property held in common with the minor child, under Articles 338 of the Civil Code, is not restricted to immovables and slaves,

Where such adjudication takes place, the special mortgage in favor of the minor, resulting from the adjudication, attaches to such of the property adjudicated as is susceptible of mortgage. The right of mortgage in this case is not restricted to the individual share of the minors, but the whole property remains specially mortgaged for the security of the payment of the price of the adjudication

Any one whose rights are affected by such mortgage, may require that the exact amount of the debtor's indebtedness to the minors be judicially ascertained.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*Durant & Horner*, for plaintiffs and appellants. *A. Pitot* and *A. W. Jourdan*, for defendants.

**VOORHIES, J.** The plaintiffs allege that two judgments were respectively obtained by them against the defendant, *J. J. Steeg*, on which writs of *fieri facias* were issued and partially executed by the seizure and advertisement of his real estate for sale by the Sheriff; but that the sale thus announced could not be effected, in consequence of a legal mortgage on the property seized established in favor of *Steeg's* minor children by a judgment of the court below, rendered on the 8th of May, 1854, whereby said property, including certain movables, was adjudicated to said *Steeg* as property belonging to the community which had existed between him and his late wife, *Christina Herman*, mother of the minors. They further allege, that the rights of said minors in their mother's succession could not exceed the undivided half of the real estate, appraised at \$2,000, and the movables, appraised at \$800, as shown by the inventory; that this right of mortgage by law should be restricted to one undivided half of said real estate, to secure the payment of \$1,000, the price of the adjudication thereof to said *Steeg*, under the Article 338 of the Civil Code, &c. The petition concludes with a prayer, that the judgment rendered on the 8th of May, 1854, adjudicating said property to *Steeg*, together with the legal mortgage resulting therefrom, be declared null and void; that the one undivided half of said real estate be decreed to be free from any incumbrance whatever in favor of said minors, and the Recorder of Mortgages ordered to erase said mortgage and to issue a certificate accordingly.

The defence set up in the answer is the plea of *res judicata* and the general issue.

The court below gave judgment in favor of the defendants, and the plaintiffs appealed.

The prescription of one year has also been pleaded by the defendants in this court, as a bar to the plaintiff's right of action.

In the matter of the succession of *Christina Herman*, deceased, which was lately before us on appeal, a rule was taken on the defendant *Steeg* to show cause why the property which had been adjudicated to him should not be sold to pay the debts of the community, of which he was the surviving partner. The application was resisted on the ground that *William Massey*, the plaintiff in the rule, was not a creditor of the community. The defence thus set up was sustained by the judgment of this court. The plaintiffs, under that decision,

must therefore be viewed as creditors of *J. J. Steeg*, and not of the community.  
Sec 11 Ann.

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The Civil Code, Article 338, declares that: "Whenever the father or mother of a minor has property in common with him, they each can cause it to be adjudicated to them, either in whole or in part, at the price of an estimation made by experts appointed and sworn by the Judge, &c.; and in this case the property so adjudicated shall remain specially mortgaged for the security of the payment of the price of the adjudication and the interest thereof." The term "property in common," used in this article, is general in its application. We do not think the adjudication, under the last clause contained in the article, is restricted, by implication, to immovables and slaves, as contended for by the appellants. The evident object of that clause, it strikes us, was to secure to the minor the right of mortgage only upon such of the property adjudicated as was susceptible of mortgage. Hence, we conclude, that the title to all the property of the community was legally vested in *Steeg* by the adjudication. The heirs of *Christina Herman*, deceased, it is perfectly clear, can only claim one-half of the price of the adjudication in right of their mother, after deducting therefrom the debts of the community which may have been extinguished either by novation or payment effected by *Steeg*, their father and natural tutor, and costs incurred in the proceedings relative to the administration of the estate and adjudication of the property to him. It is also clear, that the right of mortgage given by law to the minor on his tutor's property, can only be co-extensive with his claim. Hence, it appears to us obvious, that any one whose rights stand affected by such mortgage may require that the exact amount of the tutor's indebtedness to the minor be judicially ascertained.

It is contended by the appellants that the minors' right of mortgage in this case should be restricted to the undivided half, as their share, of the property adjudicated to their father. We do not think so. The law expressly declares that the property held in common—not the undivided half thereof—may be adjudicated to the surviving parent, and so adjudicated shall remain specially mortgaged for the security of the payment of the price of the adjudication. But conceding it to be as contended for, still it is difficult to perceive in what manner such restriction could possibly enure to the benefit of the appellants, inasmuch as the law creates in favor of the minor a tacit, independently of the special mortgage on the property of his natural tutor, from the day on which the tutorship devolved upon the latter, as security for his administration and the responsibility resulting from it. C. C. 354; 5 Ann. 565.

It is, therefore, ordered that the judgment of the court below be affirmed, with costs.

## GEORGE CONNOLLY v. JOHN H. MARTIN.

The certificate of the Clerk that "the transcript contains a true copy of all the papers and documents filed and all the proceedings had, all the orders of court of record and all the evidence adduced by the parties on the trial of the cause, cannot be contradicted by an affidavit in the Supreme Court that the original citation to the defendant was among the papers when the judgment by default was rendered and when the appeal was taken."

**A** PPEAL from the District Court of Carroll, *Snyder, J.*  
*Short & Parham*, for plaintiff. *L. Selby*, for defendant and appellant.

MERRICK, C. J. This is a suit upon a promissory note. A judgment by default was made final against the defendant, and he appealed.

A motion is made by the plaintiff and appellee to dismiss the appeal, on the ground that the record does not contain the original citation on which the action was commenced.

The Clerk, in his certificate to the record, certifies that the transcript contained a true copy of all the papers and documents filed, and all the proceedings had, all the orders of court of record and all the evidence adduced by the parties on the trial of the cause.

The defendant assigned as error the want of citation; after the transcript of appeal was made out and filed in this court, the certificate of the Clerk was produced in which he states that he finds he charged for making out the citation and verily believes that the citation issued. The plaintiff's attorney has filed his affidavit in this court, wherein he swears that the citation was among the papers of the cause when the judgment by default was rendered, when the statement of facts was made out, and when the motion to appeal was taken, and that (since the appeal) he and the Clerk made diligent search for the citation in vain.

No application for a writ of *certiorari* has been made. Being of the opinion that the certificate to the transcript of appeal cannot be corrected in the manner attempted in this case, we are obliged to take the certificate to the transcript as true, for the purposes of this trial. The motion to dismiss is therefore overruled.

In regard to the errors assigned, we have no evidence in the record that the citation was served upon the defendant. The citation being the foundation of the action, for the want thereof, in this case, the judgment of the lower court must be reversed.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and that this cause be remanded to the lower court to be proceeded in according to law, and that the appellee pay the costs of appeal.

LA SELLE & BROTHER v. N. B. WHITFIELD — WOOD & OLIVER v. THE  
SAME—Rule on J. M. BELL, Sheriff.

When the Sheriff, before the return day of the writ, had notified the plaintiffs of his release of the seizure of a slave on account of an adverse title set up by another, and had called upon both parties to point out property subject to seizure, which they failed and refused to do. *Held*: That the subsequent neglect of the Sheriff to return the writ on the return day, did not subject him to the statutable remedy by rule, which is not applicable to such a case. The plaintiff should have resorted to an ordinary action for damages.

The Legislature in 1855 having re-enacted the 17th Section of the Act of 7th April, 1826, without change, thereby ratified the judicial construction the Act had received.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy J.*  
*Bradford & Finney and Charles A. Taylor, for Sheriff Bell, appellant.*  
*Perin & Smiley, for appellees.*

**SPOFFORD, J.** We think the plaintiffs in the present case mistook their remedy.

The cause of action really is the improper release by the Sheriff of a seizure made by him under the plaintiffs' writs.

The neglect to return the writs on the return day did not operate any damage to the plaintiffs, for the Sheriff, long before the return day, promptly notified the plaintiffs of his release of the seizure on account of an adverse title set up to the slave seized, and called upon both parties to point out property subject to seizure, which they failed and refused to do.

In the case of *Lay v. Boyce*, 3 An., 622, it was said that the statute under which (as reënacted in sec. 2 of the Act of March 15th, 1855, p. 478) this rule was taken "presupposes that the acts or omissions for which the officer is held liable, have been prejudicial to the plaintiff in execution. It is not to be presumed that the latter was prejudiced by the failure of the Sheriff to advise him in the particular form of a return, of a fact which that officer had previously communicated in another form, in which he is equally required by law to convey it."

In that case the Sheriff was released because he had verbally, but seasonably notified the plaintiff of all that the return could have apprised him of, although the return was not actually made until long after the return day.

Here it is conclusively shown that the plaintiffs were notified in time by the Sheriff of all that he did, and that they have not suffered at all from his alleged *laches* in not returning the writs on or before the return day, which neglect is the only basis of the rule, but that the error of the Sheriff in releasing the seizure of a slave is the sole ground of the damage suffered.

We are of opinion that the plaintiffs should have resorted to an ordinary action in damages, and not to the statutable remedy by rule, which was not intended for a case of this description.

We concur with the District Judge in the opinion that the General Assembly of 1855, in reënacting the 17th section of the Act of 7th April, 1826, without change, ratified the judicial construction which it had received.

And we are furthermore of the opinion that the Act of March 15th, 1855, (p. 253,) in requiring officers who have made seizures under writs of *fi. fa.* to return such writs on the return day thereof, even though the property is still

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unsold, does not take away the basis for that current of decisions by which the Sheriff, when proceeded against in the summary mode invoked in this case, has been allowed to excuse himself on showing conclusively that the delay in the return has worked no injury to the complainant.

It is ordered, therefore, that the judgment of the District Court be reversed and the rule taken in this case discharged, reserving to the plaintiffs their right to proceed against the Sheriff and his sureties in an ordinary action; it is further ordered, that the costs in both courts be paid by the plaintiffs and appellees.

### ADAM BEATTY, Syndic, v. ROSE CLEMENT, Widow TÊTE.

Endorsements of partial payments in the handwriting of the holder of a written obligation, are not of themselves sufficient proof of an interruption of prescription. They will, however, when other facts are shown leading inevitably to the conclusion that the holder of the obligation made the endorsements before prescription was acquired in favor of the debtor, and against his own interest. The assignee of a bank mortgage which, by the charter, is not affected by a succession sale, has the same right as the assignor to disregard such sale.

**A** PPEAL from the Fifth District Court for the Parish of Assumption, *Cole, J. A. Beatty*, for plaintiff. *C. Belcher and A. Gentile*, for defendant.

SPOFFORD, J. (BUCHANAN, J., absent.) The defendant and appellant contends that her plea of prescription should have been sustained.

Taking into view all the circumstances of the case, we think an interruption of prescription has been satisfactorily shown.

Endorsements of partial payments in the handwriting of the holder of a bond are not of themselves sufficient proof of an interruption. But it is proved here, not only that the endorsements were in the handwriting of the creditor, but other facts are shown leading inevitably to the conclusion that he made them before prescription was acquired in favor of the debtor, *tempore non suspecto*, and against his interests; that these credits amount to nearly one third of the original obligation; that it would have been as easy for the creditor to put the bond in suit and thus interrupt prescription, as to place false credits upon it, at the time when the endorsements must have been made; and, finally, that the defendant's co-debtor *in solido* recognized the payments as having been made at the dates they purport to have been by acknowledging a specific balance with interest from the date of the last payment to be due, after the term required for prescription had elapsed. See the case of *Beatty, Syndic, v. A. Tite*, 9 An., 131.

On the only other point presented, we concur with the District Judge in thinking that the assignment of the debt carried with it the rights and privileges of the assignor, the Union Bank, and that the land in the hands of *Mrs. Jourdan* is therefore liable, notwithstanding the succession sale.

Judgment affirmed.

HENRY JOHNSON v. ROBERT R. BARROW.

A conditional endorsement does not bind the endorser if the condition be not accomplished.

**A** PPEAL from the District Court of Terrebonne, *Cole, J.*  
*Beatty & Bush*, for plaintiff and appellant. *Goode & Laycock*, for defendant.

**SPOFFORD, J.** This suit is brought against the endorser of a promissory note of the following tenor :

"DONALDSONVILLE, 30th Oct., 1851.

"One year after date, I promise to pay to the order of *Robert R. Barrow* the sum of five hundred dollars, for value received, payable at the office of the Recorder, Donaldsonville.

(Signed) JOHN HUTSON."

The endorsement is in these words :

"HOUMA, PARISH OF TERREBONNE.

"I endorse the within note for the benefit of *Mrs. Hutson* in the purchase of a tract of land from *Gov. H. Johnson*.

(Signed) R. R. BARROW."

The defendant pleaded that this restrictive endorsement does not bind him, inasmuch as the special object for which it was given was never consummated, *Mrs. Hutson* not having purchased a tract of land from the plaintiff *Johnson*.

There was judgment in the defendant's favor, and the plaintiff has appealed.

It is needless to recapitulate any other facts than that *Mrs. Hutson* did not buy a tract of land from *Henry Johnson*, nor contract to do so in any manner which could bind her.

The condition with which the defendant clogged his endorsement of the note never having been accomplished, the plaintiff has no action against him.

The judgment is, therefore, affirmed with costs.

ROBERT R. BARROW v. VALERY LANDRY.

Where a part of the testimony taken in the lower court has been lost, the case will be remanded for a new trial.

**A** PPEAL from the Fourth District Court for the Parish of Ascension, *Ratliff, J.* *J. H. Ilsley*, for plaintiff. *C. A. Johnson*, for defendant.

**MERRICK, C. J.** Since the appeal was taken in this case, a material portion of the evidence has been lost, as appears by the certificate of the Clerk and his return to the writ of *certiorari*.

Under the authority of the cases of *Ennis v. Murphy*, 11 Rob. 477; *Agricultural Bank v. Alexander*, 1 An., 246, and *Lyons v. Andrews*, 5 An., 602, the cause must be remanded for a new trial.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed and that this cause be remanded for a new trial, and that the costs of the appeal abide the event of the final decree.

## CITY OF NEW ORLEANS v. SHIP WINDERMERE, CAPTAIN WILSON and OWNERS.

The duties which the law imposes on common carriers of passengers by water, in relation to the treatment and accommodation of passengers during the voyage, necessarily cease on the termination of the voyage. If, during the voyage, a contagious disease breaks out on the vessel, and on her arrival at port the city authorities find it necessary, in order to prevent the spreading of the infection, to have her sick passengers sent to the hospital to be treated, the owners of the vessel cannot be made liable for the expenses incurred thereby.

When the consignees of the ship have paid the contribution imposed by the Statute as hospital money, and the act of introducing the passengers is not in violation of any prohibitory law, an action for damages arising from a *quasi offence* will not lie.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*J. Livingston*, for plaintiff and appellant. *Durant & Horner*, for defendants.

VOORHIES, J. This is an action for the recovery of \$525, alleged to have been disbursed by the plaintiff for the medical treatment of nineteen small pox patients, landed by the ship Windermere at New Orleans in April, 1854, and conveyed to Luzenburgh's hospital, in order to prevent the spreading of the infection. The disbursement, it is alleged, was "for and on account of the master and owners of the ship," without any obligation on the part of the plaintiff to make the same; but which was done on account of the destitute condition of said passengers; and that the defendants, having no right to bring to this port and land passengers thus afflicted with a contagious disease, became liable to pay all the expenses incurred thereby.

The defendants pleaded the general issue. Judgment was rendered in their favor and the plaintiff appealed.

The record shows that on the voyage of the Windermere from Liverpool to New Orleans, with nearly five hundred passengers on board, and when off the island of Cuba, the small pox broke out and attacked indiscriminately the passengers and the crew; that no disease of any kind had appeared until then on the ship; that the crew all recovered; and that some of the passengers were still sick when the ship reached New Orleans, and were cared for by the city authorities. It is also in proof that the hospital money, or contribution of \$2 per head under the Statute, was paid by the consignees of the ship.

The law imposes certain duties on the common carrier of passengers by water in relation to the treatment, accommodation, &c., of the passengers during the voyage. At the end of the voyage, such duties must necessarily cease. We are not aware of any legal obligation on the part of the common carrier to provide for the necessities of the passengers, however destitute may be their condition on the arrival of the vessel. Angell on the Law of Carriers, § 610 *et seq.* The claim against the defendants does not appear to us to be even founded in good conscience, for they have been compelled to pay a tax or contribution for the support of the hospital. We, therefore, consider the facts of this case insufficient to constitute a *quasi* contract between the litigants; C. C. 2272 *et seq.*; 13 Duranton, § 637. But it is insisted that the defendants are liable to the plaintiffs for damages arising from a *quasi offence*. Articles 1753, 2294, 2295 and 2296 of the Civil Code are relied upon by the plaintiff to maintain the

action. It is not pretended or shown that the act of which the plaintiff complains was in violation of any prohibitory law or municipal ordinance. Whether the disease originated from the cause attributed to the owners of the ship, or not, it appears to us immaterial, for it cannot afford any legal ground of action in favor of the plaintiff. It suffices us to say that the Acts of Congress, approved March 2d, 1819, and February 22d, 1847, afford abundant protection to unwary emigrants from the fraud and cupidity of unprincipled ship owners.

It is, therefore, ordered that the judgment of the court below be affirmed, with costs.

NEW ORLEANS,  
F.  
WINDEMERE.

### R. W. McRAE v. PURVIS, GLADDEN & Co.

The plaintiff in an action is not bound to set forth, and at the same time accompany by a specific denial, matters of defence which the defendant may urge in his own behalf. An injunction will not be maintained in arrest of an execution on grounds that might have been pleaded in defence before judgment.

**A** PPEAL from the Ninth District Court for the Parish of Pointe Coupée, Cooley J. W. H. Cooley, for plaintiff. A. Provosty, for defendants.

LEA, J. The defendants obtained a judgment against the plaintiff for \$4799 05, with interest thereon, upon his endorsement of a protested draft of which they were the holders and owners. This judgment was rendered after due citation to the plaintiff, served personally, and after all the delays and formalities of the law had been complied with, Notice of judgment having been duly served, a writ of *fieri facias* was issued, by virtue of which the plantation and slaves of the plaintiff in this suit were seized.

This suit is brought for the purpose of annulling the judgment referred to on the following grounds, viz:

That said judgment was obtained by fraud on the part of said *Purvis, Gladden & Co.* in concealing and denying a credit on said draft for the sum of \$2240 21, to which he was entitled, and which the said *Purvis, Gladden & Co.* well knew to have been paid on said draft, that it was impossible for plaintiff to prove this payment for the reason that it had been paid by the drawer of the draft, a fact which was unknown to plaintiff until a long time after it was so made. That as soon as the suit of *Purvis, Gladden & Co.* was instituted, and he perceived that no credit was given on said draft for said payment, he immediately employed counsel to defend said suit, and plead said sum in diminution of said claim; but that although he knew that said note was entitled to a credit he was ignorant of the precise sum, and that although he used all reasonable and legal diligence to ascertain the amount yet he was unable to do so until after judgment had been rendered in the case.

The petitioner further avers that in consequence of the prevalence of the yellow fever in the parish of Pointe Coupée he was compelled to leave the State, and that the defendants took advantage of his known absence to procure the confirmation of a judgment by default, well knowing that the plaintiff was not in the parish to swear to the facts necessary to obtain the legal delay. That not knowing the exact amount of the credit to which he was entitled he could

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not plead it as a defence to the action against him—wherefore he prays that the judgment rendered against him be declared null and void, that he be decreed to be entitled to a credit of \$2243 21, on the note; and further, that he recover \$5000 damages against the defendants for obtaining the judgment by fraud as aforesaid. He further asks that the execution issued upon the judgment be enjoined, and that the injunction be made perpetual.

It is evident, from a mere statement of the case, that by the plaintiff's own showing, he has no offset whatever to set up against the greater part of the judgment, which he seeks to annul, and against the execution, of which he has obtained an injunction; and, as respects that portion against which he pretends to have an offset, it is evident that he resorted to no such measures of defence as can be deemed in law the exercise of a proper diligence. Though cited personally, and with a full knowledge of the matters of defence now urged in support of the injunction, he allowed a judgment by default to be confirmed and made final without filing an answer, or interposing any other plea or suggesting any right of offset. No application was made for further time to file an answer, nor was any affidavit made for a continuance, nor was any suggestion made, whether supported by affidavit or otherwise, of an inability to make a proper defence. It appears to us that to annul a judgment so rendered upon grounds existing and known to have existed before the rendition of the judgment would be offering a premium to neglect. The 607th Article of the Code of Practice has no application to such a case. The judgment was obtained fairly and upon proper evidence, and not through fraud or mal-practices. The defendants were not bound to set forth, and at the same time accompany by a special denial matters of defence which the plaintiff in the injunction neglected to urge on his own behalf. An injunction will not be maintained in arrest of an execution, on grounds that might have been pleaded in defence before judgment. 3 Ann. Rep., 209; 1 Ann. 284; 8 Ann. 101; 6 Ann. 800. We think, therefore, that the exception taken by the defendants should have been maintained, and the injunction dissolved with damages. This view of the case makes it unnecessary to examine the questions of fact put at issue by the answer on the merits.

It is ordered that the judgment appealed from be reversed; that the prayer of the plaintiff's petition be rejected; that the injunction issued herein be dissolved and set aside; that the defendants recover of the plaintiff three per cent. additional interest upon the amount of the judgment enjoined, from the date of the order of injunction, viz: March 19th, 1856, until the day of its dissolution, together with \$200 special damages, and that the costs of suit in both courts be paid by the plaintiff and appellee—reserving, however, to the plaintiff his right to sue for and recover from the defendants, in a separate suit, any sum of money to which he is entitled in consequence of any obligation on the part of said defendants growing out of the alleged facts in the petition set forth.

CITY OF NEW ORLEANS *v.* J. L. IMLEY.

Where an appeal is taken from an interlocutory order and it neither appears that the matter in dispute exceeds \$300, nor is alleged that the order appealed from will work an irreparable injury, the court will *ex officio* dismiss the appeal, although the appellee has not moved for the dismissal.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*F. C. Laville and C. Morell*, for plaintiff. *J. Van Dalsen*, for defendant and appellant.

MERRICK, C. J. Although no motion has been filed to dismiss the appeal in this case, and the counsel for the appellee cannot be heard on this question, we think the appeal should be dismissed *ex officio*.

The suit was commenced by a writ of provisional seizure under section 103 of the Act of 1856, relative to the city of New Orleans. The defendant having taken a rule upon the plaintiff to show cause why the writ of provisional seizure should not be set aside, has appealed from the order refusing to set aside the writ. There is nothing to show that the property seized is worth \$300, and the defendant has not even alleged that the order refusing to set aside the repeal will work him irreparable injury. It will be time to consider the interlocutory orders when the cause shall come regularly before us on appeal from a decree on the merits, should such decree be adverse to the defendant. See case of *Plique v. Bellome*, 2 Ann. 293.

It is, therefore, ordered that the appeal in this case be dismissed, without prejudice to the rights of the appellant on any subsequent appeal from any decree on the merits. And, it is further ordered that the appellant pay the costs of the appeal.

PETER KLEIN *v.* FREDERICK WILD.

It is the amount due at the institution of the suit which constitutes the matter in dispute, and determines the right to appeal as affected by the amount involved.

**A** PPEAL from the First District Court of New Orleans, *Robertson, J.*  
*J. J. Michel*, for plaintiff. *Durant & Hornor*, for defendant.

VOORHIES, J. The pluries writ of *feri facias* issued on the judgment in this case was set aside on a rule taken by the defendant.

The plaintiff is appellant from the judgment thereon rendered.

The defendant and appellee claims the dismissal of the appeal on two grounds, one of which is, that the matter in dispute is not within our jurisdiction.

The writ calls for the sum of \$183 17, as the debt, with legal interest thereon from the 5th of May, 1850, until paid, and \$32 20, as costs, making in the aggregate a sum less than \$300. But it is insisted that the additional costs, since accrued, are sufficient to increase the sum, which forms the subject matter in controversy, to an amount exceeding three hundred dollars.

To determine the question of jurisdiction, it appears to us that the proper test is to ascertain whether an appeal lies from the judgment sought to be carried into execution. We think it is clear, under the well settled rule, that an

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appeal would not lie in the present case. It is the amount due at the institution of the suit which constitutes the matter in dispute. See *Mason v. Oglesby* 2 An. 793. Having no power to revise the judgment of the inferior court on appeal, we certainly have none with matters merely incidental to its execution, which are properly confined to that tribunal.

It is, therefore, ordered that the appeal be dismissed at the appellant's costs.

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JOHN P. TODD v. PATON & Co.

Where no ground is laid for an action of nullity, an injunction is allowable only for a payment alleged to have been made after judgment rendered.

Where a judgment, the execution of which has been enjoined, bears interest, such additional interest only can be allowed, under the Acts of 1861 and 1863, on dissolving the injunction, as will make the rate allowed equal to the highest conventional interest. Whatever else is allowed can only be in the shape of damages, and the interest is to be allowed only upon the principal of the debt enjoined.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*T. A. Bartlette*, for plaintiff and appellant. *Durant & Hornor*, for defendants.

SPOFFORD, J. The plaintiff has enjoined and seeks to annul a judgment obtained against him by the defendants.

The injunction was dissolved with damages, upon exceptions taken to his petition.

There is no ground laid for an action of nullity. The plaintiff does not allege that he has found the receipt to which he alludes. C. P. 607.

The allegation as to moneys made upon the original claim in Pennsylvania, is vague, insufficient, and predicated upon hearsay.

The injunction is an attempt to revive a controversy which was settled in the former action. Such a course is inadmissible, for litigation must have an end. This was a proper case for the infliction of the highest damages, as it is only for a payment alleged to have been made after judgment rendered, that an injunction is allowable. Acts 1855, p. 324, sec. 3.

The judgment enjoined bore interest at the rate of six per cent. The interest allowed upon the dissolution of the injunction, therefore, should only have been two per cent. instead of five per cent., as allowed by the District Judge. Where a judgment, the execution of which has been enjoined, bears interest, such additional interest only can be allowed, under the Acts of 1861 and 1863, on dissolving the injunction, as will make the rate allowed equal to the highest conventional interest. Whatever else it may be proper to allow, must be in the form of damages. See *Marwell v. Mallard & Armistead*, 5 Ann. 702; Act March 14th, 1855, sec. 7, (Sess. Acts, p. 325.) And the interest is to be allowed only upon the principal of the debt enjoined, not upon the aggregate of principal, interest and costs. *Lizardi v. Hardaway*, 8 Rob. 20.

It is, therefore, ordered that the judgment of the District Court be amended, by reducing the interest allowed on the dissolution of the injunction from five per cent. upon the total amount enjoined, to two per cent. upon the sum of \$1,147 16, and that in all other respects the said judgment be affirmed; the costs of appeal to be borne by the defendants and appellees.

## ANDREW STEWART v. HIS CREDITORS.

The receipt by a husband residing abroad, of money belonging to his wife, does not entitle the wife to a legal mortgage on property acquired by the husband in this State after their subsequent removal to it.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*G. & C. E. Schmidt*, for *Mrs. Stewart*, appellant. *H. R. Dennis*, for  
*Syndic*, appellee.

*LEA, J.* *Andrew Stewart*, an insolvent debtor, made a surrender of his property for the benefit of his creditors. Portions of the property surrendered consisted of real estate situated in the parishes of Orleans and Jefferson, which had been specially mortgaged to different creditors.

In these conventional mortgages *Mrs. Stewart*, the wife of the insolvent, had intervened, and made the usual renunciation of the legal mortgage in favor of married women for the reimbursement of their dotal and paraphernal effects. The *Syndic*, in due course of administration, sold the property surrendered, and the litigation now before us arises out of the contest for the distribution of the proceeds. *Mrs. Stewart* is appellant from a judgment rejecting her claim to be paid in preference to the creditors by special mortgage.

The appellant avers that she was married to *Stewart* in Alabama in 1845; that her husband then resided at Tampico, in the Republic of Mexico, to which place she went with her husband immediately after her marriage, and where she continued to reside until their removal to this State; that her father died in 1849, leaving a will, by which he instituted her sole heiress of his estate, which was composed of real and personal property, amounting in value to \$25,000, all which was received by her husband between the years 1849 and 1854, for the restitution of which she avers that she has by law a legal mortgage, not only by the laws of this State but by the laws of Mexico, which was the place of the intended matrimonial domicile at the time of her marriage.

She further avers that the pretended renunciations in favor of the creditors by special mortgage, if any such exist, were informal and illegal, never having been read or explained to her before obtaining her signature, or before the failure of her husband.

We think it is established by the evidence that the appellant was married in Alabama, in 1845, to *Andrew Stewart*, who then resided in Tampico, to which place she and her husband repaired immediately after the marriage; that the father of the appellant died in 1849, leaving to her his whole estate, with the exception of certain specified legacies; that in the same year *Stewart*, acting as administrator, sold the whole of the property, real and personal, for the sum of \$8802, of which he rendered an account at the time. Subsequently, on the 14th April, 1851, he rendered another account, showing a balance of \$5063 25 in favor of his wife. These proceedings were all conducted in Alabama, where the estate of the father was opened.

It does not appear from the evidence when *Stewart* and his wife removed to this State, but we think it is satisfactorily shown that *Stewart* did not receive any portion of the proceeds of the estate of *Randall* after he removed to this State. Under this state of facts we think but one question is presented for our

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solution, viz: Does the receipt by a husband residing abroad, of money belonging to his wife, entitle her to a legal mortgage on property acquired by him after a subsequent removal to this State? If this question is to be answered in the negative, it is unnecessary to inquire whether the renunciations made by the appellant in favor of the special mortgagees are valid or not.

It is not material to inquire what the laws of Mexico provide with reference to the rights of married women. The laws of a foreign country cannot of themselves confer any rights upon real estate situated in Louisiana. The relations of parties, and the rights incident to those relations, will be recognized and enforced as being of a binding character everywhere, except in cases where their enforcement is disregarded from considerations of public policy or convenience; but *remedial* or accessory rights conferred merely by the laws of a foreign nation can have no force or vitality within the limits of any other independent sovereignty. The question, therefore, must be examined with reference exclusively to our own legislation on this subject.

The 2367th Article of our Code provides that in cases where it is proved that the husband has received the amount of the paraphernal property alienated by the wife, or otherwise disposed of the same for his individual interest, the wife shall have a legal mortgage on all the property of her husband for the reimbursing of the same.

The mortgage exists independently of any registration, and takes precedence of conventional and judicial mortgages of a subsequent date, even though the latter may be registered. Analogous provisions in the laws of France have divided the opinions of their jurists upon the issue presented in this case. Troplong and Merlin concur in the doctrine that a minor or married woman, even though not a resident of France, have, for the security of their rights as such, a legal mortgage on the property of their tutors or husbands situated in France. See Troplong Priv. et Hyp. vol. 1, p. 247, also Merlin, verbo Remploi.

On the other hand, Duranton and others broadly announce the doctrine that the laws of France are made for the protection of French subjects and not for foreigners 19 Duranton, 418.

The first named commentators base their opinion upon the principle that the law which subjects property to a tacit mortgage is a real statute and therefore affects immovable property, without reference to the residence of those who seek to enforce those claims upon it. We certainly do not wish to place our dissent from this opinion, as applicable to property situated in this State, upon a recognition of the narrow and inhospitable doctrine which appears to have contracted the views of the last named commentators. In so doing we should violate all the precedents of our own jurisprudence. Our laws are not framed exclusively with reference to the rights of our own citizens.

On the contrary, our reports are full of decisions in which the privileges conferred by our laws have been extended to contracts made out of the State, without distinction among creditors, whether dependent upon the place of the origin of the debts or the residence of the creditors. But every law must be construed, not only with reference to the policy which dictated it, but in connection with similar legislation on the same subject. In imposing such an incumbrance upon real estate as that which necessarily results from legal and tacit mortgages, the Legislature evidently contemplated the protection of a class of persons who were unable to protect themselves, and whom they were therefore bound to protect. For this reason they have subjected the rights of their own citizens

to incumbrances which, though of doubtful policy, it cannot be supposed were intended to operate in favor of those whom it was no part of their duty to protect.

It is the duty of the State to protect its own widows and orphans and those of its own people who are laboring under legal incapacities. Accordingly, in our Code, we find a system of legal mortgages in favor of married woman, minors, interdicted persons and even absentees, whose property is the subject of *administration in this State*; but upon what principle of public policy, or even of common justice, could the rights of mortgage creditors in this State be postponed to the claims of an interdicted person residing in France upon the property of his curator situated in this State, for an indebtedness growing out of an administration in that country? And the case would not be altered in principle, even though the curator should subsequently have removed to this State.

In the language of the decision in the case of *Pratt v. His Creditors*, in 12 Rob., 508: "We cannot adopt a conclusion so injurious to the rights, the interests and the convenience of our citizens, unless it be forced upon us by some stern and unbending provision of law." But from a review of the various Articles of the Code on the subject of legal mortgages, it appears to us that they point conclusively, not only to the supposed residence in the State of the party whose property is sought to be subjected to their operation, but to the security of a debt originating in the State. Thus provisions are made for the registration of these mortgages, and it is made the duty of tutors, curators of interdicted persons, and also of husbands, to make known the existence of such mortgages, by having them recorded—a provision necessarily inapplicable to non-residents.

The whole tenor of our legislation on this subject appears to us to repel the idea that it was in contemplation of the Legislature to extend the operation of our system of legal and tacit mortgages to cases where the debt itself originated out of the State, at a time when the debtor was also a non-resident. See, on this point, the case of *Arnold v. McBride*, 6 An. 703.

Judgment affirmed.

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#### WILLIAMS, PHILLIPS & Co v. W. M. BENTON.

A witness, called to testify to the existence and contents of a deed, cannot be objected to on the ground that he obtained his information as attorney of the party against whom he is called to testify, if the deed had been intrusted to him after the relation of attorney to the party had ceased. The fact that the party against whom evidence is offered of the contents of a deed is in possession of the instrument does not authorize secondary evidence to prove the contents of it, without first giving him an opportunity of producing the original.

**A** PPEAL from the District Court of Carroll, *Farrar, J.*  
*Snyder & Montgomery*, for plaintiff. *Short & Parham*, for defendant and appellants.

**MERRICK, C. J.** A case between these parties, on the same obligation, was before this court in 1845. A judgment of non-suit was then rendered against the plaintiffs, the court being of the opinion that the action was prematurely brought.

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The present is a renewal of that action, and we refer to the case between these parties in 10 An. 158 for a statement of the facts. On the trial of the second case, in order to prove the existence in defendant's possession, and contents of the transfer from *Liles* and *Carrick*, the patentees of the land, *Louis Selby* was placed as a witness upon the stand by the plaintiffs. His testimony was objected to, on the ground that no notice had been given the defendant to produce the document, as required by Article 140 of the Code of Practice, and moreover, that the witness, having obtained his information as an attorney at law, could not be permitted to disclose the same.

From the imperfect manner in which the testimony of the witness was taken down, it is not certain but the instrument was again intrusted to the witness after his relation of attorney to the parties had ceased. If so, the knowledge he then acquired is competent testimony. *Greenleaf*, § 244.

On the other point, we see no reason to except this case from the general rules of evidence. In order to recover, it was necessary to show that the title of *Liles* and *Carrick* had either been transferred or enured to the benefit of *Wilson*, or the title which he had conveyed the defendant.

The fact that the defendant himself was in possession of the proof did not justify the resort to secondary evidence, without giving him an opportunity of producing the original. The reason of the rule is, that possibly the instrument, when produced, will be less favorable to the plaintiff than the parol proof which they may obtain.

The secondary evidence of the witness ought to have been excluded, unless the plaintiffs had been unable to obtain the original, after having availed themselves of the means of procuring it prescribed by the Code of Practice.

As it is probable that the plaintiffs may be able to establish their demand on a new trial, we will award it.

We cannot forbear to remark that the record in this case, as is too often the case, is made out in a negligent and careless manner, which makes it difficult to examine. The rights of parties depend upon the care of the Clerk in taking down the testimony and in making up the transcript of appeal in a legible and orderly manner, and there is no obvious excuse for a record made out as this has been.

It is ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that this case be remanded to the lower court for a new trial, there to be proceeded in according to law, and the views herein expressed; the plaintiffs to pay the costs of the appeal.

#### CITY OF NEW ORLEANS v. L. A. PELLERIN.

Where property is offered for sale by the Sheriff under a writ of *fi. fa.*, on a credit, and the person to whom it is adjudicated does not offer such sureties as the Sheriff is willing to accept, nor take any proceedings against the Sheriff to force him to accept the sureties offered, the adjudication does not of itself confer a title. The regular course for the Sheriff in such a case is to offer the property again for sale immediately under the same writ, but if it is afterwards regularly sold by the Sheriff under the seizure of another creditor, the purchaser acquires a valid title.

**A**PPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*G. & C. E. Schmidt*, for plaintiff in rule and appellant. *M. M. Cohen*, for appellees.

STOFFORD, J. On the 19th of January, 1856, the Sheriff of the parish of Orleans, acting under a writ of *fi. fa.*, issued in the above entitled case, adjudicated certain real estate to *Henry Pellerin*, for the sum of \$17,500, for which the purchaser was to give his twelve months' bond, with good security. But the purchaser was not put in possession. The back taxes were not paid by him, nor was the only security offered by him accepted by the Sheriff. The writ was returned on the 19th of March, 1856, with a statement that this sale was not complied with.

On the 22d of March, 1856, the same property, having meanwhile continued in the Sheriff's possession under various seizures, was adjudicated, with another lot, to *J. A. Barelli*, for 17,000 cash, he having caused it to be seized and regularly advertised under an order of seizure and sale issued in his favor upon an act importing confession of judgment and containing the pact *de non alienando*.

*Henry Pellerin* has taken a rule on the Sheriff to show cause why he should not make him a deed of sale in conformity with the adjudication of the 19th of January. The rule was filed on the 3d of May.

The rule was properly dismissed under the evidence. The purchaser has never complied with his duty by offering good security. He took no rule on the Sheriff to show cause why the security he did offer should not be accepted. The testimony in this proceeding satisfied us, as it did the District Judge, that the Sheriff acted discreetly in declining to accept the only persons tendered as security by the bidder.

The regular course for the Sheriff to have taken, would have been to offer the property again for sale immediately under the same writ.

"If the person to whom the property has been adjudged shall refuse to pay the Sheriff the price of the adjudication, or to offer the proper sureties when the sale has been made on credit, the Sheriff shall expose to sale anew the thing seized and adjudge it to another person." C. P. 689. *Lafon v. Smith*, 3 La. 475.

But the neglect of the Sheriff to proceed to an immediate resale of the property under the same writ, cannot be complained of by the purchaser, who has never complied with his bid by a tender of such security as the law exacts. If he could demand a deed under these circumstances, he would get property without paying the price. It is now too late for him to offer any new security, which, however, he does not appear to have offered. He rests his case upon the assumption that the adjudication made him absolute owner of the property. Meanwhile, he having no deed, the property has been sold under a judgment against the recorded owner to *Barelli*, who has been notified of this rule, and who is in possession under a title valid upon its face, and unassisted by any direct proceedings.

The original owner, and the judgment creditor under whose execution the adjudication was made to *Henry Pellerin*, are no parties to this proceeding. The plaintiff in the rule, being a mere bidder who failed to comply with his bid, is without interest to attack the title of *Barelli*, or the proceedings under which he acquired the title.

Judgment affirmed.

JOHN P. MASON, Executor, v. W. E. HALL, Executor, and WILLIAMS, Sheriff.

The principles settled in the case of the same plaintiff against *E. B. Fuller*, ante p. 68, as to the power of Clerks of Court in the country to grant orders of sale, are affirmed.

**A**PPEAL from the District Court of Tensas, *Snyder, J.*  
*Thomas P. Farrar*, for plaintiff and appellant. *Stacy & Sparrow*, for defendants.

**SPOFFORD, J.** This case resembles in many of its features that of the same plaintiff against *Ezra B. Fuller* and *George W. Williams*, Sheriff, just decided.

The injunction, however, in that case was dissolved upon an exception taken to the bond, and in this, upon an answer to the merits.

But we find the order here enjoined to be even more distinctly an order of seizure and sale improperly issued by the Clerk, than that granted in the former case.

The order here is as follows: "Having read and examined the within petition and the note annexed, and the document therein referred to, the said note having been duly acknowledged by *John P. Mason*, testamentary executor of *Rodney C. King*, deceased, it is ordered that said note for \$7,000, with eight per cent. interest thereon till paid, since the 4th day of January, 1854, be and the same is hereby ranked as a just claim against the succession of the said *Rodney C. King*; and, it is further ordered that the tract of land described in the foregoing petition, together with the buildings and improvements, farming utensils and ungathered crops, be sold according to law, for cash, to satisfy said debt and the cost of this proceeding."

(Signed) "JULIUS ARONI, Clerk."

For the reasons given in the case of the same plaintiff against *Fuller*, it was not competent for the Clerk of the District Court of Tensas to render such a judgment as this. That it is a judgment, we have the concurring opinions of the district Judge who dissolved the present injunction "with ten per cent. damages on the amount enjoined, viz, seven thousand dollars," and of the counsel for the defendants and appellees who, in this court, have prayed us to amend the judgment appealed from by awarding "twenty per cent. damages on \$7,000, the amount enjoined."

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed; and that the injunction sued out herein be reinstated and made perpetual; the plaintiff to recover costs in both courts.

## SUCCESSION OF ANDREAS ANDERSON.

The functions of an executor are at an end when a judgment has been rendered on his final account and no appeal is taken from it.

When the final account of the executors had been opposed by the residuary legatees and the production of their bank book demanded, the judgment rendered on such opposition being unappealed from, is *res judicata*, and may be pleaded as a bar to a subsequent claim against them for 20 per cent. per annum interest, as the penalty under the statute for failing to deposit the money of the estate in bank.

Interest cannot be claimed distinctly from the principal; the law makes no distinction between interest claimed as damages and interest as in other cases; the interest should have been claimed on the trial of the opposition.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*G. & C. E. Schmidt*, for the legatees, appellants. *Whitaker*, for executors.

VOORHIES, J. *Ambrose Lanfear*, as agent of the residuary legatees of the late *Andreas Anderson*, is appellant from a judgment discharging a rule taken by him, on the 24th of April, 1856, on the testamentary executors, to hold them liable for the payment of interest at the rate of 20 per cent. per annum on all the sums collected by them for the succession and which they had failed to deposit in bank.

The plea of *res judicata*, one of the grounds relied on by the executors, is, in our judgment, a conclusive bar to the appellants' right of action.

In May, 1855, the residuary legatees were recognized as such under a judgment of the court below, and ordered to be put in possession of the succession in due course of administration. On the 10th of November following, a final account was filed by the executors and opposed on several grounds by the agent, who also required their bank book duly liquidated to be exhibited, so as to ascertain if they had complied with the requirements of the law, and if not, to pay the penalty imposed for such neglect. There was evidence taken upon this point. The account thus rendered was, after having been modified in some respects as prayed for, duly homologated on the 19th of January, 1856, by a judgment of the court below, in which it was also ordered that *Lanfear* should be put in possession of the property and rights of the residuary legatees in the estate. No appeal appears to have been taken from this judgment. We must presume that the agent has been put in possession of the property thus adjudicated in favor of his principals. The functions of the executors were therefore at an end; and the right to enforce the penalty under the statute for a failure to make such deposit, even had it existed, also ceased.

In the *Succession of Mann*, 4 An., 28, it was settled that interest could not be recovered distinctly from the principal, the law making no distinction between interest claimed as damages, as in the present case, and interest as in other cases. For interest *ex mora* is in all cases a measure of damages. It is, therefore, clear that the appellant is not entitled to a recovery on the rule; that he should have insisted on the right of his principals to interest on the trial of his opposition to the account. The facts in the *Succession of Pasquier*, 11 An., 279, on which the appellant also relies, are materially different from those in the present case. The rule in that case was not cumulated with the provisional

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account which was passed upon; consequently, the plea of *res judicata* could not avail the party who, besides, continued in office.

It is, therefore, ordered that the judgment of the court below be affirmed with costs.

LEOPOLD BUJAC, Agent, v. PIERRE LOSTE et al.

The administrator of a succession, as respects debts due to himself by the deceased, is upon the same footing as the other creditors.

The homologation of the account and tableau of distribution must be held conclusive upon the heirs of the deceased as well as upon all other persons.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*J. J. Michel*, for plaintiff. *P. S. Biron*, for defendants.

MERRICK, C. J. This case presents two questions for our consideration, viz:

1st. Whether the homologation (after the usual notices) of an administrator's account and tableau of distribution wherein he has placed himself as a creditor of the deceased, is binding upon the absent heirs in the absence of citation to the attorney of the absent heirs or the heirs themselves?

2d. Whether the administrator is bound to cause the houses belonging to the succession to be insured?

I. We see no reason to exclude the administrator from the benefit of Articles 1057 and 1172 of the Civil Code, as it respects debts due him by the deceased. He is so far as such debts are concerned a creditor. Now, as the law accords to the creditor the right to administer, in preference to certain other persons, it is not to be supposed that it was intended by the law-giver to place him, as it respects his claims against the deceased, in a worse condition than other persons. 1039, 1114.

We think that the homologation of the account and tableau of distribution must be held conclusive upon the heirs as well as upon all others. The authorities cited are, as we conceive, in no manner in conflict with the view here taken.

II. On the second point, we are not prepared to assert that there may not arise cases in which it would be the duty of the administrator to insure portions of the property of a succession.

The property destroyed by fire (the ground of complaint in this case) was a dwelling house at that time in the city of Lafayette, in the parish of Jefferson. It was a rough building, made of plank from flatboats, and not worth more than three hundred dollars. It is not shown that the building was in an exposed situation, or if exposed, that it was customary to insure in that neighborhood, and that the insurance could have been obtained at a reasonable rate. We do not think sufficient cause has been shown to throw the loss upon the administrator.

As the lower court decided the case in conformity with our views on these questions, the judgment appealed from must be affirmed.

Judgment affirmed.

## SUCCESSION OF ANN WATERS, WIDOW ZACHARIE.

The heir who has permitted thirty years to elapse without having done any act showing an intention to accept the succession is barred by prescription from any rights as heir. C. C. 1023.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*J. W. Duncan* and *C. B. Singleton*, for opponent and appellant. *George Eustis*, for appellee.

MERRICK, C. J. Article 1023 of the Civil Code is in these words: "The faculty of accepting or renouncing an inheritance becomes barred by the lapse of time required for the longest prescription of the rights to real estate." The French text of the Article and Article 789 of the Napoleon Code are identical.

The French commentators are much divided as to the meaning of the Article, so much so that Marcadé, after examining the opinions of Delaporte, Malville, Vazeille, Duranton and Malpel, says that of the *other* authors who have taken part in the controversy, their systems may be reduced to three. He however adds his own, making a fourth. The interpretation of the article in question is forced upon us by the issues in this case, and we thus perceive at the outset that the French authorities with so much discord among them can furnish but little assistance in the present inquiry.

Did the Article read simply, the faculty of accepting an inheritance becomes barred by the lapse of time required for the longest prescription of the rights to real estate, it would present no difficulty, and we could have no hesitation in concluding that the heir who should suffer thirty years to elapse without evincing his intention to accept a succession then opened would lose his right of accepting, and the inheritance could not be claimed by him into whose hands soever it might have gone.

The prescription, however, purports to be a bar not only to the faculty of accepting but also that of renouncing. Now if a party who has not accepted the succession within the thirty years cannot afterwards accept it, it would seem that he had effectually renounced the succession. Therefore, the difficulty of the interpretation arises in our endeavour to ascertain whether the legislature may not have intended something more by the limitation of the period in which the heir may renounce. But if the Article is to be taken literally then he who is called to the succession, being seized thereof of right, cannot renounce after thirty years, he is therefore unconditional heir, but not having accepted the succession he has also lost the faculty of accepting it, and, therefore, at the same time he is not heir—which is absurd.

Some writers, however, endeavor to reconcile even this difficulty by supposing that the person called to the succession must be considered as heir as it respects the creditors, for he cannot renounce; and that he is not heir as it respects those in possession, for he cannot accept. But this violates one of our rules of interpretation, because it distinguishes where the lawgiver does not distinguish, and it violates the equitable maxim: *Qui sentit onus commodum debet sentire*.

Marcadé, who from his late position and the force of his reasoning, has recently exercised a great influence upon the jurisprudence of France, and whose arguments have not been without weight on many questions on this side of the

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Atlantic, deserves to be quoted on this question, he says, vol. 3 163, "Pour nous, ces interprétations multipliées et si contradictoires nous ont toujours étonné, et le vrai sens de l'Article nous a toujours paru facile. L'Article, en effet, déclare que le successible, après trente ans, depuis l'ouverture de la succession, aura perdu définitivement la faculté d'accepter ou de répudier, c'est-à-dire le droit de choisir entre l'acceptation et la renonciation : en sorte que, après ce délai, il ne peut plus opter et sa position est irrévocablement arrêtée. Et quelle est cette position ? rien de plus simple ce nous semble. Par le fait même de la mort du défunt, le successible s'est trouvé revêtu de titre d'héritier, il a été saisi de la succession : seulement il avait le choix ou de rendre cette position irrévocable par une acceptation, ou de s'en dépouiller par une renonciation. Or, la loi dit qu'après trente ans de silence, il n'a plus ce choix : donc il reste alors *in statu quo*, c'est-à-dire qu'il demeure héritier sans qu'il lui soit désormais possible de renoncer."

This interpretation, which appeared so easy (*facile*) to Mr. Marcadé, seems to us full of difficulty when applied to the Code of our own State. For, if the Article only means that by the silence during the thirty years the person called to the succession has lost the right to renounce, and has become absolutely fixed as heir ; the other portion of the Article concerning the faculty of accepting, as Mr. Zacharie justly observes, is obliterated.

Again, it is not to be supposed that the legislature, if that were its intention, would have expressed its meaning so obscurely or would have placed so prominently in the sentence the words "the faculty of accepting," and which in the context would strike almost every reader as the most prominent and therefore the principle object of the Article of the Code in question, and he would find, moreover, on reflection that the heir who neglected to bring his action to revindicate a succession was barred by the lapse of thirty years ; C. C. 3512. That the heir who suffered his co-heirs to enjoy the succession separately for thirty years was also precluded from his action of partition, C. C. 1228, and he might well suppose that the legislature intended the like provision in regard to the acceptance of a succession, which can hardly be distinguished from these two prescriptions.

It seems, therefore, much more reasonable to give effect to what appears to us the principal object of the Article 1023 than to annul it altogether, and carry into effect that which appears only to be secondary, and certainly occupies only a second place in the sentence.

It is true that Art. 1007 of the Code declares that he who is called to the succession, being seized thereof in right, is considered the heir as long as he does not manifest the will to divest himself of that right by renouncing the succession." The seizin here spoken of is only by relation to the acceptance. If the heir accepts, he is considered as always having been heir ; if he renounces, he is considered as never having been heir, C. C. 981. Moreover, during the period in which the heir neither accepts nor renounces the succession, it is subject to prescription in favor of third persons, and to all lawful acts done with the administrator or curator, (C. C. 1024, 3492 ; 2 An. 468,) consequences which are inconsistent with a real seizin.

We, therefore, conclude that the legislature intended to declare in one part of the Article, that if he who is called to an inheritance is silent for thirty years, and does no act, evincing his acceptance of the succession, he is barred by prescription. We do not find it necessary to put any construction upon

the second portion of the Article. It will be in time to consider the difficulties presented by it whenever the case arises in which their explanation, if possible, is required.

The facts to which the foregoing conclusion applies are the following: *Mrs. Ann Waters, widow Zacharie*, died previous to the 19th day of September, 1822, leaving several children and a last will and testament, in which she appointed *James W. Zacharie*, her son, and *Richard Relf*, her son-in-law, executors. The will was admitted to probate, and letters of executorship issued on the 24th, and the executors qualified by taking the prescribed oath on the 25th of September of the same year, 1822. *Louisa Caroline Adelina Zacharie*, one of her daughters, was married to the present opponent. By that marriage there was issue, one child. *Mrs. Shields* died on the 9th day of October, 1823, and her child, on the 9th day of March, 1824, just five months afterwards. By the death of his wife and child, as heir to his child, he acquired the right by transmission to his wife's interest in her mother's estate. That estate the executors represented as insolvent. The opponent contends that it was solvent. The difference arises from the respective constructions which the two parties put upon the sale of the plantation and slaves. The one party contending that, in addition to the price bid (\$100,000) the purchaser bound himself to pay certain outstanding mortgages, amounting to \$72,000, the other party denying the justness of this conclusion.

The present proceedings were commenced by the opponent on the 11th day of May, 1854, it being the first act on the part of the opponent, so far as we can learn from the record, showing an intention to accept the succession of his child, his wife and of her mother. A period of more than thirty years had therefore elapsed between the time opponent was called to the successions of his child, wife and mother-in-law, and the commencement of this suit. We are, therefore, not embarrassed with the one year in which the seizin of the executors continued, to wit: from the 25th day of September, 1822, to the 25th day of September, 1823, nor the five months during which the child might be supposed to have been a minor. It may, however, be proper to remark that the will contained no clause continuing the powers of the executors, and that, therefore, under the Code of 1808, they had no power longer to represent the succession; Old Code 244, Art. 166; 4 M. R. 340, 609; 1 N. S. 243; 16 L. R. 344. Their acts after that period must be viewed as those of *negotiorum gestores*.

If the construction which we have placed upon Article 1023 of the Civil Code is correct, it must follow that *Theodore Shields*, by his silence and inaction for more than thirty years, is barred from the prosecution of this suit.

The question standing at the threshold of our inquiries being thus decided adversely to the pretensions of the opponent, it is idle to pursue our investigations further.

The judgment dismissing the opposition is affirmed.

SPORFORD, J., concurring. The equivocal phraseology of Article 789 of the Napoleon Code, which has so long puzzled and divided the French commentators, was unfortunately perpetuated in our imitative codes.

We have to determine not what was meant in France, but what was the understanding of the Louisiana Legislature. In the search for that understanding, we should look at all the legislation upon the same subject, since an ambiguous phrase in one Article may sometimes be made clear by reference to an-

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other Article in connection with it. Especially if our lawgivers, while upon the general subject, have added anything to that which they borrowed from the French Code, such additions may disclose what was their understanding of the doubtful Article; and what they meant is to us the law.

"The faculty of accepting or renouncing an inheritance, becomes barred by the lapse of time required for the longest prescription of the rights to real estates." C. C. 1023.

The ingenious theory of Marcadé and some others, upon the construction of this Article is, that it creates no prescription against the faculty to accept, nor yet against the faculty to renounce *per se*; but that the faculty of choosing between an acceptance and a renunciation alone, is barred by the lapse of thirty years; so that if the heritable person holds his peace and makes no choice during that term, he becomes irrevocably and unconditionally heir by the operation of law.

But the Legislature which adopted our Civil Code in its present form, gave unmistakable evidence of an intention on their part to organize a prescription against the *right of accepting* an inheritance, and not merely against an option between acceptance and renunciation. They originated and added to the Old Code two clauses in Article 1014, the last of which declares: "If, on the contrary, the heir has only refused to accept and has not renounced, [i. e. has neglected to avail himself of this right of choice] he can claim the surplus [alluded to in the preceding clause] on accepting the succession, *provided his right of ACCEPTANCE be not prescribed against.*"

Here is a legislative recognition of the existence of a special prescription against the *right of acceptance*. Where is the term of that prescription to be found, if not in Article 1023?

A similar argument might perhaps have been deduced from an expression in Article 790 of the Napoleon Code, which was adopted into both of our Codes, and is thus translated in the first clause of Article 1024 of the Code of 1825: "So long as the prescription of the *right of accepting is not acquired against the heirs who have renounced*, they have the faculty still to accept the inheritance, if it has not been accepted by other heirs, without prejudice, however, to rights which may have been acquired by third persons upon the property of the succession, either by prescription or by lawful acts done with the administrator or curator of the vacant estate."

Marcadé sought to avoid the difficulty which this Article doubtless suggested to his analytic mind, by treating it as if it established an exceptional prescription against the right of accepting only on the part of an heir who had renounced; but this led him into what appears to me to be the greatest difficulty of having to supply by analogy, a special term for a *prescription against the right of accepting*, which, according to his view, was nowhere regulated by the law maker, and only existed as against one who had renounced. "*Ce renonçant, dit notre Article, pourra accepter encore, 'tant que la prescription du droit d'accepter n'est pas acquise' contre lui. Quel est le délai de cette prescription? La loi ne le dit pas explicitement; mais il paraît évident que notre Article doit s'expliquer par l'Article précédent, et que le délai de trente ans depuis l'ouverture de la succession, qui éteint le choix entre l'acceptation et la répudiation, est aussi celui qui éteint le droit d'accepter organisé par notre disposition.*"

3 Marcadé, 238.



But here again our legislators, both in the Codes of 1808 and of 1825, have added to the provisions of the Code to which they were so much indebted an original clause, which shows that they thought something more than an option was barred by the Article under discussion. They went on to declare, that "in like manner, so long as the *prescription of renunciation* is not determined the heir may still renounce, provided he has made no act to make himself liable as heir."

Our lawgivers then have placed in antithesis, "the prescription of the right of accepting" and "the prescription of renunciation." Is it possible that this could have meant that there was no prescription against either faculty, but only a prescription against a choice between the two?

But it is said that if the right of acceptance is barred by thirty years, it was unnecessary to say any thing about the faculty of renunciation. This argument would be unanswerable to my mind, if all the other interpretations proposed to be put upon Articles 1023, did not, *under our Code*, involve analogous or still graver objections.

The rule that some effect should be given to all the words of the law, is qualified by the condition that it be possible. If lawgivers sometimes nod, if they occasionally add an idle word to their statutes it is no more than the great masters of human wisdom in all departments of letters have done before them.

It is true that, where the right of accepting an inheritance is barred, the faculty of renunciation falls with it, as there is nothing left for the heir to renounce.

I think the Legislature of Louisiana intended in Article 1023, to fix a term of prescription against the right of acceptance, and to intimate the consequence of its lapse without an acceptance; that consequence, I think, is that the *successible* becomes a stranger to the succession.

The executors and unconditional heirs have an interest to plead this exception against the pretended heir, who opposes their account.

I, therefore, concur in the decree.

Argument of counsel for opponent and appellant, on an application for a re-hearing:

With your honor's indulgence, we propose, in the following pages, to elaborate some of the points made in our application for a re-hearing.

I. The question which first commands our attention is, what is the true interpretation of Article 1023 of the Civil Code?

A strictly literal interpretation of this Article, that would give effect to every part of it, is impossible. The true meaning lies below the surface, but can easily be brought to view by the aid of other provisions of our Code relating to the same subject matter.

It is declared in general terms in Articles 934, 935, 936, 937 and following, that "the succession is acquired by the lawful heir, who is called to the inheritance immediately after the death of the deceased person to whom he succeeds," see also O. C. 234, Art. 122, 124; and "that this right is acquired by the heir by the operation of law alone, before he has taken any steps to put himself in possession or has expressed any will to accept?"

This rule refers to testamentary as well as to legal heirs but not to particular legatees. Art. 934.

We are not to understand, from these provisions, that the heir who is called to the inheritance acquires it by mere operation of law, independant of any act of his own, immediately after the death of the deceased person to whom he succeeds, in every instance. Other provisions of the Code place limitations on these, which must not be disregarded.

For example, *irregular heirs* "before being put into possession of the estate left to them are not considered as having succeeded to the deceased from the instant of his death." Art. 944.

Again, the universal legatee by the death of the testator is seized in full right of the succession, independent of any acts of his own, in default of heirs to whom a portion of the testator's property is reserved by law. Art. 1602, (see French text.) But when there are forced heirs living at the decease of the testator the succession is not acquired by the universal legatee immediately on the death of the testator, but on the contrary, the forced heirs are seized of right by his death. Art. 1600; see also O. C. 234, Art. 122, 126.

The rule, that the heir is seized by mere operation of law, independent of any act of his own, immediately on the death of the person to whom he succeeds, we find, is subject to the following modifications and exceptions:

1. Those heirs to whom a certain portion of the property is reserved by law are seized of right immediately on the death of their ancestor.

2. The universal legatee is also seized of right, immediately on the death of the testator, unless there are forced heirs living who have not been legally disinherited, (Art. 1617,) in which case the seizin only vests in him after he has complied with the requisites of Art. 1600.

3. The other regular heirs (not forced) are seized of right, immediately on the death of their ancestor, provided there are no forced heirs or a universal legatee; Art. 1600, 1602, 1605. In which event they are not.

4. The legatee under a universal title is seized of right, immediately on the death of the testator, only in default of regular heirs (either forced or not) and a universal legatee. Art. 1605.

5. Irregular heirs are never seized of right by the death of the person to whose succession they are called; they are permitted to take possession only by the order of court. Art. 925, 943.

If we keep these distinctions in view we will experience no difficulty in arriving at the true meaning of Article 1023.

Article 1007 provides that, "he who is called to the succession, being seized thereof in right, is considered the heir as long as he does not manifest the will to divest himself of that right by renouncing the succession."

That is to say, whenever the law vests the seizin in the person called to the succession: it also invests him with the quality of heir; and that quality he can only divest himself of by renouncing the succession in the manner prescribed by Art. 1010. So long, therefore, as the seizin lasts the heirship continues.

Article 1023 provides that, "the faculty of accepting or renouncing an inheritance becomes barred by the lapse of time required for the longest prescription of the rights of real estate." Now, what is the acceptance of an inheritance? It is nothing more than the assumption of the quality of heir, while the *renunciation* of an inheritance is simply the disavowal or rejection of that quality. It is, therefore, the right of assuming the quality of heir that is lost when the faculty of accepting is barred, and the right of disavowing or disclaiming it that is lost when the faculty of renouncing is barred by prescription. Now, Article 1023 means simply this: Whenever an acceptance is necessary to invest a person with the quality of heir it must be made within thirty years from the time he is called to the succession, or the faculty is lost. And, on the other hand, whenever a renunciation is necessary to divest the person called to the succession of the quality of heir it must be made within thirty years from the time that quality is imputed to him, or the faculty of making it is lost.

Now, we have already seen that whenever the person called to the succession is seized thereof in right, and in this case only, he is invested with the quality of heir by mere operation of law, independent of any act of his own, and is considered heir so long as the seizin lasts. In this case, therefore, acceptance is not necessary to invest him with the quality of heir, and he, therefore, does not lose his right to the inheritance by the lapse of thirty years. But, on the other hand, inasmuch as the law, in this case, imputes to him the quality of heir, he must, if he wishes to divest himself of that quality, do it within the period limited, or he loses the faculty of so doing and becomes heir irrevocably.

Our construction of this Article may be stated as follows:

1. Whenever an acceptance is necessary it must be made within the time limited, or the faculty is lost.

It is only necessary when the person called to the succession is not seized thereof in right, and is not consequently invested with the quality of heir by mere operation of law.

2. Whenever a person is invested with the quality of heir by operation of law, he can only divest himself of it by a renunciation made within the time limited.

The practical effect of this construction is as follows:

The forced heir loses the faculty of recouping by the lapse of thirty years.

So also does the universal legatee if there are no forced heirs. If there are forced heirs, however, it is the faculty of accepting, which he loses by the lapse of that period.

Regular heirs (not forced) lose the faculty of accepting by the lapse of that period when they are forced heirs or a universal legatee who have renounced; but, if there are neither forced heirs or universal legatee, he loses the faculty of renunciation.

The legatee under a universal title, when there are forced heirs, a universal legatee or other regular heirs, loses the faculty of accepting by the lapse of thirty years; when there are neither, it is the faculty of renunciation he loses.

The irregular heir loses the faculty of acceptance by the lapse of that period.

This construction of Article 1023 is supported by the following considerations:

1. Without violating any rule of interpretation, and by adhering almost to the letter, it gives effect to every part of the Article. And, in this respect, it has the advantage of your Honors' construction, which virtually eliminates one entire clause—a mode of interpretation only to be resorted to as the surgeon resorts to the knife in the last extremity. Every rule of construction should be consulted before the Judge assumes the functions of a legislator.

2. It is consistent with, and gives effect to other provisions of the Code relating to the same subject matter, in which respect your Honors' construction is again defective.

For example: Article 1024 provides that "So long as the prescription of the right of accepting is not acquired against the heirs who have renounced, they have the faculty still to accept the inheritance, if it has not been accepted by other heirs, without prejudice however to rights which may have been acquired by third persons upon the property of the succession, either by prescription or lawful acts done with the administrator or curator of the vacant estate."

"In like manner, so long as the prescription of renunciation is not determined, the heir may still renounce, provided he has done no act to make himself liable as heir."

It is the last clause of this Article which cannot be reconciled with the views which your Honors have expressed. Mr. Justice Spofford treats the clause, "faculty of renouncing," in Article 1023, as surplusage. A vice from which, unfortunately, our legislation is not free. Article 1023 is copied from the French Code, and is, in fact, but a literal translation of Article 789. Now, admitting the possibility that the author of the French Code inadvertently inserted the clause referred to, and that the compilers of our Code copied the error without detecting it, this however does not account for the presence of this clause, or a similar one, in the last paragraph of Article 1024, which paragraph is not found in the French Code. If it crept into Article 1023 by error, it is not likely that our Legislature would have taken especial pains to perpetuate it by reproducing it in the subsequent Article, by the insertion of a paragraph for that very purpose. It is evident that our Legislature, by thus adding to the legislation of the French Code, intended to provide for certain cases which they foresaw might arise under our Code. \* \* \* \* \*

But we contend that the Legislature intended to fix a term of prescription against the faculty of renouncing also; and if it has not made its intention sufficiently clear by Article 1023, we cannot fail to discern it in the subsequent Article; and the construction which we have put on Article 1023 is consistent with this intention.

The law, as we have seen, invests certain persons with the quality of heir, independent of any act of their own, and if they suffer a certain period to elapse without divesting themselves of that quality, by a renunciation of the succession, they lose the faculty of so doing; but they may renounce at any time previous to the expiration of that period; or in the language of Article 1024,

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"so long as the prescription of renunciation is not determined, the heir may still renounce, provided *he has done no act to make himself liable as heir.*"—Can the meaning of this Article be mistaken? Does it not clearly refer to a class of persons who, without having accepted the succession or having intermeddled with it in any way, are nevertheless considered heirs so far, that unless they divest themselves of that quality within a certain period by renunciation, lose the faculty of doing so thereafter, and become irrevocably liable as heir? It does not refer to the heir who has expressly accepted: for after an acceptance there can be no renunciation. It does not refer to the person who has made himself liable as heir, by a tacit acceptance, for he is expressly excepted by the Article. It must, therefore, refer to the person who has remained silent, who has abstained from the succession. But unless the seizin of the inheritance is vested in this person, unless he is considered heir independent of any act of his own, what has he to renounce?—what does he lose if the faculty of renunciation is barred?—and what are the consequences to him?

3. His Honor, the Chief Justice, remarks that "the seizin spoken of in Article 1007 of the Code, is only by relation to the acceptance. If the heir accepts, he is considered as always having been heir: if he renounces, he is considered as never having been heir." C. C., 981.

Your Honor does not, we conceive, intend to say that there is no seizin until after acceptance; but rather, that the seizin is given in expectation of a future acceptance, and is not real. This opinion we respectfully submit is erroneous. The seizin spoken of in Article 1007 is an independent fact. It has no relation whatever to the acceptance or any other act of the heir. It vests in him by mere operation of law, and he cannot prevent it. C. C., 935. It continues in him, without any acceptance, until he has renounced the inheritance. Article 1007. It qualifies him to do certain acts and to transmit rights, which he could not do were it not a real seizin. Arts. 936, 937, 938 and 939. And it is in consequence of the very fact of this seizin being vested in him by mere operation of law, independent of any act of his, immediately on the death of his ancestor, that his acceptance, when made, takes effect from the day of the opening of the succession. Domat C. L., Vol. 2, Art. 2477, Cushing's edition.

It is the divesture of the seizin which takes place by relation. That is to say, the heir who renounces is considered as never having been invested with it. Thus the Code, Art. 940 says: "If the heir accepts, he is considered as having succeeded to the deceased from the moment of his death." But he is considered so before he accepts, and even if he never accepts, provided he does not renounce. Art. 938 says: "The heir is considered as having succeeded to the deceased from the instant of his death." So that his acceptance does not alter his relations in the slightest degree towards the succession; nor does it invest him with a single right which was not already invested in him by operation of law; it simply takes away from him the right of renouncing. But if he rejects the succession, says Art. 960, he is considered as never having received it, which very distinctly implies that up to the time when this renunciation is made, he is considered as having received it. The seizin, therefore, of the heir is no way affected by his acceptance, though it is by his renunciation.

But admitting your honors' view to be correct, are we to understand that no distinction is to be made between the heirs in whom the seizin of the succession is vested by operation of law, and those who can only acquire it by some act of their own, in the application of the provisions of Article 1023, simply because that seizin is by relation to the acceptance? It is difficult to discover by what process of reasoning such a conclusion is deduced from the premises. Whether this seizin is by relation or not, it produces important legal effects. See Arts. 936, 937, 938 and 939, and the person in whom it is vested is considered heir so long as it continues; and he can only divest himself of it by a renunciation, by public act. His renunciation is never presumed. C. C. 1007, 1010. Hence in applying Art. 1023, we must distinguish, unless we disregard all rules of interpretation, between those persons who are already seized of the inheritance, who are invested with the quality of heir without an acceptance, and those who are not. The distinction between them is too well defined to be overlooked, and it has been too studiously observed by the Legislature to be disregarded by the Judge. There is not a principle contained in the Code, which the Legislature has been more anxious to impress upon us, than that respecting the seizin of the heir. It is first enunciated in Art. 934; it is repeated in Arts. 935, 936, 937, 938, 939, 940, 943, 1007, 1600, 1602 and 1617.

And as if the Legislature intended to provide against the possibility of its being overlooked, in the application of the provisions contained in the section respecting the renunciation of successions, (in which section Art. 1023 occurs,) it has been placed at the very beginning of that section. Art. 1007.

4. Again, your honor remarks, "moreover, during the period in which the heir neither accepts nor renounces the succession, it is subject to prescription in favor of third persons, and to all lawful acts done with the administrator. C. C. 1024, 3492. 2 Ann. 468. Consequences which are inconsistent with a real seizin." If your honor means by *real seizin*, actual or corporeal possession, these consequences are certainly inconsistent with it; but in this case, would the heir who has accepted without having obtained the corporeal possession of the effects of the succession, be in any better position than the succession was previous to his acceptance? Although the consequences mentioned by your honor are inconsistent with the corporeal possession of the effects of the succession, they are nevertheless entirely consistent with the seizin which the law vests in the heir, and do not in any manner derogate from its real character.

Seizin is either in *fact*, or in *law*. The seizin of the heir is a seizin in law. That of the actual possessor is a seizin in fact. I need not say that, while one person is seized in law, another may be seized in fact—for these are the very conditions necessary to the existence of prescription.

The prescription mentioned in the Articles of the Code, referred to by your honor, is the ordinary prescription, by which property is acquired and debts discharged.

"The prescription by which property is acquired, is a right by which a mere possessor acquires the property of a thing which he possesses, by the continuance of his possession during the time fixed by law." C. C. 3421.

"Prescription runs against all persons, unless they are included in some exception established by law." C. C. 3487.

Now Articles 1024 and 3492 simply mean, that when a third person has acquired the actual possession of any of the effects of a succession, he can prescribe for them notwithstanding the succession has not been accepted, or is vacant. That is to say, vacant estates, and successions which have not been accepted, are no exception to the general rule laid down in the Article cited, to wit, 3487. Prescription runs against them, as it runs against every person not included in some exception established by law.

To say, therefore, that the seizin of the heir who has not accepted is not real, because third persons may acquire rights by prescription against the succession, during the period it remains unaccepted, is to say that the seizin of the owner of a thing in the actual possession of a third person is never real, because that person may prescribe for it, or that the seizin of the heir who has accepted is not real, because the actual possession of some of the effects of the succession may be in a third person.

The seizin of the heir is a seizin in law, until he has obtained actual possession of the effects of the succession. But it is nevertheless a real seizin; and its nature is in no respect changed by a simple acceptance; in other words, it continues a seizin in law, notwithstanding an acceptance, until he takes actual possession of the estate.

It is probably in view of the fact that the right of possession which the deceased had continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession, (C. C. 936,) that the lawgiver included successions which have not been accepted, or which are vacant, within the operation of Article 3487; because it would seem unjust that prescription should run against these estates, unless in contemplation of law there was some person in existence whose interest and right it is, to look after and protect them. Now this right it gives to the heir in whom the seizin is vested, before any acceptance on his part. Art. 939.

5. Again, your honor remarks, "that if Article 1023 only means that by silence during thirty years, the person called to the succession has lost the right to renounce, and has absolutely become fixed as heir, the other portion of the Article is obliterated." This is the interpretation commented upon by Duranton, vol. 6, sec. 488.

The construction we propound is not liable to the objection urged, for it gives full effect to every part of the Article, and almost, in accordance with the very letter, supplying nothing but what is necessarily implied.

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WATERS.

Whenever it is necessary in order to invest the person called to the succession with the quality of heir, that he should accept, he must do so within thirty years, or he loses the faculty of doing so. Whenever, on the other hand, the law invests him with that quality, then if he wishes to divest himself of it, he must do so by renouncing the inheritance before the lapse of thirty years, or he loses the faculty of so doing.

Your honor further says, that it appears to be the principle object of Art. 1023, to fix a term of prescription against the acceptance of an inheritance. Now the argument in favor of this view, which is based principally on the circumstance that the term *acceptance* holds a more prominent position in the Article than that of *renunciation*, (because it comes before it,) is scarcely conclusive; nor does it derive much support from the (what your honor seems to regard) analogous provisions of Arts. 3512 and 1228. That the Legislature intended to fix the term of prescription against the right of acceptance, cannot be doubted; but it is equally true (if an intention can be clearly expressed in words) that it intended also to fix a term of prescription against the right of renunciation; and any construction of Art. 1023 which does not give effect to this intention, must be radically wrong.

6. Again, Mr. Justice Spofford says: "But the Legislature which adopted our Code, in its present form, gave unmistakable evidence of an intention to organize a prescription against the right of accepting an inheritance, and not merely against an option between acceptance and renunciation. They originated and added to the Old Code two clauses in Art. 1014, the last of which declares: 'If, on the contrary, the heir has only refused to accept, (*i. e.* has neglected to avail himself of the right of choice,) and has not renounced, he can claim the surplus, on accepting the succession, provided his right of acceptance be not prescribed against.' Here is a legislative recognition of the existence of a special plea of prescription against the right of acceptance. Where is the term to be found, if not in Art. 1023? As we have already said, this cannot be denied. But is it necessary, in order to give effect to Art. 1014, to mutilate Art. 1023? Or, in other words, is the prescription of the faculty of acceptance irreconcilable with that of renunciation? We have, we conceive, shown that it is not. And there is nothing in Art. 1014 which is not entirely consistent with our views. The heir who has simply refused to accept, may claim the surplus on accepting the succession, provided his right of acceptance (if he is one of those against whom the prescription of acceptance runs) be not prescribed against."

II. *Theodore Shields* has tacitly accepted the succession of *Mrs. Zacharie*, by suffering judgment to be given against him, in the capacity of heir, without claiming the benefit of inventory, or renouncing the succession. C. C. 994.

On the 6th July, 1831, *J. T. Pemberton* instituted suit against *Lavania Irwin* and others, on two promissory notes, for the sum of \$10,000 each, being the two notes given by *Irwin* to *Pemberton*, when he purchased the plantation from *Pemberton*. *Mrs. Irwin* called the heirs of *Mrs. Zacharie* in warranty, alleging them to be liable for the amount of said notes, on account of her assumption of them, when she purchased the plantation from *Irwin*.

*Pemberton* also instituted suit against the heirs of *Mrs. Zacharie* on these notes, and the two cases were consolidated. In both of these suits the liability of *Theodore Shields* as an heir is alleged both by the plaintiff and his co-defendants, and judgment against him is prayed for, as well as the appointment of a curator *ad hoc*.

On the 16th Nov. 1831, *G. Schmidt, Esq.*, was appointed to represent him, and citation served on him. See record of suit of *Pemberton v. Heirs of Irwin and Zacharie*. Judgment was rendered against *Shields* for his portion of the debt.

These suits were on a joint obligation of the heirs of *Mrs. Zacharie*. *Shields* was a necessary party to them, and was legally in court by the appointment of a curator *ad hoc*. C. C. 2080. *Jelks v. Smith*, 5 An. 674; *Dupuy v. Hunt*, 2 An. 564. Under the jurisprudence of our State, as it stood at the time these suits were instituted, *Shields* was properly before the court. C. C. 3522, C. P. 116, 120, 964, 195. *George v. Fitzgerald*, 12 La. 604; *Zacharie v. Blandin*, 4 La. 154; *Copely v. B.*, 12 Rob. 79. H.'s D., verbo Absentee, vol. 1, p. 8, No. 21.

The person appointed to represent *Shields* was a sworn attorney, and it is to be presumed that he did his duty, and duly notified *Shields* of the institu-

tions of these suits. *Beaumont v. Corington*, 6 R. 189; *Cooley v. Seymour*, 9 La. 274.

The proceedings of the court which rendered judgment against *Shields* must, after the lapse of twenty years, be presumed to have been regular. After the lapse of that period, there is a presumption in favor of every tribunal acting within its jurisdiction, and that all persons concerned had due notice of its proceedings. *Gibson v. Jester*, 2 An. 503; *Gentile v. Foley*, 3 An. 146.

III. Prescription was interrupted by the acknowledgment of *Shields's* rights in the succession of *Mrs. Zacharie*, in 1830 and 1831, by the persons who now plead it.

There is nothing in the nature of the prescription set up which takes it out of the general rule laid down in C. C. 3486. It operates like all other prescriptions. While it divests the person against whom it is acquired of a right, it vests that right in some other person.

Thus the faculty of accepting the inheritance, or in other words, the portion which the heir loses by the prescription of thirty years, vests in his co-heirs of the same degree or in those next in degree. C. C. 1015, 1016, 1017. And moreover, a mere stranger, or a person having no interest in the estate, or who cannot be benefited by prescription, cannot plead it. C. C. 3429. Now it is clear, that if the person who is benefited by the plea of prescription, or who has an interest in pleading it, acknowledges the rights of the person whose title he prescribes before the term has accrued, there is an interruption.

Your honors held that the defendants in the opposition, being co-heirs of the opponent, have an interest in setting up the plea. We are to understand, I presume, that it is as co-heirs simply, and not as executors, that they have such an interest. They certainly have an interest as co-heirs, because, if the opponent has lost his rights in the succession, they have acquired them jointly with other heirs who have accepted. But they have no interest as executors, because as executors they can acquire nothing by it, and it is contrary to every principle of law and equity to permit them to set it up for the professed purpose of shielding their conduct from the scrutiny of justice. *Coudage v. Chamberlain*, 4 An. 368. C. C. 3404.

Now this brings us to a question of pleading presented by the record. The exception in which the plea of prescription is set up alleges "that the succession of the said *Widow Zacharie* was never accepted by the said opponent, or by the parties through whom he claims," but it is not alleged that the successions of those persons, through whom he claims, were not accepted by him. In the absence of any denial, it must be conceded that the opponent has accepted their successions. But again, the exception concludes: "Wherefore these appearers, reserving their right to answer more fully to the said opposition, in case this exception is overruled, now pray said exception be sustained and said opposition dismissed," &c.

Now it is clear that they plead this exception in their single capacity of executors. They are before the court in no other capacity, and they have made no attempt to assume any other. They were called upon to account as executors, and as executors they have accounted.

As executors they cannot maintain the exception; it would be *contra bonos mores*, and as co-heirs they do not plead it. The plea of prescription being *stricti juris*, the court can supply nothing. The party wishing to avail himself of it must plead it expressly, and in that capacity in which the law permits him to avail himself of it. If he pleads it in any other, it is the same as if it had not been set up at all. C. C. 3426.

Re-hearing refused.

J. A. ROZIER *v.* A. A. MAGINNIS *et al.*

There was a judgment decreeing in favor of the plaintiff a servitude of passage, &c., over defendants' lots, for which a suspensive appeal was allowed, on defendants giving bond in a sum fixed by the court. The condition of the bond given was that the defendants should pay whatever judgment might be rendered against them. *Held*: That it was not necessary that the value of the servitude should be estimated and referred to in the motion for the appeal; that it was the duty of the Judge to fix the amount of the security when the order was granted.

Article 577 of the Code of Practice is applicable to judgments decreeing the delivery of real estate yielding revenues, and not a right of servitude.

If the proprietor of two estates, between which there exist an apparent sign of servitude, sell one of those estates, and if the deed of sale be silent respecting the servitude, the same shall continue to exist, actively or passively, in favor or upon the estate which has been sold. C. C. 765.

Parol evidence is admissible to prove the existence of such apparent servitude. Where parties have been acting in good faith in the assertion of what they deem to be their legal rights, a case is not made out for damages.

**A**PPEAL from the Fourth District Court of New Orleans, *Reynolds, J. C. Roselius*, for plaintiff. *F. Haynes* and *Duncan & McConnell*, for defendants and appellants.

VOORHIES, J. The appeal in this case is sought to be dismissed by the plaintiff and appellee on several grounds.

I. The defendants have not made such a motion as is required by the statute approved 22d March, 1843.

The judgment appealed from was rendered on the 1st of February, signed on the 6th, and on the 7th of the same month the following motion was made for the appeal, to wit:

"On motion of *Frank Haynes*, attorney for defendants, and on suggestions that they are aggrieved by the final judgment rendered in this case on the 1st of February inst., it is ordered that a suspensive appeal be granted them from said judgment, returnable to the Supreme Court the fourth Monday of March, 1856, the appellants giving bond in the sum of \$600, with good and solvent security, conditioned as the law directs."

We think this is a sufficient compliance with the requirements of that Act Session Acts of 1843, p. 40; Art 573 of C. P. as amended.

II. That the motion was made as if a judgment had been rendered merely for a sum of money, when in fact it is for the delivery of real estate, or a servitude thereon, with a perpetual injunction on the defendants from erecting any works or doing any act whereby the use and enjoyment may be impeded.

This objection appears to us to be untenable. The admission of the parties in the record is that the matter in dispute exceeds \$300. The statute requires, in cases in which an appeal may be granted by motion in open court at the same term at which the judgment was rendered, that "the Judge shall fix the amount of security, and cause the same, with the order granting the appeal, to be entered upon the minutes of his court." This has been done, as we have seen, and the bond is in the usual form.

III. We do not think the defendants were bound to ask that the value of the servitude should be estimated and referred to in the motion for the appeal. The plaintiff claims a right of passage, ten feet in width, on the rear portion of two lots of ground owned by the defendants, and it is admitted that the matter in dispute (*i. e.* the servitude, and not the land) is worth more than \$300.

IV. The objection that the bond is defective, as the defendants have merely bound themselves to pay whatever judgment may be rendered against them, appears to us to be equally untenable. The Article 577 of the Code of Practice is applicable to real estates yielding revenues, and not to a right of servitude.

It is unnecessary to notice the other objections, as we deem them clearly untenable.

It is therefore, ordered that the motion be overruled.

LEA, J. The late *Alexander McKeever* improved a certain property belonging to him, situated on the corner of Prytania and Calliope streets, by erecting thereon certain buildings of different forms and dimensions. At the rear of the property he made an alley-way, paved with round stone and properly graded and planked up, with openings leading into it from each and every one of the tenements. This alley-way was used in common by the occupants of all the buildings.

At the sale of *McKeever's* estate the property was divided, and on the 19th April, 1854, the plaintiff became the purchaser of one of the lots with the improvements thereon. This lot opened upon the alley-way. The act of sale contains the usual transfer of all the accessory rights incident to the ownership of property, viz: all the rights, ways, servitudes, &c., thereunto belonging or in anywise appertaining. Whatever rights *Rozier* acquired, they were complete when this adjudication was made. No subsequent sale of other portions of the property could invalidate his rights.

Now at this time there existed an apparent sign of servitude in favor of property purchased by him, which had been accompanied by actual use of the same by the proper occupants of the property. Subsequently the other properties opening upon the alley-way were sold to the defendants, their titles extending, however, not over the alley-way, *but only to it*. By the terms of the acts of sale made to them, *the use of the alley in common with other lots* was reserved to them.

It is not pretended their *use* of the alley-way for the purposes for which it was designed, has been interfered with by the plaintiff; but the defendants, conceiving that they had a right of property in the soil of the alley-way, and that the plaintiff had not the right to use it, have obstructed the passage and planked it up, so as to prevent the plaintiff from using it.

Now, even if the defendants had purchased the soil which is set apart for the alley-way, it would have been subject to the apparent servitude in favor of the plaintiffs. Art. 765 of the Civil Code provides that: "If the proprietor of two estates, between which there exist an apparent sign of servitude, sell one of those estates, and if the deed of sale be silent respecting the servitude, the same shall continue to exist, actually or passively, in favor or upon the estate which has been sold;" and from the very terms of this Article it is manifest that parol evidence is admissible to prove the existence of the apparent servitude thus designated. There was no error, therefore, in admitting parol evidence for that purpose. But in reality the soil of the alley-way was not sold to the defendants, and the very fact that it was not sold is corroborative proof (if any were needed) that the soil had been set apart as dedicated to a perpetual servitude.

In obstructing the alley-way, the defendants were, therefore, mere trespassers, interfering with the enjoyment of a lawful servitude belonging to the plaintiff. They have probably, however, been acting in good faith in the assertion of

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what they deem to be their legal rights, and, under the circumstances, we do not think a case is made out for damages.

For a further illustration of this subject we refer to the commentaries of Demolombe on the 694th Article of the Napoleon Code. See 12th vol. Demolombe, page 322, No. 809 *et seq.*; also Merlin Comp., verbo Servitude; also 2d Marcadé, p. 611; by which authors both sides of the question argued at bar have been presented.

Judgment affirmed.

### R. R. BARROW v. JOHN McDONALD.

An attachment will not lie in an action for damages *ex delicto*; nor in an action for the settlement of a partnership before any liquidation of accounts, when, from the nature of the business, it is impossible that the plaintiff can swear with certainty to the amount that will be found due to him on a final settlement.

**A** PPEAL from the District Court of Terrebonne, *Cole, J.*  
*Goode & Aycock*, for plaintiff and appellant. *Beatty & Bush*, for defendant.

**LEA, J.** The plaintiff's claim against the defendant in this case is based upon two causes of action:

1st. A claim for damages for the malicious killing of a slave, which was owned by the plaintiff and the defendant in the proportion of three-fourths by the former and one-fourth by the latter. These damages the plaintiff has assessed at \$1500.

2d. A demand for an alleged balance due upon a settlement and liquidation of accounts growing out of the management by the defendant of a plantation owned by them in common, in the proportions above stated.

The defendant being a non-resident, this suit was instituted by the attachment of a judgment which the defendant had obtained against the plaintiff.

The defendant, by his counsel, moved that the attachment be dissolved on the grounds: 1st, that the causes of action are insufficient to maintain an attachment; 2d, that the judgment against *Barrow* could not be attached on an unliquidated claim for damages. From a judgment dismissing the attachment the plaintiff has appealed.

We consider the doctrine too well settled to be longer treated as an open question; that no attachment can be maintained in an action for damages *ex delicto*. See *Irish v. Wright*, 12 Rob. 563; 2 An. 943; 3 An. 376, 445; 4 An. 63.

We consider it equally well settled that no attachment will lie in an action for the settlement of a partnership before any liquidation of accounts where, from the nature of the business, it is impossible that the plaintiff can swear with certainty to the amount which will be found due to him on a final settlement. 2 An. 277; do. 154; 11 La. 581.

There is nothing in the nature of either of the demands upon which this action is based which would make them exceptions to the application of the principles above set forth.

Assuming that the defendant promised to pay three-fourths of the value of the slave, it does not appear that any price was agreed upon. Moreover, we

think the District Judge was right in holding that this was a matter which entered into and constituted a part of the partnership transactions. It was an act done in the course of his administration as a managing partner, and as such, could not be separated from the affairs of the partnership so as to make it the basis of an independent suit. It is urged in support of the attachment, that the business of the partnership was so limited and simple in its features, that the plaintiff could swear with reasonable certainty to a precise balance. We can scarcely imagine any kind of partnership in which an estimate of the ultimate rights of the respective partners would be more purely conjectural, than in a partnership for the management of a sugar plantation.

We think the judgment setting aside the attachment should be affirmed, but we do not consider that a proper case is presented for the infliction of damages for a frivolous appeal.

Judgment affirmed.

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P.  
McDONALD.

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SARAH PHIPPS, Executrix, v. JOHN BERGER.

When, at a public sale, the Deputy Sheriff proclaimed the negro sold to be unsound, the redhibitory action cannot be maintained by the purchaser on account of any latent defects, and parol evidence is admissible to prove such declaration.  
C. C. 2498.

APPEAL from the District Court of Terrebonne, *Cole, J.*

*A. Beatty*, for plaintiff. *Goode & Aycock*, for defendant and appellant.

BUCHANAN, J. Defendant being sued on his three notes, given for the price of a slave purchased at probate sale, pleads that the slave was affected at the time of the sale with a chronic disease, which defendant is not able to describe, but which he was informed was brought on by eating dirt, the existence of which disease was fraudulently concealed by the executors at the time of the sale, and that the slave was rendered entirely useless by the said disease, which caused his death about six months after the sale.

The unsoundness of the slave *Henry* when sold is not only proved but admitted. But it is proved by four witnesses, introduced by plaintiff, that he was proclaimed to be unsound from the stand, to the bidders at the public sale, by the Deputy Sheriff who cried the property sold. This brings the case within Article 2498 of the Civil Code, which says: "Nor can the buyer institute the redhibitory action on account of the latent defects which the seller has declared to him before or at the time of the sale."

It is hardly necessary to notice the bills of exception to the parol evidence of these declarations, for the same Article of the Code expressly allows this sort of proof.

Judgment affirmed, with costs.

NICHOLSON BARNES *v.* J. S. CRANDELL et al

Interest cannot be claimed on a judgment which does not bear interest on its face, and which was rendered when no general law was in force by which interest was superadded to it.

**A**PPEAL from the District Court of Madison, *Farrar, J.*  
*Bemis & Wallace*, for plaintiff. *A. Steel*, for defendants and appellants.  
 SPOFFORD, J. This is an injunction sued out against an execution of a judgment rendered against the plaintiff, as surety upon the dissolution of a former injunction.

The plaintiff's pleadings and proofs, on the main grounds urged in discharge of his liability, are equally unsatisfactory. Conceding, what is far from being clear, that the agreement between *Lewis* and *Downs* was admissible under the vague allegations of the petition, the instrument fails to show a discharge of the principal debtor. There was only a promise to discharge him after certain conditions precedent should be performed, which are not shown to have been performed.

The loose plea of compensation is also untenable. *Barnes* was not debtor and creditor of *Downes* in the same quality, if indeed he was his creditor at all.

The plaintiff, therefore, cannot recover the sum of eighty dollars on the ground that he paid it in error to the defendant *Steel*.

But this sum should have been credited on the judgment, and the injunction is to be perpetuated for that amount.

And as the judgment bore no interest on its face, and no general law in force at the date of its rendition superadded interest to it, the injunction must be perpetuated against that part of the execution.

It is, therefore, ordered and decreed that the judgment of the District Court be avoided and reversed, and proceeding to render such judgment as should have been rendered, it is ordered and decreed that the injunction herein issued be made perpetual as to the interest called for by the writ of *fi. fa.* enjoined, and also for the sum of eighty dollars, which should be credited as having been paid to the defendant *Steel* on the 20th April, 1855; it is further ordered that in other respects the said injunction be dissolved, and the defendants allowed to proceed in execution against the plaintiff for the sum of three hundred and thirty-three dollars and costs; and it is further ordered and decreed that the defendant, *A. T. Steel*, recover of the plaintiff in injunction and his surety, *Ralph S. Coons*, *in solido*, interest upon the said sum of three hundred and thirty-three dollars, at the rate of eight per cent. per annum from the 14th July, 1855, until this judgment becomes executory; the costs in the District Court to be paid by the defendant, *Steel*, and those in this court by the plaintiff and appellee.

## STATE ex rel., JOHN G. GAINES v. THE JUDGE OF THE SECOND DISTRICT COURT.

A bill of exceptions should be taken or reserved at the time the ruling of the Judge in the matter complained of was made. If not then reserved, the Judge cannot be compelled on a subsequent day to sign a bill of exceptions.

ON an application for a *mandamus* to the Second District Court of New Orleans, *Morgan, J. Clark & Bayne*, for the relator.

MERRICK, C. J. This is an application for a rule to show cause why a writ of *mandamus* should not issue to compel the Judge of the Second District Court of New Orleans to sign a bill of exceptions.

The relator is the testamentary executor of *Simeon V. Sickles*, deceased. In his capacity of executor, he made an application for an inventory which the Judge, after considering for some time, granted, but at the same time entered therewith an order appointing an attorney and counsellor-at-law to represent the absent heirs; that so soon as advised of the entry of the order and the ear of the court could be obtained in order to show his dissent from that portion of the decree, he tendered the Judge a bill of exceptions for signature, wherein he stated that the appointment was made without any prayer to that effect by petitioner, and that he excepted to the same as unnecessary, there being no heirs absent and unrepresented, the will instituting the city of New Orleans as heir, and that the court overruled the exception, and that thereupon the counsel tendered his said bill of exceptions to be signed.

The object of a bill of exceptions is to place on the record and make part thereof something which was done under the order of the court, during the progress of the cause, which would not otherwise appear, in order that the question of law arising from the ruling of the Judge, in the matter excepted to, may be reviewed by the appellate court. It should be taken or reserved at the time the act objected to occurs. If not then reserved, the Judge cannot be compelled to sign a bill of exceptions at a subsequent day.

If the Judge of the lower court had seen fit to embody in a bill of exceptions what occurred before him when the party was first advised of the order, such as a motion to set it aside and his refusal or the like, it would not have been improper; but in the bill tendered, it seems to us something more is stated than the Judge was bound to admit (*viz*), that the executor excepted to the appointment as unnecessary, &c., which would imply that the objection was made at the time of the appointment of the attorney for the absent heirs.

From the showing of the relator, we are satisfied that the record, as it now stands, declares truly what occurred at the date of the entry complained of. As no objection was made at the time of the entry of the order, the Judge cannot be called upon now to sign a bill of exceptions which implies contrary to the fact that an objection was made to the order at the time it was entered.

The application for the rule is dismissed at the costs of the applicant.

## W. L. KNOX v. W. L. THOMPSON.

When a motion is made to take the answers of parties to interrogatories for confessed, on the ground of their being evasive, the court must act on the motion, it cannot be referred to the jury to determine on the merits of the cause.

It is only when there has been an actual delivery of immovables or slaves sold that the law receives as evidence of the sale the confession of the party when interrogated on oath. C. C. 2255. Parol evidence cannot be received to contradict the answers.

Where a party who has been put upon oath gives all the facts of the case which are necessary to the determination of the question propounded to him, he has complied with the law, and he is not bound nor permitted to answer questions of law based upon those facts.

Where, from the relation of the parties, as deduced from the answers to interrogatories, it is manifest that although both parties expected that the preliminary arrangements for a sale would be carried out, yet neither of them considered a sale had been concluded unaccompanied with conditions, a sale is not established. Damages incident to the institution of a suit for the recovery of any civil right cannot, as a general rule, be recovered upon a demand in reconvention.

**A** PPEAL from the District Court of Carroll, *Farrar, J.*

*E. Sparrow and Short & Parham*, for plaintiff. *A. B. Caldwell and Benjamin, Bradford & Finney*, for defendant and appellant.

LEA, J. This suit is brought for the recovery of damages incident to a breach of an alleged contract of sale. It is true the plaintiff asks that the defendant be ordered to execute an act of sale, and asks damages only in the event of his failure to comply with a specific performance of his alleged contract, but the evidence shows that the defendant had sold the property which is the subject matter of contestation to third persons before the institution of this suit.

The plaintiff alleges that he entered into a contract of sale with the defendant, by which the latter agreed to sell to him the undivided half of a plantation, with one hundred and fifteen slaves, together with the mules, cattle, corn, &c., belonging to the place, for the price of \$78,225, payable upon the terms set forth in the petition; but that, although he has been ready to comply with his part of the contract, as stipulated, the defendant has refused to pass the act of sale, as he was bound to do. The plaintiff alleges that, by reason of this refusal, he has sustained damages in the sum of \$10,000, for which sum he claims judgment on the alternative of the failure of the defendant to pass the act of sale, as above stated.

Interrogatories were annexed to the petition, which the defendant was called upon to answer under oath. The plaintiff, considering the answers of the defendant unsatisfactory and evasive, moved the court that the interrogatories be taken for confessed. The court did not act definitively upon this motion, but referred the matters in the motion set forth to be determined upon the merits. The case was tried by a jury, who found a verdict in favor of the plaintiff for the sum of \$8000. From a judgment rendered in accordance with this verdict the defendant has appealed.

We think the court erred in not acting upon the motion to take the defendant's answers for confessed. It was the exclusive province of the court to determine what evidence should go to the jury. As the case was presented to them, they were called upon to determine the question whether the answers of the defendant were or were not in evidence, and whether the interrogatories were or were not to be taken for confessed. Upon the sufficiency and effect of

these answers the case must, in our opinion, be decided. No parol evidence could be introduced to contradict these answers.

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v.  
Thompson.

The policy of the law extends a special protection to the titles by which immovable property and slaves are held. It does not permit them to be invalidated or attacked by parol evidence, and though it is permitted to one of the parties to a verbal sale of real property to probe the conscience of the other by calling upon him to answer interrogatories; even this can only be done when there has been an actual delivery of the immovable property or slaves sold. C. C. 2255.

We have but two questions, therefore, to settle in this case:

1st. Are the answers evasive or unsatisfactory?

2d. If not, do they establish a sale from the defendant to the plaintiff?

The defendant, on being asked whether he did not sell to the plaintiff the undivided half of the property described in the petition upon the terms therein set forth, and whether the said Knox did not agree to comply with said terms, answers "that he did not sell and deliver the property described in the petition." If the answer had gone no further, it probably should be considered evasive, but to avoid all misapprehension, the defendant made a full statement of all the facts connected with the transaction, which, so far from being evasive, is unusually minute and specific, and appears to us to indicate good faith on the part of the respondent.

When a party who has been put upon oath gives *all* the facts of the case which are necessary to the determination of the question propounded, he has complied with all that the policy of the law requires. He is not bound, nor indeed would he be permitted by his answer to settle questions of law based upon the facts.

Whether the facts set forth in the defendant's answer constitute a sale is a question of law, which the plaintiff himself would not be willing to submit to the opinion of the defendant. In stating the facts of the case, therefore, the defendant has done all that the law requires of him.

The defendant answers that the plaintiff represented to him that he was a man of means and credit, familiar with the business of planting, and that, therefore, with a view to the establishment of a partnership between them, he was induced "to entertain a proposition from said Knox to become a partner in his respondent's plantation. He, the said Knox, proposing to live on the said plantation all the year and manage the affairs of the same as a *permanent* partner, and that he did accordingly verbally agree on the basis or preliminaries of a sale or partnership in one-half of respondent's plantation," &c. That after said verbal agreement, he requested the said Knox to enter into writings with him previous to his departure for New Orleans, "and thereby *complete and close the agreement*, which said Knox declined to do."

Respondent avers that before the sale was completed he ascertained to his great astonishment that Knox was worth nothing; that his wife had obtained a separation in property from him; that no debt due by him could be collected, and that he was not only without means but without credit; that under these circumstances he sent the plaintiff a written notice that his proposal for a purchase did not suit him and that he therefore declined his offer.

We deem it unnecessary to transcribe the whole of the defendant's answer, nor do we think it is necessary to consider the question of bad faith on the part of the plaintiff, as displayed in the answers.

Knox  
v.  
Thompson.

The only question which we consider it essential to determine is whether, from the scope of the answers themselves, it appears that the defendant had irrevocably bound himself by a contract of sale.

If we are to consult the intentions of the parties, as deduced from the answers, we think it manifest, that although both parties expected that the preliminary arrangements would be carried out, neither of them considered that a sale had been concluded, unaccompanied with conditions or reservations having reference to the management of the place. This conclusion relieves us from the necessity of examining the other questions presented in the record.

There is no legal ground for the demand in reconvention in this case. Damages incident to the institution of a suit for the recovery of any civil right cannot, as a general rule, be recovered upon a demand in reconvention.

It is ordered, that the judgment appealed from be reversed; that upon the plaintiff's demand there be judgment for the defendant, and that the demand in reconvention be rejected. It is further ordered, that the plaintiff pay costs in both courts.

BUCHANAN, J. In addition to the remarks of Mr. Justice Lea as the organ of the court, in which I entirely concur, I would add that, in my opinion, the proof of a sale of immovables or slaves by interrogatories, under Article 2255 of the Civil Code, is only admissible for the purposes of perfecting the title in the vendee or of recovering the price by the vendor, in cases where actual delivery has been made of the immovables or slaves sold verbally. From the words of the Article, it cannot have been intended as a means of recovering damages from the vendor for a refusal to deliver. The Article requires that actual delivery should have been made.

#### SUCCESSION OF WILLIAM REGAN.

The claim of the appellant, for interest upon her judgment against the estate as heir of her father, was rejected on the ground that the judgment carried no interest on its face.

A suit brought against the husband on notes due by the community, interrupts prescription as to the heirs of his deceased wife. C. C. 3517.

As a general rule it is too late, after the evidence has been closed and the argument commenced, to allow new issues of fact to be made. The plea of payment, however, is highly favored. - Courts always lean to the correction of an error that works injustice, and the strict rules of practice may with more propriety be relaxed, when the parties litigant are not the original contracting parties. The rule relaxed under the facts of this case.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*J. Dunlap*, for *Mrs. Fanny Cutter*, appellant. *Thomas Gilmore* and *Benjamin, Bradford & Finney*, for *Mrs. Regan*, Administratrix, also appellant. *Charles De Choiseul* and *Thomas A. Clarke*, of assignee for *Kohn, Daron & Co.*, appellees.

BUCHANAN, J. Two appeals are before us from the judgment of the District Court, rendered on the 9th of November, 1855, upon an account of administration of this estate; 1st, that of *Mrs. Fanny Cutter*, and 2d, that of the administratrix.

So far as *Mrs. Cutter* is concerned, the judgment appealed from is the supplement of that rendered by this court at the May term of 1854. See 9 Ann.

344. By our decree in that case, the rights of *Mrs. Cutter* as heir of her mother were reserved.

The Judge of the District Court has now fixed the amount of those rights at \$1,978 33, and the calculation by which he has arrived at that result seems to follow the evidence. The data for the ascertainment of the amount of the community of *Regan* and his first wife, are necessarily vague and uncertain. But this vagueness is not the fault of the appellant. It is owing to the neglect of her stepfather, the survivor of the community, to take the proper and legal steps for settling the community; and the appellant ought not to be made responsible for such neglect. *Mrs. Cutter's* claim of interest upon her judgment against the estate of *Regan*, as heir of her father, was properly rejected. That judgment carried no interest on its face. See *Saunders v. Taylor*, 7 N. S. 41.

*Mrs. Cutter* complains that the syndics of *Miller* and the assignee of *Kohn, Daron & Co.*, who are judgment creditors of *William Regan*, are improperly preferred to her, because, she argues, the community between her mother and *William Regan* was dissolved by the death of the former before the debts accrued upon which the said judgments were founded. *Mrs. Cutter's* mother died in January or February, 1843. The judgment of the syndics of *Miller* against *Regan* was rendered on the 20th of December, 1842.

The judgments in favor of *Kohn, Daron & Co.'s* assignees, are three in number, and were all rendered after *Mrs. Regan's* death; but of the promissory notes upon which those judgments were founded, the following were executed during the community:

Six notes of \$460 each, dated 1st November, 1842; total due by community \$2,760. Two other notes, respectively \$468 50 and \$466 28, were dated 25th March, 1843, consequently after *Mrs. Regan's* death. Total of notes due by *Regan* alone \$934 78.

A payment of \$1,802 12 was made on the aggregate claims of *Kohn, Daron & Co.*, by the sureties of a former administratrix, on the 31st July, 1854; which is imputable, *pro rata*, to those notes due by the community, and to those due by *Regan* individually.

The appellant pleads prescription of ten years against those claims of *Miller* and *Kohn, Daron & Co.*; but we think that plea cannot avail her. The suits brought against *Regan* in 1843 and 1844 upon those notes barred prescription as to the heir of his deceased wife. C. C. 3517.

We now proceed to the appeal of the widow *Regan*, administratrix. This appellant attempts to revive the question of the marriage of *Regan* and the mother of *Mrs. Cutter*. But this question must be considered as settled by our decision in 9th Annual. She also excepts to a decision of the District Judge refusing her permission to plead on the argument of the cause and after the evidence was closed, that the claim presented by the assignee of *Kohn, Daron & Co.* does not really belong to said assignee, but had been transferred to another party, with whom *William Regan*, in his lifetime, compromised and settled it.

The Judge did not err. The plea presented on the 13th July, 1855, declares that the appellant had discovered the facts therein set forth, on the 7th of the same month, or six days previously to her calling them to the notice of the court. It is obvious what confusion would be introduced into the trial of causes if such a practice were tolerated, as to allow new issues of fact to be thus kept in reserve until after the evidence was closed and the argument had

SUCCESSION OF  
REGAN.

commenced. Such new issue, if entertained, would require new evidence to substantiate the affirmative; and the opposite party could not, of course, be refused the right of producing evidence to rebut. The case might be different were the fact pleaded, one which had just come to the knowledge of the party pleading it.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended, by giving to the assignee of *Kohn, Daron & Co.* a preference over *Mrs. Cutter*, in the distribution of the assets under this account of administration, only for the following notes, with interest, till paid, and costs, viz: two notes, \$460 each, interest from 4th of May, 1843; two notes, \$460 each, interest from 4th of August, 1843; two notes, \$460 each, interest from 4th November, 1843—subject to a credit of \$1,346 paid on the 31st of July, 1854; that the two notes of *William Regan* of \$466 28 and \$468 50, with interest and costs upon the same, held by the assignee of *Kohn, Daron & Co.*, be postponed in rank of distribution of those assets to *Mrs. Cutter's* claim, as allowed by the judgment appealed from; and that in all other respects the said judgment be affirmed; the costs of the court below to be paid by the succession, those of the appeal of *Mrs. Cutter* by the appellees, and those of the appeal of *Widow Regan*, administratrix, by the said appellant.

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SAME CASE ON A RE-HEARING.

**BUCHANAN, J.** The claim of *Miller's* syndic, allowed by the judgment of the District Court, is for the amount of a judgment against *Regan*, rendered the 20th of December. But it was proved on the trial of the oppositions to the account of administration in the court below, that the said judgment had been fully paid in the hands of *Miller's* syndics, on the 29th of April, 1843, by one *Brindy*, with funds furnished by *William Regan*, the judgment debtor. This claim should, consequently, be rejected.

The administratrix offered a plea of payment against the claim of *Kohn, Daron & Co.'s* assignee, on the same day (July 13th, 1855) that she offered a similar plea against the syndic of *Miller*; and offered at the same time evidence to sustain the plea. But the assignee of *Kohn, Daron & Co.* having objected, the court ruled out the plea of payment and the evidence in support of the same, on the ground that the evidence was closed and the argument commenced.

The plea of payment alleges, that the facts set forth in said plea had been discovered by the administratrix for the first time on the 7th of July, 1855. In our decision heretofore pronounced, we considered that this interval of six days, between the discovery of the fact of payment and its being brought to the notice of the court, excluded the party from the right of interrupting the argument of the cause, in order to place a new issue before the court.

In his petition for a re-hearing, the counsel of the administratrix has brought to our attention from the record, that on the 7th of July, the day of the alleged discovery, the cause had been on trial for many days, and had been continued over for want of time, from the 6th of July to the 10th of July; on which day (without anything being done) it was continued over until the 13th of July, and that it was not finally submitted to the court until the 14th of July.

A review of these proceedings inclines us to doubt the correctness of our first impression, that the administratrix had been remiss in bringing the fact of

payment to the notice of the court as soon as practicable after its discovery. The plea of payment is highly favored in our practice; and the length of time that elapsed between the rendition of the *Kohn, Daron & Co.* judgments and the death of the judgment debtor, without those judgments having been pressed, is a circumstance, as the counsel of the administratrix argues, that may be explained by the evidence offered at this late hour. The argument on the other side is, that the judgments have been admitted in various accounts of administration, as valid claims against *William Regan's* succession. So was *Miller's* judgment; yet the proof of the satisfaction of that judgment, under the plea filed (without objection) at an equally late day, is perfectly conclusive. Courts always lean to the correction of an error that works injustice; and the strict rules of practice may, with more propriety be relaxed, where the parties litigant are not the original contracting parties. This cause abounds with incidents out of the ordinary line of events. It would seem that it was *Regan's* policy, about the time of the judgments in question, to appear more in debt than he really was. And it is not at all surprising, that his widow and the female children of his first wife, should have been ignorant of the true state of his affairs, and should have taken for granted that claims avouched by judgments, were valid subsisting debts of the succession of their husband and father. The party who is urging the claim of *Kohn, Daron & Co.*, is also acting in a representative capacity, and may well be supposed ignorant of the facts, which are the subject of this rejected plea.

We think the ends of justice require that the administratrix have an opportunity of establishing the defence thus offered by her.

The judgment heretofore rendered by this court upon these two appeals, is therefore avoided and annulled; and it is now adjudged and decreed, that the judgment of the District Court, so far as relates to the claim of *Mrs. Fanny Cutter*, be affirmed; that as regards the syndic of *John F. Miller* and the assignee of *Kohn, Daron & Co.*, the judgment appealed from be reversed; that upon the claim of *Miller's* syndic, there be judgment in favor of the succession of *Regan*, and against the syndic of *Miller*; that as regards the claim of the assignee of *Kohn, Daron & Co.* the cause be remanded, with instructions to the District Court to allow the administratrix to file the answer and plea by her tendered on the 13th July, 1855, and in other things to be proceeded in according to law; and that the costs of appeal be paid by the appellees, the syndic of *Miller*, and the assignee of *Kohn, Daron & Co.*

#### LAFOURCHE AND TERREBONNE NAVIGATION CO. v. JOHN COLLINS.

Where the mandatary has made no agreement for a compensation for his services, and it cannot be inferred, either from the nature of the employment or the relation of the parties, that it was in contemplation of both parties that the mandatary should receive compensation for his services—it is a case of a gratuitous procuration, and the mandatary is not entitled to compensation.

C. C. 2960.

APPEAL from the District Court of the parish of Lafourche, *Cole, J.*  
*Beatty & Bush*, for plaintiff. *Connelly & Righter*, and *Clifford Belcher*, for defendants. Both parties appellants.

NAVIGATION Co.  
v.  
COLLIER.

LEA, J. This suit is brought to recover from the defendant the sum of \$30,000, being an alleged balance due by said defendant for moneys received by him as the mandatary and treasurer of the plaintiff, of which moneys he has refused to render an account.

The defendant avers that on or about the 26th March, 1848, he was appointed by the said company their general agent for the receiving and forwarding of freight and the transaction of its other business in general, without any agreement as to the rate of compensation for his services; that since that time he has devoted much time and labor to the concerns of said company, which services are worth \$2000 per annum. Defendant moreover avers that he has paid and expended for the benefit of said company sums amounting in all to \$50,000, for which amount, together with his compensation for the services above mentioned, he claims judgment in reconvention. The defendant rendered an account, which was examined by an auditor whose report was homologated without opposition, the auditor having declined to pass any opinion upon the correctness of the defendant's claim for remuneration for services.

The balance reported by the auditor to be due to the plaintiff by the defendant, viz: \$5479 45, was adopted as the basis of the judgment of the court, and upon the reconventional demand the court allowed the sum of \$4200, as a compensation for the services referred to in the petition. Both parties have appealed, the defendant averring that the amount allowed is an inadequate compensation, and the plaintiff contending that the defendant is entitled to no compensation whatever. No other question is presented on the appeal except that having reference to the claim for compensation. The District Judge has made a careful analysis of the testimony having reference to the value of the services of the defendant, and has fixed their value at \$700 per annum, and if the case were one in which any compensation should be allowed we would consider this as probably a just valuation. On the other hand, we are relieved by the pleadings themselves from all difficulty in determining the nature of the contract, out of which this litigation arises. The defendant in his answer avers that he was appointed the *general agent of the company* for the receiving and forwarding of freights and the transaction of other business in general "without any agreement as to the rate of compensation for his services." The relation of the defendant to the plaintiff was, therefore, that of a mandatary who has made no agreement for a compensation for his services; a case coming within the application of the 2960th Article of the Civil Code, which says that "the procuration is gratuitous unless there has been a contrary agreement." Though this language is comprehensive and almost positive in its terms, many cases have been recognized in our jurisprudence as constituting exceptions to the rule; such, for instance, as those in which the services of the mandatary are rendered in the course of an employment or profession where it is customary to make charges for such services; thus, lawyers, brokers, commission merchants, land agents, &c., though mandataries, are not presumed, even in the absence of any special agreement for compensation, to render their service gratuitously. It has even been held also, and we think correctly, that where the relations of the principal and agent were such as to justify the conclusion that there was an *understanding* between them that the services should be remunerated, the mandatary might recover the value of his services. It was upon this doctrine exclusively that the decision in the matter of *Fowler's Succession* was placed. The language of the court in referring to this point is as

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follows: But we do firmly believe from their relations and the evidence that the one intended and the other expected that, if their relations terminated, a very liberal reward would be made for those services;" see 7 An. 211: in other words, a contract is presumed or inferred from the nature of the employment and the relation of the parties.

But, can any such implied contract be inferred in the case at bar, either from the nature of the employment or the relation of the parties? The character of the employment was that of a general superintendent of the affairs of a company of which the defendant was a corporator and a director. It is not shown that it is customary to pay agents of this kind, and from almost all the facts of the case, as disclosed by the evidence, we should infer that a direct pecuniary remuneration was not intended or expected by either of the parties.

To none of those employed in the service of the company, not even to his own partners, did the defendant ever intimate any expectation of compensation. Witnesses well acquainted with the affairs of the defendant state, that the relation of the defendant to the company, as their general agent, was attended with advantages in his business which might of themselves be considered a sufficient compensation. Again, the defendant himself, who had no motive to withhold any claim against the company, as was the case with the curator of *Fowler's Succession*, does not appear to have made any charge against the company on his own books, or on those of the company; and yet he was six years in their employ without ever asserting a claim to any compensation for services which he alleges were worth \$2000 per annum.

Upon the whole, we see nothing in the evidence which would justify us in inferring from the relations of the parties, that there was an *understanding* between them that the defendant should be paid for acting as the general agent of the company.

The case at bar has no relation or analogy with one in which a claim upon a contract for services or labor is made, as upon a *quantum meruit*; in such case the *contract* for compensation is the basis of the action, and there exists no presumption of law in reference to such a contract, as in the case of mandate, that the services are gratuitous; neither is the defendant's claim analogous to the demand of a *negotiorum gestor* for a reimbursement of all necessary expenses made by him on account of another, for the management or preservation of his property. If the Article of the Code is to be so construed as to have any practical application, it is evident that a mandatary seeking compensation for services rendered in his capacity as such, must bring his claim within the scope of some exception to the general rule that the contract is gratuitous, and must show that his demand is made under circumstances from which it must be inferred that compensation for his services was in contemplation of *both parties* at the time the mandate was conferred.

It is ordered that the judgment appealed from be reversed, and that the plaintiff, the Lafourche and Terrebonne Navigation Company, do have and recover of the defendant, *John Collina*, the sum of \$5179 45, with interest thereon at the rate of five per cent. per annum, from judicial demand till paid, and costs of suit, and that the costs of the auditor be taxed at \$150. It is further ordered that the demand in reconvention set up by the defendant be rejected, and the costs of this appeal be paid by the defendant *Collina*.

NAVIGATION CO.  
v.  
COLLINA.

## FERNANDO AGUILAR v. LUCIEN BOURGEOIS.

The mere designation of the Recorder's office, as the place where the note is to be paid, does not authorize the payment of it to the Recorder himself.

Without a special authority to the Recorder to collect it, the money left with him is to be considered a deposit and at the risk of the depositor. The fact that the creditor endeavored to collect from the Recorder the money which had thus been deposited for him does not imply that he considered the deposit as a payment, nor bar his recovery from the debtor.

**A** PPEAL from the District Court of Terrebonne, *Cole, J.*  
*Goode & Aycock*, for plaintiff and appellant. *Connelly & Righter*, for defendant.

**LEA, J.** This is an action on two promissory notes drawn by the defendant, which were given as the price of a tract of land sold by the plaintiff to the defendant on the 23d of October, 1854. One of these notes, viz: the one for \$400 was made payable in all March, 1855, and the other for \$225 was made payable in all March, 1856.

By a clause in the act of sale, it was expressly stipulated "that the note for \$400 was to remain *deposited* in the office of the Recorder of the parish of Terrebonne, until such time as the said vendor will cause to be cancelled certain judicial mortgages existing against him, and when he shall have complied with all the above conditions and agreements, then the *said note shall be returned to him.*"

The plaintiff avers that the mortgages referred to in the stipulation above referred to have been erased, and that he has obtained possession of the above described note, upon which he now brings suit.

It is needless to recapitulate all the matters set up in defence to the plaintiff's action; the only matter at issue, as the case is presented to this court, being whether the defendant is liable on the note for \$400. As respects this note, the defendant avers that "the same has been fully paid and satisfied; that as soon as the same became due and exigible, viz: on or about the first of April, 1855, respondent repaired to the office of the Recorder of the parish of Terrebonne, in whose possession the said note had been left, and at whose office the same was payable, and plaintiff not being there to receive payment, respondent paid the same to *J. Adrien Leblanc*, the then legally qualified Recorder of the parish of Terrebonne, who was fully authorized to receive said payment. That the plaintiff was duly notified of said payment, and frequently demanded payment of said Recorder, and never called upon the defendant for payment until after the death of *Leblanc*, who died insolvent."

No exception having been taken to the prematurity of the plaintiff's demand, and the plea being *payment*, our inquiry is confined exclusively to the validity of this alleged payment. And first we will remark, that a mere designation of the Recorder's office as the place where the payment of the note was to be made by no means authorized a payment to the Recorder himself. The Recorder was not a banker, nor is it shown that the note was left with him for collection. On the contrary, the stipulation in the act of sale would indicate that a payment of the note at maturity was not contemplated by the parties, unless certain judicial mortgages were erased, and in case the mortgages should be erased, then it was provided that the note should be given up to the plaintiff.

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ANGULIER  
v.  
BOURGEOIS.

The Recorder retained the note for the security of the defendant, not of the plaintiff, and if he is to be considered as standing in the relation of mandatary towards either of the parties, it must be the defendant, not the plaintiff.

Again, the endorsement upon the note made by the Recorder at the time he received it, shows that he did not consider it as deposited with him for collection. It is as follows: "Deposited for safe keeping for *F. Aguilar*, until he releases the mortgage on the land sold."

Indeed we should infer from the terms of the bill of sale and the acts of the parties, that the note was not to be intrusted to the plaintiff at all until he had complied with the stipulation respecting the mortgages. A delivery of the money under such circumstances to the Recorder must be considered as a deposit, not as a payment, and, as such, was at the risk of the depositor. C. C. 2136.

Indeed, so far was the defendant from considering the deposit as a payment to the plaintiff, that at the time it was made the defendant left express instructions with the Recorder that it was "*not to be paid to Mr. Aguilar till Mrs. Malbrou's renunciation had been procured.*"

But it is contended that the plaintiff himself has ratified the validity of this deposit as a payment. The plaintiff certainly made repeated and ineffectual efforts to collect the amount from the Recorder, and he is shown to have spoken of this deposit as "his money in the Recorder's office." There is nothing, however, in such conduct and language which implied that he considered the deposit as a payment, or that he intended to release the defendant.

The case of *Breen v. Schmidt*, 6th Annual, though applicable so far as it relates to the principles announced, did not present a similar state of facts with that now under consideration. The judgment for the defendant in that case was placed exclusively upon the ground, that the plaintiff had instructed the defendant to make payment to the notary of the first instalment upon the purchase of a lot. It was held that by so doing the defendant *consented* to consider the delivery of the money to the notary as a payment.

In a subsequent case, of *Brown* against the same defendant, it was held that as a general rule such a delivery of money to the notary was a deposit, not a payment. See 7 An. 349.

We find no evidence in the record of a consent on the part of the plaintiff to consider the delivery of the money to *Leblanc* as a payment of the note.

It is ordered that the judgment appealed from be reversed; that the plaintiff, *Fernando Aguilar*, do have and recover of the defendant, *Lucien Bourgeois* the sum of \$625, with interest at the rate of eight per cent. per annum on \$400 thereof from the 1st day of April, 1855, till paid, and with like interest on \$225 thereof from the 1st day of April, 1856, till paid, with costs of suit, and that the plaintiff's right of special mortgage, stipulated in the act of sale referred to in the petition, be recognized, together with the privilege of said plaintiff as vendor upon the property described in the petition, and that the same be sold to satisfy the plaintiff's claim, and the proceeds applied to the payment of the plaintiff's demand, with privilege and preference as aforesaid. It is further ordered that the costs of this appeal be paid by the defendant and appellee.

## P. F. HELLUIN v. W. J. MINOR.

When a patent from the United States issued to the assignees of parties who had purchased land of land from the United States, and obtained the Receiver's receipt for the same, the title will not be invalidated on the ground that the act of transfer from the original purchaser from the United States to the patentees expressed that it was made for *value received*, without mentioning the price.

The assignment was executed in the form recommended by the Land Department of the United States, and the patentee is the holder of the legal title.

**A**PPEAL from the District Court of Terrebonne, *Cole, J.*  
*A. Gentile and Malhiot & Mills*, for plaintiff and appellant. *Goode & Aycock*, for defendant.

MERRICK, C. J. *Basile Richard* and *Joseph Richard* having a claim by pre-emption to the tract of land in controversy, under the Act of Congress approved 19th June, 1834, reviving the Act of 29th of May, 1830, relative to pre-emptions, on the 23d day of June, 1843, obtained the Receiver's receipt for the same. On the 27th day of the same month, they executed an act in the following words, viz :

"For value received, we, *Basile Richard* and *Joseph Richard*, of the parish of Assumption, State of Louisiana, do hereby assign, transfer and set over, unto *Van Perkins Winder*, of the parish of Terrebonne, and *Wm. J. Minor*, of Natchez, Miss., all of our right, title, claim and demand, to a tract of land purchased by us on the twenty-third day of June, 1843, as per Receiver's receipt No. nineteen hundred and ninety-four, designated as the \_\_\_\_\_ of section No. eighty-three, in township No. seventeen, of range No. seventeen, East, situated in the district of lands subject to sale at New Orleans, and request that a patent may be issued to the said *Van Perkins Winder* and *Wm. J. Minor*, their heirs or assigns.

"Witness our hands, this twenty-seventh day of June, 1843.

His  
 "BASILE + RICHARD.  
 mark.

His  
 "JOSEPH + RICHARD.  
 mark.

"Acknowledged before me, this twenty-seventh day of June, 1843.

"A. M. FOLEY,

"Justice of the Peace of the parish of Assumption.

"MARCELLIN RICHARD, Témoin."

A patent issued to *Van Perkins Winder* and *William J. Minor*, as assignees of *Basile Richard* and *Joseph Richard*, on the 27th day of December, 1843. *Minor* purchased the interest of *Winder*.

The present suit was commenced against the defendant *Minor* in April, 1853, in the usual form of petitory actions. The plaintiffs set up the certificate of the Register of the Land Office in favor of *Basile* and *Joseph Richard*, and alleged that a patent issued to said *Basile* and *Joseph Richard* for the same.

They further allege that *William Minor*, in the year 1846, unlawfully and in bad faith, took possession of the land.

The defendant, among other things in his answer, set up the transfer from

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the two *Richards*, the patent to *Winder* and *Minor*, and transfer from *Winder* of his interest to *Minor*.

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Judgment was rendered in favor of the defendant, and plaintiff appealed.

The plaintiffs state the controversy as follows:

"The issue then," they say, "involved in this suit, regarding the respective titles of the plaintiffs and defendant, is whether *the Richards' title has passed to the defendant?* Defendant avers it has, in virtue of the assignment of the *Richards* to himself and *Winder*, and the patent issued to them as the assignees of *Richards*."

In this statement of the case, it is evident that plaintiffs' counsel have assumed that the Register's certificate and Receiver's receipt are the title. Now, as between the holder of the Register's and Receiver's receipt and the patentees, the question might be much more pertinently asked, which party holds the legal title? the General Government, we believe, has uniformly held that the patentee is the holder of the legal title. § An. 87. If so, the defendant's title must prevail, unless there are equities to defeat it.

But the defendant has exhibited his title, and he claims in virtue of a transfer from *Basile* and *Joseph Richard*, and if the assignment were invalid, it is possible that in a proper case it might be decreed that the patentees being without equity should hold for the benefit of the equitable owner.

In this case, however, the plaintiffs have not in their petition attacked the transfer or patent by alleging that they were improperly and fraudulently obtained, and the plaintiffs cannot, in this suit, raise the question, except perhaps by showing that the transfer made by *Basile* and *Joseph Richard* to *Winder* and *Minor*, when produced, is absolutely null and void upon its face. The plaintiffs contend that it is thus absolutely null upon its face.

The act was executed in the form recommended by the Land Department at Washington, after the passage of the Act of January 23d, 1832, authorizing the assignment or transfer of the certificate of purchase or final receipts of settlers under the Act of 1830, and authorizing the issuance of patents in the name of the assignee. Statutes at Large, vol. 4. p. 495.

The plaintiffs contend that if the Act referred to be considered a sale, it is void for want of a fixed and determinable price, (C. C. 2414, 2439;) if it be considered as a donation, the assignment is void, not having been passed before a notary public and two witnesses. C. C. 1523.

There cannot be any doubt that our courts would consider the instrument invalid as a donation, and it may not be (technically considered) a sale under the Civil Code; but it does not necessarily follow that the contract itself, after its execution, is to be considered as void because it cannot be classed under the contract of sale. Trop. Vente, No. 148.

An illustration of this occurs where a planter or a head of a family sends his servant for, or orders himself in person, without agreeing upon the price, such articles of merchandize at a store where he has a credit as he may need. The dealer charges the goods upon his books at such prices as he deems just. Here no price is agreed upon, and at most it can only be implied that the planter will pay a price equal to the value of the goods at the end of the year or period of credit. Now, although there has been no fixed price agreed upon, the planter, after having consumed the goods or injured the same by wear, would not be listened to for a moment in a court of justice, with a plea that in the delivery to him of each article there was no contract of sale, because there was no price

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agreed upon, as required by Article No. 2439 of the Civil Code. The court would at once conclude that the property in the goods, by a contract analogous to the contract of sale, had vested in the one party, and the value of the goods was due to the other party, and that if the contract was not a sale, it was an innominal contract, not the less obligatory.

So in the contract before us. We find it has been executed. The vendees have received what they considered the value of the land; the vendees have received what was contemplated, a patent, and with it the possession of the soil.

Now, as this instrument was made to conform to the instructions of the department at Washington, where it was to produce its principal effect, we think we may safely infer from the language used, "for value received," that the price was agreed upon and paid, or its equivalent given in exchange. A contract is not invalid because the cause has not been properly expressed. *O. C.* 1894. As the contract was not attacked by the pleadings, the defendant was not bound in the present case to administer proof of the real price, the consideration of the sale.

Judgment affirmed.

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RUFUS K. HOWELL v. ANDREW E. CRANE.

When one has acquired a negotiable note after its maturity, he will, notwithstanding, be protected as an innocent holder if the immediate party who transferred the note to him took it by endorsement *bona fide* for value, before it was due.

**A** PPEAL from the District Court of the parish of St. James, *Ratliff*, Judge of the Seventh District, presiding. *C. A. Johnson*, for plaintiff. *Beroult & Legendre*, for defendant and appellant.

**SPOFFORD, J.** This is a suit by the holder of a negotiable promissory note against the maker.

The defence is, that the maker has been disquieted in his title and possession of the slave for which the note was originally given by him to the payee, and that he is entitled to set up this defence because the plaintiff acquired the note after its maturity.

It is probably true that the plaintiff acquired the note after its maturity; but there is no other reason for suspecting his good faith. And it is proved that the endorser, from whom he acquired it, took the note from the payee and first endorser long before its maturity, in good faith, and for a valuable consideration.

Under these circumstances, the plaintiff succeeds to the rights of the endorser under whom he holds; and the equities pleadable, as against the payee, are not open to inquiry in this action.

"If the immediate party transferring an overdue bill might have sued thereon, as, if he took the bill by endorsement, *bona fide*, for value, before it was due, the holder is invested with his rights." *Chitty on Bills*, ch. 6, p. 244. See also 3 *Kent Com.*, \*p. 92; *Story's notes*, §178; *Chalmers v. Lanier*, 1 *Camp.* 383.

Judgment affirmed.

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## WILLIAM SPENCER v. HENRIETTA AMIS, Executrix and Tutrix.

A judicial mortgage affects the debtor's slaves attached to a plantation in a parish where the judgment was not recorded, from the date of the registry in the parish of the debtor's domicile. C. C. 3215, 3225, 3217, 3226, 3217.

**A**PPEAL from the District Court of Madison, *Farrar, J.*  
*Alexander Steele and J. B. Lyman*, for plaintiff and appellant. *Stacy, Sparrow & Snyder*, for defendant.

**VOORHIES J.** This is an hypothecary action based on the following state of facts: On the 12th of June, 1843, *Goodwin, Fisher and Spencer* obtained for the use of the plaintiff a judgment against *L. A. Collier* in the Ninth District Court of this State for the sum of \$1916 80, with eight per cent. per annum interest thereon from the 7th of October, 1841, until paid, and costs of suit, which judgment was duly inscribed in the office of the Recorder of Mortgages of the parish of Concordia, the domicile of *Collier*, and reinscribed in the same office on the 19th of June, 1853. *Collier* then owned and possessed a plantation in the parish of Concordia, where he continued to reside until January, 1844. On the 16th of March, 1841, he acquired by purchase at Sheriff's sale a plantation and slaves in the parish of Madison, which he continued to own and possess until the 9th of January, 1844, when they were sold by the Sheriff, under an execution against him, to *Amis and Featherston* for the price of \$25,866 66. The interest of *Featherston* therein was subsequently conveyed to *Junius Amis*, who died in 1852, leaving a widow and several minor children as his legal heirs. After satisfying the writ against *Collins*, and making an allowance for the value of a portion of the property from which *Amis* was evicted subsequent to the sale, there remained a surplus of \$13,739 66 in the hands of said *Amis* to pay the debts of *Collier*. Out of this surplus, *Amis* applied the sum of \$11,000 to the payment of the claim of the Planters' and Commercial Bank of Natchez, secured by a mortgage originally given by *Hunter & King*, from whom *Collier* derived his title under the Sheriff's sale, leaving still in his hands, as cash, a balance of \$2739 66, on the 9th of January, 1844. Other mortgages existed on the property; but it is evident could not affect the plaintiff's rights, as more than ten years had elapsed since their inscription, and they do not appear to have been reinscribed.

The admission of the parties shows, that the slaves, on which the plaintiff seeks to enforce his judicial mortgage, have been employed in cultivating the plantation acquired by *Collier* at Sheriff's sale, in the parish of Madison, ever since the year 1841; and that said plantation and slaves belonged to the community of acquets and gains which existed between the late *Junius Amis* and his surviving spouse, *Henrietta Amis*, natural tutrix of her minor children, issue of their marriage.

It is contended by the defendants that the inscription of the judgment against *Collier* in the parish of Concordia, the place of his domicile, could not affect his slaves attached to his plantation in the parish of Madison, that in order to have effect, such inscription should have been made in the latter parish, where the plantation is situated; whilst on the other hand it is insisted that no mortgage unless recorded in the parish in which *Collier* had his domicile could affect his

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slaves, and hence the plaintiff's mortgage was entitled to precedence even over the execution under which the slaves were sold to *Amis* in 1844.

The Civil Code, Article 3318, declares: "The inscription of mortgages only binds the property of the debtor, when it has been made, with regard to immovables, in the office of mortgages for the parish where the property lies; and with regard to slaves, in the office of mortgages for the parish where the debtor has his domicile or usual residence. If the debtor has immovable property lying in more than one parish, the inscription ought to be made in the office of mortgages for each of them." See also C. C. 3328, 3317, 3296.

Under this Article, in order to bind slaves, it is perfectly clear that the inscription of a conventional or judicial mortgage must be made in the office of mortgages for the parish where the debtor has his domicile or usual place of residence. But it is insisted that the exception to this general rule exists in cases where slaves are attached to and permanently employed in the cultivation of a plantation; and have become immovables by destination or operation of law.

The Articles of the Civil Code on which the defendants rely, do not, in our opinion, warrant such a conclusion. In the division of things in the Civil Code, "slaves, though movables by their nature, are considered as immovables by the operation of law." (Art. 461). Thus classed, independently, it is evident that they cannot be considered as falling within the scope of Article 459, or the category of things which become immovables by destination: Article 459 applies, we think, exclusively to movables placed by the owner for the service and improvement of a tract of land, and to such also as are attached permanently to the tenement or to the buildings thereon erected. A distinction between immovables and slaves in relation to mortgages appears to be carefully observed in our different statutes upon the subject, and cannot be disregarded by us. Moreover, the proposition assumed by the defendants is sought to be deduced merely from inference and, as we conceive, in opposition to the clear letter and spirit of the law.

It is proper to observe that the only question strictly before us is, whether a judicial mortgage affects the debtor's slaves in another parish from the date of its registry in the parish of the debtor's domicile, and we hold that it does. There is no conflict of mortgages here; and we are not called upon to say whether a vendor's privilege might not override this judicial mortgage by registry in the parish where the plantation to which the slaves belonged was situated, under the following Article of the Code: "The privilege granted to the vendor on the immovable sold by him extends to the *slaves*, beasts, and agricultural implements attached to the estate and which make part of the sale." C. C. 3217.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed, that the plaintiff's judicial mortgage on the slaves described in his petition be recognized as valid, and that in default of the payment of the judgment in his favor against said *L. A. Collier*, including principal, interest and costs, said slaves be seized and sold according to law to satisfy the same, and that the defendants and appellees pay the costs of both courts.

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## W. C. AULD v. J. B. WALTON.

Whoever may have been the authority of a Commissioner of Election to inquire into the evidence of citizenship of a voter, prior to the passage of the Act approved the 20th of March, 1856, entitled "an Act providing for the Registry of the names and residence of all the qualified electors of the city of New Orleans, according to Article eleventh of the Constitution of the State," he has no such power as the law now stands.

By the said Act of March 20th, 1856, an officer is created having authority to receive and consider the proof of citizenship of any person desirous of exercising the elective franchise in New Orleans, and proof being made according to certain rules and forms of evidence set forth in the statute, to enregister the name of the applicant as a qualified elector, and to deliver him a certificate.

This certificate is, by law, full proof of the right to vote at the day of its date of the person named in it, and no person can vote in New Orleans who is not the bearer of a certificate of registry.

The office of Register, under the statute, is a special tribunal for the trial of the right to vote in New Orleans; and the certificate is in the nature of a judgment, which is not subject to revision by the Commissioners of Election.

These judgments of the Register are, however, subject to revision. The 9th section of the Act provides a mode of redress, by a suit against the Register, for an applicant to whom the Register shall refuse a certificate. And the validity of the certificate, and the sufficiency of the proof upon which it was based, may in all cases be examined upon the contest of an election, by the tribunals seized of the jurisdiction of such contest.

Where the registry of the vote is more than three months old, and there is no change of domicile endorsed upon the certificate, the vote may be challenged upon the ground that the voter has changed his domicile since the date of the registry, and by such change of domicile has lost his vote in that precinct. Upon such challenge being made, the Commissioners of Election may lawfully swear the voter as to the fact of his change of domicile.

**A**PPPEAL from the First District Court of New Orleans, *Robertson, J.*

*Benjamin, Bradford & Finney and George S. Lacey, for plaintiff and appellant. Randell Hunt and L. M. Day, for defendant.*

**BUCHANAN, J.** On the 5th of November, 1855, a general election was held in the city of New Orleans for the choice of State and parish officers by the people. The votes were received at twenty-three distinct election precincts, fixed by the common council of New Orleans, in conformity to section sixth of the Act relative to Elections, approved March 15th, 1855.

The following were the officers to be elected: Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Attorney General, Superintendent of Education, Representatives in Congress, State Senators, Representatives in the State Legislature, Sheriff, Coroner, District Attorney, Clerks of Court, Assessors, Tax Collectors, Justices of the Peace and Constables.

The districts of election for some of these officers included all the precincts, for others but a portion of them; but in each and every precinct, one or more officers of each of the above denominations was to be voted for (among them, six Clerks of Court), and in two ballots: the vote for Justice of the Peace and Constable in one, and the vote for any or all of the other officers named in another; two ballot boxes being furnished, as directed by law, to each election precinct for the reception of the votes; one box in which to deposit the votes received for Justice and Constable, and one box for the votes cast for the other officers voted for.

At all of the twenty-three precincts the votes were received up to the hour fixed by law for closing the poll; when the ballot boxes were opened and the three Commissioners of Election, assisted by the two Clerks appointed and

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sworn in each precinct, proceeded to count and record the votes polled for each candidate. In twenty-one out of the twenty-three precincts, the counting was completed and recorded, and the result ascertained without any obstruction. But at two of the precincts, the seventh and ninth, after the counting of the votes had commenced and before it had been completed, the polls were invaded by mobs, who snatched from the hands of the Commissioners of Election the ballot boxes and ballots, and from the hands of the Clerks of the election the lists of voters and the tallies which they were occupied in keeping, and consigned ballots, ballot boxes, lists of voters and tallies, to an indiscriminate destruction.

Returns of the votes polled in all the precincts, except the seventh and ninth, were made to the proper returning officer. From the seventh precinct no returns were made. From the ninth precinct, there was a return of the vote for Justice of the Peace and Constable, but no return of the vote for the other officers.

Among the officers which it was the purpose of this election to fill, was that of Clerk of the Fourth District Court of New Orleans. The only candidates for that office were the plaintiff and the defendant, the nominees respectively of the *Democratic* and of the *American* parties. The returns of the twenty-one precincts, at which the vote was fully counted, as certified by the Commissioner to the Sheriff, and by the Sheriff to the Secretary of State, gave collectively to *Mr. Walton*, the defendant and the "*American*" candidate, a majority of two hundred and two votes over his opponent *Mr. Auld*, the plaintiff, candidate of the "*Democratic*" party; and the present action is a contest of defendant's right to the office, according to the forms and within the delays prescribed by the Act of 15th March, 1855, relative to elections.

The petition of the contestant, *Mr. Auld*, sets forth the following grounds of contestation :

1st. "At the seventh precinct there were polled, in my favor, legal votes sufficient to give me a majority of at least two hundred and twenty votes at said precinct, which votes have not been returned to the Sheriff by the Commissioners, for the reason that before the Commissioners had finished counting all the votes given for the several candidates at said precinct, and before they had been able to make up their returns, the room in which said Commissioners were employed in counting said votes and making up said returns, was violently invaded by a band of lawless men, who destroyed the ballot boxes, the votes, the lists of voters, and the other papers and documents of the said Commissioners, although the count had progressed sufficiently far, of the vote cast for the said office of Clerk of the Fourth District Court of New Orleans, to enable said Commissioners and their Clerks to ascertain that there was a majority of at least two hundred and twenty votes of legal voters in favor of myself.

2d. "At the ninth precinct there was a large majority of legal votes given in my favor, the exact number of which I cannot specify, which votes were not returned in my favor by the Commissioners, because they were hindered from counting said votes and making the returns thereof, by the violent interruption of a band of lawless men, who destroyed the ballot boxes with their contents, and the list of voters, so as to render it impossible for the said Commissioners to make the returns required by law.

3d. "At the twelfth precinct there was an error in counting the votes in the ballot boxes, and in making the returns of the count, which error resulted to my injury and disadvantage to the amount of twelve votes.

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4th. "At all of the precincts in the city except the fourth, a large number of legal voters, who tendered their votes in my favor, were rejected by the Commissioners and their votes refused, because they did not produce their certificates of naturalization, which the Commissioners arrogated to themselves the power of demanding, although no such power is granted them by law, and although said voters offered to take the oath required by the fourteenth section of the Act of the 15th of March, 1855, entitled an Act relative to Elections.

5th. "At all the precincts in the city except the fourth, large numbers of legal voters, who tendered their votes in my favor, were rejected and their votes refused, after they had complied with the illegal and unauthorized demand of the Commissioners for the production of their certificates of naturalization, and after taking or offering to take the oath required by the fourteenth section of the Act of the 15th of March, 1855; the said Commissioners giving no reason or pretence for the said refusal, except the illegal and frivolous pretext that they had the right to disregard and consider as null the judgment of courts of record whenever, in the opinion of said Commissioners, said judgments were erroneous.

6th. "That the persons whose names are set forth in the papers hereto annexed, and marked A and B for greater certainty, together with many other persons whose names will be hereafter produced, were on the said day of the election legal voters of the parish of Orleans, and entitled to vote in the respective precincts set forth immediately above their names; and that on the day of said election they did tender their respective votes in my favor, at the respective precincts where they were entitled to vote, and that they were not admitted to vote, and that the votes were refused by the Commissioners, although they offered to take the oath prescribed by the fourteenth section of the Act of the 15th of March, 1855, entitled an Act relative to Elections, and although many of them did take the said oath, and did exhibit also, in compliance with the illegal demand of the Commissioners, their certificates of naturalization duly issued in conformity to law, and that said votes were rejected solely on the illegal and unjust pretext set forth in the fourth and fifth grounds aforesaid.

7th. "That at the third precinct there were three legal votes in my favor; at the eighteenth precinct one legal vote in my favor; at the twenty-third precinct five legal votes in my favor, and at the tenth precinct one legal vote in my favor; all for said office of Clerk of the Fourth District Court of New Orleans; which were delivered by legal voters and received by the Commissioners of said respective precincts, which were not counted by the said Commissioners and not included in the returns, because, by accident or mistake, on the part of some one of the said Commissioners, they were deposited in the ballot box kept for the reception of votes for Justice of the Peace and Constable.

8th. "There was error to my prejudice in adding up the tally lists at all the precincts, the said additions showing a smaller number of votes in my favor, and a larger number in your favor, than would have appeared if the tally lists had been correctly added.

9th. "The grounds above set forth will, when proven, suffice to overcome the majority which I learn will be shown by the returns already made, the said majority being only two hundred and two votes."

The petition concludes by a prayer for citation and for judgment, decreeing that petitioner and not the defendant, *James B. Walton*, was duly elected Clerk of the Fourth District Court of New Orleans.

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Defendant pleaded the general issue, averred that he was the Clerk elect by a large majority, and that his majority would have been much larger had not the Commissioners of Election received votes for contestant of persons not legally naturalized and not entitled to vote.

Upon this issue the parties went to trial before a jury who found a verdict, by a majority of seven to five, "that *J. B. Walton*, the defendant, was duly and legally elected to the office of Clerk of the Fourth District Court of New Orleans."

A new trial was prayed for, which the District Judge refused to allow, ("although inclined to the opinion that the verdict was contrary to the law and the fact,") inasmuch as the forty-fifth section of the Act of 1855, relative to elections, declares that the court shall have no power to grant a new trial in a case of this kind.

The counsel of plaintiff has brought to our notice a contradiction between the English and French texts of this section quoted by the Judge of the District Court. For while the English text reads as stated by the learned Judge, the French text seems to declare directly the reverse. In this contradiction of the two texts, we cannot say the Judge erred in adopting that which most promotes the end which the Legislature seem to have had in view in this statute, namely, a speedy determination of this class of cases.

The cause is now before us on the appeal of the contestant, under the Acts of 1856, pages 9 and 117, with the same latitude of control as was possessed by the jury under the forty-fifth section of the Act of 1855.

Counsel on both sides seem agreed in relation to two general principles of the law of contested elections:

1st. "That the official return is *prima facie* evidence of the legality of an election."

2d. "That the *election* and not the *return*, entitles the party to the office, and that in a suit of this character, the court can go behind the return to ascertain the true canvass." *People v. York*, 14th Barbour's New York Rep.

The burden of proof is upon the contestant (in the words of his ninth ground) "to overcome the majority shown by the returns already made, of two hundred and two votes" against him.

He proposes to do this by two different kinds of evidence:

1st. Of votes received at the polls, but not counted.

2d. Of votes offered at the polls and which ought to have been received, but were not received.

No question is made of the admissibility of the first kind of proof. The argument in relation to it, turns exclusively upon the credibility and effect of statements of witnesses to some extent conflicting.

The second class of evidence offered, involves many and intricate questions of law, but little or no contradiction as to facts.

The principal evidence of the first class is that in relation to the destruction of the ballots at the seventh and ninth precincts, and the state of the vote at those precincts at the close of the polls; and our attention must first be directed to the testimony given by the witnesses upon this subject.

The destruction of those ballots was a crime committed by persons unknown, which both plaintiff and defendant deplore, and in the commission of which there is not the slightest hint of suspicion, in the pleadings or in the evidence, that either of them had any complicity. Both parties admit that a large num-

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ber of votes was received at the two precincts in question. Both parties admit the propriety and necessity of secondary evidence of that vote, to come in aid of the partial returns of election which have been made; and to assure the possession of the office in contest to that candidate who has in truth been elected to fill it. The only dispute on this branch of the case is, whether the testimony adduced has accomplished this object. On the part of plaintiff, it is insisted that the state of the poll at the seventh and ninth precincts is established with sufficient certainty by the evidence. On the part of defendant, it is contended that the data are insufficient for that purpose. As to the occurrences at the seventh precinct, we have the testimony of the three Commissioners, *William Christy*, *Samuel Locke* and *Charles H. Horton*; of the two Clerks of the precinct, *D. Mitchell* and *C. D. Raney*; of the Deputy Sheriff at that precinct, *T. D. Harper*; and of a citizen, *T. J. Hitzelberger*.

All these witnesses agree that the total number of votes received at the seventh precinct from the opening to the closing of the poll was *eight hundred and ninety-four*, except *Hitzelberger*, who does not mention the number.

They all agree that, when the hour arrived for closing the polls the Commissioners opened, first, the ballot box containing the ballots polled for the State and parish officers, other than Justice and Constable, and commenced ascertaining the result of the election, as to those officers, by unfolding the tickets and distributing them into three piles; one pile being composed of printed tickets, headed "Democratic," which had no name erased or written upon them. This is called by the witnesses "the straight Democratic ticket." Another pile was composed of printed tickets, headed "American," which had no name erased or written upon them. The witnesses call this "the straight American ticket." A third pile was formed of "scratched" or "split" tickets.

The important operation of counting the votes was next in order; and as this is the point where the witnesses sunder, it becomes indispensable to trace, step by step, the testimony of each. We take them in the order in which they stand in the record.

*D. Mitchell* says, "*Colonel Christy* counted out, one at a time, without calling the names on the ticket, the number of straight American tickets, amounting to 299, and told me to put that down as the number of straight American tickets. *Mr. Locke*, in like manner, counted the straight Democratic tickets, amounting to 509. The split tickets were called off, the names on each ticket, and tallied by the clerks. On those the different candidates had different majorities. These tickets were then put back in the ballot box, and locked up by *Colonel Christy*. Then they commenced opening the box of Justice of the Peace and Constable, and began to assort the tickets in the same manner as they had done for the others; and they had counted out those for Justice of the Peace and Constable, tickets that had the names of *Mr. Bradford* and *Mr. Agaisse* on them, and they had counted about 140 of the tickets having the name of *Mr. Cuvillier* and *Mr. Kearny*, when the mob came in, took the ballot boxes and the other tickets that were then on the table, also all the tally lists and lists of voters, and carried then out into the street, and that is the last I saw of them."

*Mr. Raney* says, "*Colonel Christy* then proceeded to examine the straight American tickets, counting from one to one hundred. When he got through, my memory does not serve me what the number of the straight American ticket was. In counting the straight American tickets, they were taken out one by

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one from one hat and put into another. When he got to one hundred I put down on my sheet the figure 100, and so on until he got through. After they got through the straight American ticket, *Mr. Locke* proceeded to count the straight Democratic ticket in the same manner as *Colonel Christy* did the straight American ticket, and I kept the tally in the same manner." "My memory does not serve me now so as to state the number of straight Democratic tickets." "The scratched tickets were then called off by *Mr. Locke*, and each name tallied up by the Clerk. After we had got through tallying the scratched tickets, the whole of the tickets, straight American, straight Democratic, and scratched, were then placed back together in the box, either by *Mr. Horton* or *Colonel Christy*. I mean, they were placed in the same from which they had been taken in the first instance, and the box was locked up. We then proceeded to open the Justice box and assort the tickets in the same manner as in the State box, placed them in three different piles, one pile in a hat, one pile in a basket, and one pile in a bucket, the same receptacle which had been used for the State tickets. *Mr. Locke* then proceeded to count the straight Democratic tickets for Justice of the Peace and Constable. They were counted in the same manner as the State tickets. While the Commissioners were counting the Justice's box *Mr. Mitchell* and myself were then adding our tally list to make our report for the State ticket and the vote for each candidate on the scratched ticket together, and the result had been extended. The result for Sheriff and for Governor had been announced. While the Commissioners were counting the Justice's box the mob broke in, blew out the lights, seized the tally sheets, the ballot box, one of the round tables, took them out in the middle of the street, then made a fire of the whole of it. This took place at about half-past eleven o'clock P. M."

*Samuel Locke* says, "After the closing of the polls we proceeded to open the State box. There were two boxes, one for Justice and Constable, and the other for all the officers mentioned in ticket marked B. We proceeded to straighten out and assort the tickets, putting the Democratic clean unscratched tickets into a champagne basket; putting the clean unscratched American tickets into a hat; all tickets that were scratched or not throughout a party ticket, were put into another hat." "I counted the clean Democratic tickets, *Messrs. Christy* and *Horton* looking over me to see that I counted right. There were 509 of them. *Mr. Christy* counted the clean American ticket, I looking to see that he was counting right. There were 299 of them. There were 85 scratched tickets, and one blank ticket. I called off all the names on the scratched tickets. The Clerks kept the tally. *Mr. Horton* looking over me and taking the tickets to see if I called them right. Some of them had the Governor scratched, some the Sheriff, and others other candidates."

"After the ballots had been assorted, counted and tallied, they were all put together in the State ballot box by *Mr. Christy*, who pressed them down to get them in. The box was locked by him, and the key put in his, *Christy's*, pocket, and he remarked that we had done with them, and his plan had been carried out, that is, in counting the ballots instead of tallying each name. We then proceeded to open the Justice's box, straightened out and assorted the tickets in the same manner; and we found three State tickets in these, two American tickets and one Democratic ticket. The Clerks were ordered to add these to the count. The account I have given of the number of votes for each party was made up then, these votes being counted. *Mr. Christy* opened the

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State box, and put then those tickets into it, and put the key back in his pocket. Just previous to adding these three ballots, the Clerks had announced the majority for the Governor and the Sheriff. We proceeded to count the Justice's votes in the same manner as we had done the State tickets; *Mr. Christy* counting the American vote for Justice and Constable, and there were 999 votes, and I was counting the Democratic votes when the mob got in and destroyed them."

*T. D. Harper* says, "After closing the poll the votes were separated, as before stated by *Mr. Locke*; they finished counting; all the State tickets were placed by *Colonel Christy* in a box, and locked up by him; the Commissioners had commenced counting the votes for Justice and Constable. The whole number of votes was 894—567 for *Bell*, 318 for *Hufty*. Heard *Colonel Christy* announce the majority for Sheriff, also *Mr. Locke*. This was about an hour before the mob broke in." "Witness did not add up the tally lists. It was done by the Clerks." "When they had finished counting the three piles of State tickets, they were put by *Colonel Christy* in the State box, were pressed down by him, and the box locked by him with the remark "that is now done with." This box was afterwards opened to put into it the tickets which had been found in the Justice's box. *Colonel Christy* then requested *Mr. Locke* to relieve him, as he was tired, and count the tickets in the Justice's box."

*William Christy* says, "At the closing of the polls, the tickets were divided into three parcels. Those headed 'American' were placed together, and those headed 'Democratic' placed together, and those *scratched* were placed together, with the view of facilitating us in calling off the names of candidates, none of which had been called off except those upon the split tickets. These bundles of tickets were made expressly with reference to their heading. The assorting these tickets and piles was done with great rapidity, and not a name was examined by any of the Inspectors, and so far as I was concerned, I did not examine a single name upon a single ticket thus assorted, nor did any of the other Inspectors to my knowledge. The three Inspectors assorted all of the tickets. Each took a handful of the tickets, examined the heading, and placed each ticket on its proper pile. *Mr. Locke* then counted the number of tickets headed 'Democratic,' and I counted those headed 'American.' The number of each was announced, and I ordered it to be put upon loose sheets of paper by the Clerks. We then proceeded to call off all the names upon the eighty split tickets, and, as before stated, those were all the names that were called off and tallied."

"This arrangement of the tickets into piles was a preliminary step, taken by us merely to facilitate the counting, and was not intended by the Commissioners to be the final counting of the votes. This was done at my suggestion. I did not see the name of *Mr. Auld* or of *Mr. Walton* upon any of the tickets in either pile, except that of the split tickets which was counted. After the distribution of the tickets, I put the American tickets which I had counted back into the ballot box. Those headed Democratic were placed in a champagne basket, and those which were split were placed in a bucket, with the view of a final examination and calling off. While we were counting the votes of Justice of the Peace, and before we had touched the others, the boxes were destroyed. We did not, I am positive, put all the tickets, American, Democratic and scratched, back into the box, and lock the box up. I did not lock the box containing the tickets headed 'American,' nor touch the key. I could not have made a return at any time since the election showing the num-

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ber of votes received by any one candidate at that precinct. The ticket boxes and every scrap of paper that was on the table disappeared in about five seconds after the mob entered, and the last I saw of them they were burning in the street." "The total number of votes cast at that election precinct was, I think, 894. I am not positive, but that is my impression of the number. I do not know how many tickets were said to have been on that pile called 'Democratic' tickets. As the number was placed on paper by the Clerks, by order of the Inspectors, I did not charge my memory with it." "I think there were about 82 scratched votes—between 80 and 90. I have no idea what the relative vote between *Auld* and *Walton* on the scratched ticket was, as the tallies had not been counted by the Clerks and reported by the Inspectors. I heard the names on the scratched tickets called out." "I never on that day officially announced to any person the result of the election as to any candidate, but I did announce the number of votes headed 'American' when I returned them to the box, which number was taken down by the Clerks; but I do not remember what that number was."

Examined on another occasion, *Mr. Christy* says, "The State ticket had been counted before the destruction of the boxes, and divided into three piles, one headed by *Derbigny*, the other by *Wickliffe*, the third the *split* tickets, which last pile was large and had to be tallied and each name called. Witness suggested to the Clerks to go on and carry out and add these tallies whilst the Commissioners counted the votes for Justice and Constable, which was done." "Witness did not, nor did he hear any of the other Judges ask the Clerks if they had finished their tally, and what the result was, before the destruction of the box; but he heard remarked in conversation around him, (does not know by whom, as he was engaged in counting,) that the result would be on the general ticket, about 213 majority for *Wickliffe*, and about 250 majority for *Bell*."

*C. H. Horton* says, "There is no fact or circumstance of that election that I am aware of, by which the actual vote of any of the candidates can be known by me. I have no information about the correctness of the counting of the straight piles of votes, and I do not know what one of the Commissioners conceded as to the correct counting of those piles. I am unable to say anything in regard to *Mr. Auld's* position, or that of any other of the candidates on the tickets relatively." "I am certain that after the tickets had been separated and counted, as described by *Colonel Christy*, they were placed, those headed 'American' in the ballot box, those headed 'Democratic' in the champagne basket, and those that were scratched in the bucket."

Examined on another occasion, *Mr. Horton* says, "The whole of the State tickets had been counted out and tallied by the Clerks. Thinks the Clerks did announce the votes for some of the candidates. Was very busy counting votes from the other boxes. Does not remember how many straight Democratic tickets had been counted. Remembers the straight American ticket was 299. Thinks the number of the straight Democratic ticket exceeded 500."

*T. J. Hitzelberger* says: "Was present at the 7th Ward when the tickets were separated into three parts. Does not know what piles contained 'straight American tickets,' and what contained 'straight Democratic tickets,' nor what contained 'scratched tickets;' but I found it impossible, from the extreme rapidity with which the tickets were passed from the ballot box, to ascertain whether the tickets were straight Democratic tickets or straight American tickets."

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kets. They were headed, however, Democratic and American tickets respectively, and as such counted." "To the best of my recollection, after the separation of the tickets, the American tickets and the scratched tickets were returned to the ballot box, the Democratic tickets being left in the champagne basket. I supervised the counting of the Democratic tickets by *Samuel Locke*, having previously called the attention of Commissioners *Christy* and *Horton* to the necessity of such supervision."

"The tickets were separated, as I understood, with a view to ascertain the approximate result of the election, to gratify public curiosity, and not with a view to an accurate and final result of the election. The separation was made solely to ascertain approximation to the gubernatorial vote."

These copious extracts from the testimony are believed to contain all that the record shows, which is material, in relation to the counting of the vote at the 7th precinct, at the election of the 5th November, 1855.

In connection with the testimony of *Mitchell* and *Raney*, we must not omit, however, to mention that there is in evidence a memorandum which those gentlemen, with a very commendable regard to their duty as sworn Clerks of the election, and to the rights of their fellow-citizens interested in this election as voters or as candidates, made and signed by comparing their recollections of the lists of voters and the tallies which had been destroyed, on the very next day succeeding the election. This memorandum commences by giving the exact vote polled for each of the candidates for the offices of Governor and Sheriff, at the 7th precinct, and proceeds to state the *minimum* majority of the candidates who had obtained the highest votes for each of the other offices included in what the witnesses call the State ticket. In this memorandum it is declared that the plaintiff, *W. C. Auld*, had obtained a majority, at that precinct, of not less than two hundred and twenty votes, for the office of Clerk of the Fourth District Court.

We see no reason to doubt the correctness of this memorandum. It is made by the very men who had been engaged the whole of the preceding day, from nine o'clock in the morning until twelve o'clock at night, in recording the votes received and in tallying the votes counted. It is proved that the vote for Governor and for Sheriff (which two offices excited a more general interest than the others) had been definitively ascertained and announced before the destruction of the ballots and tallies. It is proved that the contest was between two party nominations for fourteen distinct classes of office, besides those of Governor and Sheriff, and to be filled (so far as the vote of the 7th precinct was concerned) by twenty-five individuals, whose names might be, and in most cases were, all included in each ticket polled, in addition to those of the candidates for Governor and for Sheriff. It is proved that, in order to avoid the enormous fatigue and delay of going through every one of nearly a thousand tickets, name by name, (or proclaiming and tallying twenty-five thousand names separately,) the Commissioners at this precinct had adopted a mode of operation which, it is also proved, was followed at the other precincts, which have made returns whose correctness is not disputed, namely: to cull out from the mass of ballots all those of a strictly party character; to distribute such into two piles, according to the party for which they were respectively cast; to put all the ballots which did not contain a complete or unmixed list of the nominees of the parties engaged in the contest, in a third pile; after such distribution of the ballots, to count each ticket in the party piles, as a vote for each nominee of

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the party in whose pile it was found; and only to call off, name by name, the tickets in the third pile, whose mixed character rendered its minute verification a matter of unavoidable necessity. It is proved that this mode of operation, thus adopted, was carried out by the Commissioners at this precinct; that, of the 894 ballots polled and deposited in the "State" ballot box, 509 were assigned to the "Democratic" pile, 299 to the "American" pile, 85 to the "split" or "scratched" pile, and that one ticket was a blank paper; that 509 votes were therefore assigned to each candidate (besides Governor and Sheriff) on the "State" ticket of the Democratic party, and 299 to each candidate on the "State" ticket of the American party; that the "split" tickets were called off, and the votes tallied name by name.

It is proved that, after the count of the "State" ticket, made and recorded in the mode just described, the ballots, or a portion of them, were restored to the "State" ballot box; and the Commissioners proceeded to open the "Justice's" ballot box, and to make a similar distribution into three piles of the ballots polled for Justice of the Peace and Constable, preparatory to a count of the vote for those officers.

It is proved that while the Commissioners were engaged in distributing the ballots for Justice of the Peace and Constable, the Clerks added up, compared, and extended the result of their tallies of the vote for each candidate upon the "State" ticket, as a fact accomplished, and in accordance with the expressed intentions of the Commissioners.

Under these circumstances, when the irruption of the mob had annihilated the record which the law had provided, it was an effort of memory, not a matter of conjecture, on the part of the Clerks of election for the 7th precinct, to establish the exact majority which the highest competitor for each office on the "State" ticket had obtained. They lost no time in taxing their memory for that purpose, and in consigning the majorities to paper, after consultation with each other, before intervening days and nights, and the routine of the ordinary pursuits of life, had effaced or dimmed the freshness of their recollection of the exciting events in which they had participated. Of those events, the tally and its addition were not only the most interesting, as being the consummation to which everything else tended, but were also the events with which the two signers of this memorandum had, of all the actors in the scene, the most intimate connection. They were, emphatically, their own work. And the effort of memory, which reproduced the majorities, were not, in reality, so great as it might seem at first blush. The two Clerks were only obliged to recall the addition of the several names on the eighty-four "scratched" tickets, being less than one-tenth of the whole number of votes cast.

Finally, the two Clerks concur in testifying to the correctness of the memorandum thus made to replace the tallies destroyed. On this subject, *Mitchell*, examined in this cause on the 19th January, 1856, says: "I carried out the tallies on the split ticket. I made a memorandum to the best of my recollection. I cannot recollect the exact majority of each candidate. I made the memorandum the next morning after the election. That memorandum was made by *Mr. Raney* and myself."

[The memorandum was here shown to the witness.] "When I presented the memorandum to *Mr. Raney*, I asked him if his recollection corroborated mine, and if the majorities put down on that paper were correct. I informed *Mr. Raney* that I intended to show the memorandum to *Colonel Christy* and the other Commissioners, with a view to have a return made."

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The witness *Raney* says, on the same point: "Being shown the original memorandum filed in the 6th District Court as document B, says that his signature thereto is genuine. *Mr. Mitchell* and myself met on Tuesday morning after the election. We had a conversation in regard to the majorities. We agreed in regard to the majorities, with the exception of one name, that of *Col. Marks*; and after my explaining to him, he then agreed that I was right. I told him that we had better get together and make out a statement, our memory being then fresh. He then said he would prepare a memorandum of the majority, and present it to me for examination, and on Wednesday morning, after examining it carefully, I signed it, and it is the same memorandum filed in the 6th District Court and marked "B." That memorandum is a correct statement of the majorities for each candidate, according to my recollection at the time. I am positive that the statement in the memorandum is the lowest number, and when *Mr. Mitchell* and I could not agree we took the lowest ebb. I told *Mr. Mitchell* at the time that *Mr. Auld's* majority was twenty votes more than it is given in the memorandum."

The court has marked with satisfaction that no objection was made to the introduction of this parol evidence, to supply the place of the ballots and tallies destroyed. It affords a proof, if any were required, of the detestation which the respectable defendant and his eminent counsel entertain for any attempt, through violence, to pervert or defeat the exercise of the right of suffrage.

The sovereign, in this land, is the people, and the ballot is the expression of the sovereign will. The audacious criminal who lays the hand of violence upon the ballot box, in effect usurps the sovereignty of the country. Wherever, therefore, a case of such attempted usurpation is presented, the tribunals charged with the jurisdiction of contested elections should avail themselves of every legal means within their reach, to ascertain whether the popular will has been expressed through the ballot box; and if so, what it has decreed.

In summing up the evidence of the occurrences at the 7th precinct, a wish to avoid adding to the otherwise, perhaps, excessive length of this decision, has alone prevented us from commenting on the discrepancies in the testimony of some of the witnesses. We have contented ourselves with recapitulating the material portions of their depositions, and giving our carefully considered conclusions. We will observe that some of the apparent contradictions are not, in reality, so much differences of fact as differences of inference from facts; and that, where there exists a real and substantial variance in a matter of fact, the court is bound to attach more weight to a precise and positive affirmation, than to a negation founded upon a memory, either avowedly or obviously defective.

The record contains evidence of a ticket, printed and circulated in considerable quantities on the day of election, which contained the names of "Democratic" candidates for all the State offices, and the "American" candidates for all the parish offices, including Clerks of Courts; also of another ticket, which was throughout "Democratic," with the exception of the Clerk of the Fourth District Court, for which office it had *Walton's* name instead of *Auld*; and it is argued that some of these tickets might possibly have been counted at the 7th precinct as "straight Democratic" tickets. On this point it is only necessary to say, that not a single ticket of either of these descriptions is proved to have been voted at the 7th precinct. We conclude, therefore, that the plaintiff is entitled to count a majority of two hundred and twenty votes, at the 7th precinct, in addition to his vote as certified in the official returns to the Sheriff,

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in evidence. This is sufficient to overcome the majority of two hundred and two votes for defendant, shown by the official returns, and to convert the result of the election into a majority of eighteen votes for plaintiff.

The ballot box was also broken in the 9th precinct, and the ballots, &c., destroyed. In this precinct, differently from what occurred at the 7th, the Commissioners, after the polls were closed, commenced by counting the ballots for Justice and Constable. Having finished that box, and ascertained the result, (of which they have made a return,) the Commissioners opened the "State box," and commenced distributing the tickets into piles, as at the 7th precinct. They had gone so far with this operation as to count and announce 138 "straight American" tickets, which finished that pile. They then commenced counting the "straight Democratic" tickets, and had got as far, according to some, as 100, and according to others, as 160, when a mob rushed in and destroyed ballots, ballot boxes and papers, as at the 7th precinct. The evidence as to the state of the poll at the 9th precinct rests, therefore, very much on conjecture; but we are spared the labor of scrutinizing that evidence, inasmuch as no witness, out of many who have been examined, pretends that *Mr. Walton* had a majority over *Mr. Auld* at that poll. The official return shows a majority of twenty-one for the "Democratic" candidate for Justice of the Peace at the 9th precinct, and the *conjectured* majority of plaintiff over defendant is stated by none of the witnesses at a lower figure, and by most of them at a much higher one.

The great bulk of this monstrously voluminous record is composed of evidence in relation to votes tendered at all the different precincts for plaintiff, and rejected by the Commissioners of Election. In relation to these, it has been argued upon authority, by the counsel of defendant, that under the system of voting by ballot, rejected votes cannot be counted for the candidate who received a minority of the votes actually cast. Did we go into the inquiry of the propriety of the rejection of these votes, we would have to consider and decide a variety of grave and intricate questions of constitutional and statute law, which have been elaborately argued by the learned counsel on both sides, with a research and ability which challenge our admiration. But in the view that we have taken of this cause, it is not necessary that we should express any opinion upon the admissibility or effect of the proof as to the rejected votes. We find that a majority of the votes actually received were cast for the plaintiff and contestant. He is therefore entitled to the office.

It is proper to remark, that the defendant offered no evidence in the court below in support of the allegation of his answer: "That his majority would have been largely increased had not the Commissioners of Election received the votes, for the plaintiff, *W. C. Auld*, of persons that were not legally naturalized and had no right to vote."

And here we might terminate. The settlement of the controversy between these parties demands no more. But the holy mission of restoring tranquility to an agitated community is ours. The Acts of 1856, which have conferred upon this court an appellate jurisdiction in matters of contested elections, give us the authority, and the alarming state of things which this record discloses makes it our duty, to expound what we conceive to be the rules laid down by the legislative will for government of those citizens who may in future be called to fulfil the irksome and invidious, no less than important, functions of Commissioners of Election in New Orleans.

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Whatever may have been the authority of a Commissioner of Election, under the law as it existed on the 5th November, 1855, to inquire into the evidences of citizenship of a voter (upon which we forbear to express any opinion,) he certainly has no such authority as the law now stands.

The 11th Article of the State Constitution reads as follows: "The Legislature shall provide by law that the names and residence of the qualified electors of the city of New Orleans shall be registered in order to entitle them to vote, but the registry shall be free of cost to the elector."

In obedience to this constitutional injunction the Legislature has passed the Act, approved the 20th March, 1856, entitled "An Act providing for the registry of the names and residence of all the qualified electors of the city of New Orleans, according to Article eleven of the Constitution of the State."

By the provisions of this Act an officer is created, with a salary equal to that of a Judge of the Supreme Court, having authority to receive and consider the proof of citizenship of any person ambitious of possessing and exercising the elective franchise in New Orleans; and upon such proof being made, according to certain rules and forms of evidence fully set forth in the statute, to enregister the name of the applicant as a qualified elector, and to deliver to him a certificate, setting forth, if a naturalized citizen, the particulars of his naturalization and the proof by which it has been established. This certificate is by law full proof of the right to vote, at the day of its date, of the person who is named in it; and no person whatever can vote in New Orleans unless he is the bearer of a certificate of registry.

Section 20th enacts: "That from and after the first Monday of October next (1856) any person having complied with the provisions of this Act shall be entitled to vote, and whenever the right of any person shall be challenged at the polls, the certificate of registry issued to such person shall be held conclusive of the right of said person to vote, and no Commissioner or Commissioners of Election shall require, under the pains and penalties imposed by the sixteenth section of this Act, any other evidence of the right of such person to vote, except that portion of the oath prescribed by Article ninetieth of the Constitution respecting duelling, and the following oath or affirmation, viz: "You solemnly swear (or affirm) that you are the identical person described in and to whom this certificate was issued, and that you are not a soldier, seaman or marine in the army or navy of the United States, nor under conviction of crime punishable by hard labor, or a pauper."

"Section 21. Be it further enacted, That no person shall be entitled to vote who shall not have registered his name in pursuance with the provisions of this Act."

We view the office of Registry, under this statute, as a special tribunal for the trial of the right to vote in New Orleans, whose certificate is in the nature of a judgment, which is not subject to revision by the Commissioners of Election.

We do not hold, however, the judgments of that tribunal to be without appeal. The 9th section of the Act provides a mode of redress, by suit against the Register, for an applicant to whom the Register shall refuse a certificate. And the validity of the certificate, and the sufficiency of the proof upon which it was based, may in all cases be examined, upon a contest of an election, by the tribunals seized of the jurisdiction of such contest.

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We also hold that, where the registry of the voter is more than three months old, and there is no change of domicile endorsed on the certificate, the vote may be challenged on the ground that the voter has changed his domicile since the date of the registry, and by such change of domicile lost his vote in that precinct; and upon such challenge being made, the Commissioners of Election may lawfully swear the voter as to the fact of his change of domicile. For, although the certificate of registry be, under the 20th section, conclusive proof to the Commissioners of the residence of the voter in the precinct at the date of the registry; and although, by Section seven and eight of the Registry Act, it is the duty of the voter to notify the Register of a change of domicile, and to have the same endorsed on his certificate of registry, yet it may be that a voter who has changed his domicile has neglected this formality.

We confidently expect that this exposition of the principles of the election law in New Orleans, emanating from an authority of the last resort, will command the respect and acquiescence of all; that the actions of the Commissioners of Election will thereby be rendered uniform and easy of performance; and finally, what is of paramount importance, that disorder will thereby be effectually prevented.

For the reasons above given, it is ordered, adjudged and decreed, that the judgment of the District Court upon the verdict of the jury be reversed, and that there be judgment in favor of the plaintiff and appellant, *William C. Auld*, decreeing him, the said *Auld*, to be entitled to the office of Clerk of the Fourth District Court of New Orleans.

MERRICK, C. J. In the limited time I have been able to devote to the voluminous record in this case, I have not been able to satisfy myself fully of the accuracy of the conclusions of the majority of the court; nevertheless I am unwilling to dissent or to delay the decision of this important cause upon a question of fact upon which my colleagues are unanimous.

#### L. CLAUSSE v. W. BURGESS AND WIFE.

An objection to a document offered in evidence that it was not signed by all the parties, goes to the effect of the evidence, and not to its admissibility. A clerical error in the date of an instrument may be amended by parol evidence.

The acceptance of an heir is *express* when he assumes the quality of heir in an unqualified manner in some authentic or private instrument, or in some judicial proceeding.

The intention with which an act is signed by the heir is made by Article 983 of the Code the touchstone of its character. If signed with the intention of binding himself as heir, he becomes heir pure and simple.

When a written instrument, purporting to be a notarial act of sale of property of the succession, by all the heirs, was signed by some of the heirs, and others refused to sign it, on the ground that they would render themselves liable as heirs, and the act of sale in consequence was not consummated, it is, nevertheless, an express acceptance of the succession by those heirs who signed the instrument, and they are liable as heirs.

The subsequent formal renunciation of heirs who have thus accepted will not undo the effect of their acceptance.

**A**PPPEAL from the District Court of Pointe Coupée, *Cooley, J.*  
*U. B. & E. Phillips*, for plaintiff. *S. J. Powell*, for defendant and appellant.

SPORFORD, J. The question here is whether the defendants have made themselves liable as heirs pure and simple of their deceased son, *Wesley L. Burgess*.

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The objections to the reception of the evidence offered by the plaintiff went to the effect of the evidence, and were correctly overruled; and the clerical error in the date of the writing was amendable by parol.

The proof is that the two defendants signed a written instrument, which was intended to be a notarial act of sale from themselves and their two surviving children, *Lewis A. Burgess* and *Mrs. Lucinda Burgess*, wife of *N. B. Benjamin*, to *Messrs. F. V. & J. W. Leake*, of an undivided half of a lot of ground in Bayou Sara, described in the act as having belonged in common to *F. V. Leake* and the late *Wesley L. Burgess*, it being the same acquired by the said *Wesley Burgess* to *L. Clauss* by an act specially designated. The vendors were also said in the act to be "the heirs at law of *Wesley L. Burgess*, deceased."

It is also proved that *Mrs. Lucinda A. Burgess*, one of the parties named as vendors in this act, refused to sign it, "for the reason that she feared to make herself unconditionally liable for the debts of the estate, there being no legal administration of deceased's estate."

It is also in evidence that long afterwards the defendant, *William Burgess*, put the *Messrs. Leake* in default by tendering them a title to the same property on the terms described in the projected act aforesaid, but they answered that they were not bound to accept the title.

Upon these facts the District Judge concluded that the defendants had made themselves unconditional heirs of the succession of *Wesley L. Burgess*, and from a judgment against them for a debt due by that succession to the plaintiff they have appealed.

It is urged by the appellants that, as the pretended act of sale was a mere project, never signed by their co-heirs, the two surviving children, nor by the pretended vendees, nor by the notary, it cannot constitute an acceptance, either express or tacit, on the part of the two heirs who did sign it.

"The simple acceptance may be either express or tacit. It is express when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding. It is tacit when some act is done by the heir which necessarily supposes his intention to accept, and which he would have no right to do but in his quality of heir." C. C. 982.

"By the word *act*, used in the preceding Article, is understood any writing made with the intention of obliging himself, or contracting as heir, and not a simple letter or note, still less a verbal declaration, in which the person who is called to the succession may have styled himself the heir." C. C. 983.

In *Flower v. O'Connor*, 8 N. S. 556, it was justly observed that the latter Article has reference alone to the express acceptance spoken of in the preceding Article, the word *acte*, in the French text of that branch of the former Article, having been translated *instrument*.

An express acceptance is effected by something written, a tacit acceptance by something done.

The District Judge thought that by signing what purported to be an act of sale of property belonging to the deceased, in which they described themselves as his heirs, the defendants *expressly* accepted his succession.

The *intention* with which they signed this *projet* of an act is made by Article 983 the touchstone of its character.

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Did they sign it with intent to bind themselves as heirs of *Wesley Burgess*? If they did, they are heirs pure and simple.

We think it manifest, from a perusal of the whole instrument, that they did sign it with that intention; indeed they could not have signed it with any other. In it they described themselves as his heirs; by it they engaged to sell a portion of his property for a stipulated consideration. That they failed to carry out the engagement was no fault of theirs, for they did all they could to consummate it. The fact that the instrument never became binding on them as a sale, for the want of the assent of other proposed vendors, and a consequent acceptance by the vendees, can have no such retroactive effect as to change the intention with which they signed it.

In the express acceptance, the intention must be manifested by what is written; in the tacit, by what is done. C. C. 984.

We find in this case a written declaration of the defendants which, in our judgment, clearly shows a design on their part to act as masters of the succession of *Wesley L. Burgess*.

They are, therefore, his unconditional heirs. 3 Marcadé, No. 205.

Such would probably have been the determination of the cause, even if the Articles 983 and 984 had not been added by the compilers of our present Code to the Code of 1808, which followed the French original much more closely. M. Duranton teaches that an act which is declared void for a vice of form or for incapacity on the part of the person with whom the heir supposed he was contracting, may, nevertheless, constitute an acceptance on the part of the heir, if it shows a design to accept. Although the act has no effect, as between the parties, to bind them in a covenant, it may have the effect of disclosing the heirs' intention to accept the inheritance which has fallen to him. 6 Duranton, No. 383.

It is contended by the appellant's counsel that this construction may open the door to fraud. The Code has guarded against that in Article 1003: "The heir who is of age cannot dispute the validity of his acceptance, whether it be express or tacit, unless such acceptance has been the consequence of fraud practiced or violence exercised against him, he never can urge such claim under pretext of lesion."

In the present case there is no suggestion of fraud or error.

The formal renunciation of the defendants, after the acceptance which we have described, did not undo its effects. *Semel hæres, semper hæres.*

The attempt to sell the property as the property of *Wesley Burgess* would imply an acceptance, even if it turned out not to be his, for it is the intention which controls. 3 Marcadé, No. 203. So proof of the title being in his succession was unnecessary.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with costs.

EUPHROSIN HOTARD *v.* MARY C. HOTARD, his Wife.

The interdiction of the wife for the cause of insanity, is no ground for a decree of separation of property against her in favor of the husband.

The community can be dissolved by the husband, only by the effects of the dissolution of the marriage bond, or a separation *a mensa et thoro*, of which a dissolution of the community is the logical sequence.

**A** PPEAL from the District Court of Terrebonne, *Cole, J.*

*Connelly & Righter*, for plaintiff and appellant. *Goode & Aycock*, for defendant.

SPOFFORD, J. The plaintiff sued to procure the interdiction of his wife for the cause of insanity, and also prayed for a decree of separation of property against her.

The former prayer was granted and the latter rejected; the husband has appealed, and urges in this court that the separation of property should be awarded.

His argument is, that the law of community is predicated upon the theory that matrimonial gains are the result of the reciprocal industry and thrift of husband and wife; that, therefore, when the wife ceases to contribute anything to the community in the way of labor, care or counsel, and becomes a helpless burden to the business partnership, the partnership should cease and the husband be entitled to a separation of property.

Marriage is a contract for life, and, in this State, it superinduces of right a partnership of acquets and gains in the absence of a contrary stipulation at the date of the marriage. This community is only dissolved consequentially by a dissolution of the marriage, or a separation of bed and board, and directly by a separation of property judicially pronounced. The causes for which a divorce *a vinculo*, a separation from bed and board and a separation of property may be demanded, are specially defined by law. An interdiction for insanity, although authorized at the suit of either spouse by Article 383 of the Civil Code, has not been named by the law giver as one of these causes. It is out of our power to add it to the category.

This is not the proper forum in which to assail the wisdom of rules of property laid down by the Legislature, or to seek an amendment of them, by softening their rigor or creating exceptions, which the law itself has not recognized.

It may be true, that among the rude and hardy tribes of German origin who introduced the custom of the matrimonial community of gains into Gaul, whence it has been transmitted to us, the wife was the equal partner of her husband's toil. If, in the change of manners which a higher civilization has produced, this prime reason of the community law has ceased to exist, yet the institution remains. With us it is a positive provision of law, a rule of property, and must be enforced without reference to the theory upon which it was founded. The hardship of a particular case cannot exempt it from a rule which the law giver has made universal. The law concerns itself only with general principles and results; it takes no heed of individual cases. If the courts could, at their discretion or caprice, take cases out of universal rules to avoid a hardship, there would soon be no rules and, consequently, no law.

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Every marriage superinduces the community, of right. That is the general rule. The community can be dissolved at the instance of the husband, only by the effects of a dissolution of the marriage bond, or of a separation *a mensa et thoro*, of which a dissolution of the community is the logical sequence. The law has allowed the wife in a limited class of cases, to sue her husband for a separation of property *during marriage and without disturbing the marriage*. C. C., Art. 2399 *et seq.* It has nowhere accorded to the husband a like exemption from the general law. The District Judge was, therefore, right in declining to make a law which would authorize the plaintiff in this case to demand a separation of property against his wife, because she has fallen into madness.

*MM. Rodière and Pont* have remarked, that all the authors are agreed that the husband cannot sue the wife for a separation of property, that being a privilege conceded only to the wife against her husband. 2 *Contrat de Mariage*, No. 806 *in notis*. La femme peut seule demander la séparation de biens. 13 *Toullier*, No. 37. See also 5 *Marcadé*, Article 1443 C. N.; *Pothier, Traité de la Communauté*, No. 513.

The faculty to demand this separation is accorded to the wife only when the disorder of her husband's affairs puts her present or eventual rights of property in peril.

And the reason why a similar faculty is not granted to the husband is, that he is head and master of the community; and it is out of the power of the wife to put his rights of property in peril.

It is, therefore, ordered and decreed, that the judgment appealed from be affirmed, with costs.

#### SAMUEL TILLET v. MARY UPTON.

Judgment reversed where rendered on issue joined by defendant, a married woman, unauthorized by her husband or the court.

The husband being sued with the wife, and both cited, the plaintiff might have made his judgment by default final on proving his demand, but it must appear from the record that such proof was made.

APPEAL from the Tenth District Court of Tensas, *Snyder, J.*  
*Reeves & Briscoe*, for the plaintiff. *T. P. Farrar*, for defendant.

VOORHIES, J. This suit was brought against the defendant as the executrix of the last will of her deceased husband, *John Upton*, for the recovery of \$998, evidenced by a promissory note signed by the latter in favor of the plaintiff, dated the 20th of January, 1851, and payable on the 1st of January, 1852, "bearing eight per cent. per annum."

The defendant having contracted a second marriage with *W. M. Wilson*, her husband was also made a party defendant, and both were duly cited.

The defendant, *Mary Upton*, unassisted by her husband, pleaded specially *in limine litis*, that she was not executrix of the succession of *John Upton*, &c. This exception was overruled and a default entered. On the same day, the plaintiff filed a supplemental petition, alleging that *Mary Upton* was the administratrix instead of the executrix of the succession, and prayed for judgment against her as such, for the sum claimed in his original petition.

The defendant, unassisted by her husband, also pleaded specially, that she had never been cited in her capacity as administratrix, and prayed that the

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judgment by default taken against the succession should be set aside. This exception being overruled, she then, still unassisted by her husband, joined issue by pleading a general denial. There was judgment against her, and she took the present appeal, in which she was joined and assisted by her husband.

It is urged that the judgment against her should be reversed, first, because she was not authorized either by her husband or the court to appear and defend this suit. Under the authority of the case of *Adlé v. Anty*, 1 An. 260, we think this objection is fatal. There the husband of the defendant, a married woman, was joined in the suit, as in the present case, and a judgment by default was entered against both. Subsequently, the judgment by default was set aside, and the wife alone filed an answer to the merits. Upon that issue the plaintiff went to trial without taking the necessary steps to have the wife authorized to contest the suit, and judgment was rendered in his favor. The court held, that the separate answer of the wife was an unauthorized appearance in court, and reversed the judgment. Here, it is true that, as the answer of the wife must be taken as an unauthorized appearance in court, the judgment by default stood unaffected, and the plaintiff could have made the same final on proving his demand. But this want of proof forms the second objection urged by the appellant. There is no note of evidence in the record. The note declared upon is annexed to and forms a part of the petition. There is no proof of its execution, which was essential to make the judgment by default final. C. P. 312; 12 R. 518. The certificate of the Clerk informs us that the record contains all the documents filed and testimony adduced in the case.

It is, therefore, ordered that the judgment of the court below be reversed, and this case be remanded for further proceedings; the plaintiff and appellee paying the costs of this appeal.

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P. G. MOURAIN v. V. MOURAIN.

When the wife by the marriage contract constituted to herself as dowry certain slaves, and her father became a party to the contract and signed it, he is estopped from contesting his daughter's title to the slaves.

**A**PPEAL from the District Court of Pointe Coupée, *Cooley, J.*  
A. Provosty, for plaintiff and appellant. W. H. Cooley and A. L. Mahoudeau, for defendant.

BUCHANAN, J. The plaintiff claims of the defendants, his daughter and his son-in-law, certain slaves, which the petition avers the daughter constituted to herself in dowry by marriage contract, although the same actually belonged to plaintiff.

Now it is proved, and in fact admitted by the petition, that plaintiff was a party to the marriage contract, and signed the same.

We think, therefore, with the District Judge, that the plaintiff is estopped from contesting his daughter's title to the slaves in question.

The rules applicable to donations *inter vivos* are improperly invoked by the plaintiff. There is nothing, either in the recitals of the marriage contract or in the other evidence in the cause, which implies a donation of these slaves by plaintiff to his daughter.

Judgment affirmed, with costs.

## A. LAFOREST v. R. R. BARROW.

Where, to enforce a mortgage containing the pact *de non alienando* property had been sold under an order of seizure and sale, prosecuted contradictorily with the third possessor, who was an absentee, by the appointment of a curator *ad hoc*, and when the order of sale, and all the proceedings under it, were subsequently homologated by a monition; *Held*: that the judgment could not be collaterally attacked by one claiming to have derived his title subsequently from such third possessor.

The purchaser in possession under such a sale cannot be disturbed in his title, on the ground of irregularities and defects in the executory proceedings, from which the parties in interest might at the time have been relieved by appeal.

The vagueness and uncertainty in the description of the property in the act of mortgage will not be permitted to operate to the injury of a purchaser in good faith who went into possession under the sale of the property, which was understood at the time to be the object of the mortgage and sale under it. The notice with which the parties under whom a claim is set up adverse to the purchaser, is chargeable, is sufficient to vest in the purchaser a valid title to the land which he went into possession of under the sale, notwithstanding an uncertainty in the description as to the land sold.

**A** PPEAL from the District Court of Terrebonne, *Cole J.*  
*Beatty & Bush*, for plaintiff and appellant. *Miles Taylor & W. H. Taylor*, for defendant.

MERRICK, C. J. The plaintiff and defendant claim to be owners of the tract of land in controversy, in virtue of titles derived from the same author.

The plaintiff claims, by direct conveyances from *James Bowie* and the defendant, in virtue of a forced sale made by the Consolidated Association upon a mortgage given to that institution by *James Bowie*, and a purchase at the Sheriff's sale by said Consolidated Association, and a transfer by it to the defendant.

The defendant's title is the oldest, and the plaintiff's counsel admit that it is incumbent on them to show it to be defective before they can recover. They propose, in substance, to do so in two modes, viz:

1st. They allege that the proceedings of the Consolidated Association, in their order of seizure and sale, were null, and hence no title was conveyed by the sale to the bank by the Sheriff, nor by the bank to *Barrow*.

2d. That the description of the property in the act of mortgage was vague and uncertain, and could convey nothing which could prejudice subsequent purchasers in good faith.

I. *Laforest* claims in virtue of a transfer from *Robert J. Walker*. The act of mortgage given by *James Bowie* to the bank when he borrowed the money upon his mortgage and pledge of stock contained the pact *de non alienando*.

*Walker*, *Duncan Walker* and *Wilkins* bought of *James Bowie*, and when *Robert J. Walker* bought the interest of his co-purchasers, he bought the stock in the Consolidated Association which was secured by the mortgage of *Bowie* to the bank. The objections to the executory proceedings are that no such proceeding could be instituted upon the mortgage as against *Walker*, and if such proceeding could be instituted against him, the present one was defective for non-observance of the legal delays and forms; that the attorneys *ad hoc* appointed to represent the defendant, *R. J. Walker*, the absentee, could not waive the required proceedings and accept services; that prescription had inter-

vened before taking the legal steps to interrupt its acquisition, and that the order of seizure and sale was null because a copy of the bond of *Bowie* was annexed to the petition instead of the bond itself.

We remark that at the time the order of seizure and sale was signed by the Judge ten years had not elapsed from the maturity of the bond to the date of such order. Moreover the bond had credits endorsed upon it which, if correctly made, interrupted prescription from the date of such payment.

If it be conceded that one, not a party to the order of seizure and sale, can collaterally question its regularity in this particular, we think the burden of proof would be upon him to show that the alleged payments were fictitious and improperly made, and that the order of the Judge was granted upon an instrument absolutely barred by prescription.

In regard to the other objections, we observe that no appeal was taken by *Walker*, and that the proceedings in the order of seizure and sale were confirmed by a monition. Under the facts of the case, we do not see how it is possible for the plaintiff to question in this collateral manner the regularity of the proceedings in the order of seizure and sale.

If the Judge of the District Court granted the order of seizure and sale upon a copy of the bond instead of the bond itself, it was at most but an error in the judgment, subject to revision on appeal, and one which was not injurious to *Walker*, as we must presume from the fact that the bond really existed, and *Walker* never thought it worth his while to appeal.

If *Walker* did not chose to appeal upon a mere matter of form, it is clear that no other persons ought to avail themselves of the objection, particularly after the homologation of the order and all of the proceedings by a monition. Revised Statutes, p. 341, § 7.

The institution of the executory process against *Walker* instead of *Bowie* was one of which he, *Walker*, could not complain, for he was in possession of the property, and was thus notified of the necessity of making payment in order to relieve his property from seizure, he being the owner of *Bowie's* stock secured by the mortgage.

If, under the pact *de non alienando*, a sale of the property would have been legal without service upon *Walker* and by service upon *Bowie* merely, it cannot be the less so by service upon the third possessor, who really represents the property which it is the object of the proceeding to sell, and who is to be injured by the sale. Moreover in this case the defect is cured by the monition, which is notice not only to *Bowie* and *Walker*, but to all other persons besides.

II. The second point presented by the plaintiffs and appellants is much more difficult.

It grows out of the description in *Bowie's* mortgage to the Consolidated Association, dated 15th June, 1829, under which the order of seizure and sale issued in 1840, and the land was sold by the Sheriff on the 21st September of that year.

The description of the mortgage is in these words: "A plantation, situated in the parish of Terrebonne, measuring seventy-five arpents on the Bayou Bœuf alias Bayou du Large, on the left bank of said bayou, by forty arpents in depth and fifty arpents front on the same bayou, on the right bank, by the same depth of forty arpents, bounded above by other lands belonging to said *Bowie*, and below by *Mr. Edmond Hogan* on the left bank and by *Mr. William Hargrove* on the right bank of the said bayou, of which plantation there is now only a

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small number of arpents in cultivation, the greater part being in standing wood and wild cane."

The order of seizure and sale, as well as the monition, having followed this description of the property, it is the title under which the defendant must, if at all, protect his possession. In itself it appears well enough upon paper, but contains a latent ambiguity, which makes its application to *Bowie's* land upon Bayou du Large very difficult.

*Bowie* owned two tracts of land upon Bayou du Large of eighty arpents front on both sides of the bayou by a depth each side of forty arpents. The upper tract is called in this controversy the "Gabion tract;" the lower tract is called the "Felicé tract," they being two confirmations by Congress to persons of those names. The defendant is in possession of and claims so much of the "Gabion tract" as could be found after sales made by *Bowie* prior to the mortgage to the bank were carved out of it. The plaintiff contends that the "Felicé tract" answers the description contained in the mortgage better than the "Gabion tract."

The District Judge has examined the hypothesis of the plaintiff and the pretensions of the defendant in this respect, in an elaborate and able opinion which he has placed on file, and he has arrived at the conclusion that both *Walker* and *Laforest* are chargeable with notice, and that as against them the description in the mortgage, accompanied as it has been by possession, was sufficient to vest the title to the land in controversy in the defendant.

We concur fully in the reasoning and conclusion of the District Judge on this branch of the case, and deem it sufficient to state, as we have done, the result, simply observing that although the "Felicé tract" corresponds in more particulars with the boundaries mentioned than does the "Gabion tract," yet it is shown that there was no improvement at all upon that tract of land, whilst there was a small improvement upon the other; that the "Gabion tract of land is identified by one of the witnesses, who appraised the land for *Bowie* and the bank, as the one appraised, and moreover, that all parties, up to the sale of *Walker's* pretensions to *Laforest*, in 1855, seem to have treated the "Gabion tract" of land as the one covered by the mortgage.

It is true that Article 3273 of the Civil Code requires that a mortgage, in order to be valid, should describe the nature and situation of each of the immovables on which the mortgage is granted; yet we think that where a sale of the mortgaged property has been made under an order of seizure and sale, and possession has followed the title, that an error in some of the boundaries ought not to be permitted to defeat the title, where the most important calls in the description are answered, and the identity of the tract is also established *aliunde*, particularly in favor of one purchasing with notice, as in the present case with *Laforest*.

Judgment affirmed.

LEA, J., is recused in this case on the ground of interest.

## J. LAIDLAW v. JEAN B. LANDRY.

When defendant's title is not traced to a sovereign grant, possession in good faith under successive purchases from private vendors for more than ten years, will not constitute a title by prescription against one who claims under a patent from the United States, issued within ten years previous to the institution of the suit.

In the absence of any other evidence, the date of the actual severance of the land from the public domain, the date of the patent must be considered as the time when the severance took place.

The burden of proof rests with the party pleading prescription to show affirmatively a state of facts which will sustain the plea.

**A**PPEAL from the District Court of Assumption, *Cole, J.*

*W. C. Laves*, for plaintiff. *Mailhot & Mills*, for defendant and appellant.

**LEA, J.** The plaintiff claims from the defendant a tract of land situated in the parish of Assumption and constituting the fractional section 56 of township 12, range 14 east. His right is derived from *A. F. Rightor*, who purchased directly from the United States and in whose favor a patent was issued on the 8th of September, 1845. The defendant holds under successive purchases from private vendors, none of whom trace their title to a sovereign grant, but under which the defendant and his vendors have held possession in good faith for more than ten years. The plaintiff, on his part, shows a paramount title emanating from the General Government within ten years prior to the institution of this suit, and, as before stated, the evidence shows that the defendant and his vendors have held possession in good faith under a title translativ of property for more than ten years. The plaintiff, therefore, has made at least a *prima facie* showing of a transfer, within the last ten years, from a vendor against whom prescription could not run. See 4th Howard's Reports, p. 184.

It is urged that the date of the patent does not furnish conclusive evidence of the fact that the actual severance of the land in question from the public domain took place at that time, and that the payment for said land may have been made prior to that time and more than ten years prior to the institution of this suit. It is undoubtedly true that such may have been the case; it is equally true that nothing of the kind has been proved. The only evidence before us of the time of the transfer from the Government, is the date of the patent which was duly set forth in the plaintiff's petition. It was a part, therefore, of the defendant's case to show, if he could, that the title of the Government was divested not only anterior to the date of the patent, but more than ten years prior to the institution of this suit, and without such proof, he could not make out his plea of prescription. It is a mistake to consider the plaintiff as defending himself against a title by prescription by an exceptional plea, and as such, under obligation to prove a state of facts which he has not alleged. It is clear that prescription in favor of the defendant could not begin to run until after the severance of the land from the public domain, and if the defendant wishes, by the plea of prescription, to attack the validity of a title based upon a patent issued within ten years prior to the institution of the suit, it is incumbent upon him to show affirmatively a state of facts which will sustain his plea.

Judgment affirmed.

## JUDITH A. HARBOUR v JOHN S. SCOTT.

Where the Sheriff is incapable of acting by reason of interest and there is no Coroner of the parish the Judge may appoint a special officer to attend the jury during the trial.

**A**PPEAL from the Ninth Judicial District Court for the parish of Pointe Coupée, *Cooley, J. U. B. & E. Phillips*, for plaintiffs. *W. H. Cooley*, for defendants. Both parties appellants.

BUCHANAN, J. We see no reason for changing our opinion upon the question involved in the *mandamus* issued to the Judge of the Ninth Judicial District in February last. 11 Annual Rep. 79.

Neither do we find any error, under the peculiar circumstances of the case, in the order of court appointing *Marcel Samson* special officer to attend the jury during the trial; nor in the course followed in empannelling the jury. Defendant admits in argument that there was no Coroner at that time in the parish.

The only real contest between these parties relates to the right of the defendant to have the value of two slaves, named *Rachel* and *Dick*, deducted from the note sued upon, on the ground that those slaves were affected with redhibitory diseases at the time of the sale, which was the condition of the note and that they afterwards died of said disease. The pleadings of the defendant, in relation to this part of his case, are very defective. He does not declare what were the diseases of said slaves. Neither does the testimony make out to our satisfaction the existence of any redhibitory disease in those slaves, or either of them, at the time of the sale. We conclude that the jury erred in making a reduction of the price on account of the death of the slave *Dick*.

The plaintiff, *Mrs. Morgan*, has asked, in her answer to defendant's appeal, for an amendment of the judgment; to which we consider her entitled.

It is, therefore, adjudged and decreed that the judgments appealed from be reversed; and that the plaintiff, *Judith Ann Harbour*, wife of *James A. Morgan*, recover of defendant, *John S. Scott*, seven thousand two hundred and sixty dollars, with interest at eight per cent. per annum, from January 31st, 1855, until paid, and costs in both courts; and with mortgage and privilege of vendor on the property sold to said defendant, which is set forth and described in plaintiff's petition and the act of sale thereto annexed; and that said property be seized and sold for the payment of this judgment.

MERRICK, C. J. It is ordered, by the consent of the defendant, in writing, and on the motion of plaintiff's counsel, that the decree in this case be amended by correcting a clerical error in this, that the interest on \$7260, allowed by the decree, be changed so as to read: to allow said plaintiff eight per cent. interest from January 31st, 1853, until paid, instead of January 31st, 1855, until paid; and that the judgment so amended be certified to the lower court for execution, notwithstanding the mandate already issued.

## SUCCESSION OF CHARLES MORGAN, SEN.

When the front tract belonged to the husband before marriage, the *double concession* purchased by him after the marriage, under the Act of Congress of June 15th, 1822, became the property of the husband. The only right of the community is that of claiming a reimbursement of the sum paid as the price, if the payment has been made out of the funds of the community.

In cases of partition where some of the part owners are minors, the Judge has no power of his own will to order a sale of the property to be divided, upon terms of credit. This can only be done at the instance of the tutor and upon the advice of a family meeting. C. C. 1263

**A** PPEAL from the Ninth Judicial District Court for the parish of Pointe Coupée, *Cooley, J. Louis Janin, for Olivia Van Wickle et als., appellees. Hiley & Provosty, for H. Allain et als., appellants.*

VOORHIES, J. On the 17th of February, 1848, *Charles Morgan* died intestate, in the parish of Pointe Coupée, where his succession was opened, leaving a widow and the following children and grand-children as his legal heirs, to wit: *Charles Morgan, Jr., James A. Morgan, Augustine Morgan*, widow of *J. W. Swain*, *Aurora Morgan*, widow of *Wm. R. Falconer*, and the three children of *Adele Morgan*, deceased wife of *Stephen Van Wickle*, to wit: *Emma Lise Van Wickle*, a minor represented by her father and natural tutor, *Adeline Van Wickle*, wife of *J. P. Coulon*, and *Olivia Van Wickle*, wife of *J. L. Mathews*.

*Charles Morgan, Jr.*, one of the heirs, was appointed administrator of the succession. He died in July, 1855, without having rendered any account of his administration, leaving a widow and seven minor children.

This action was instituted by *Olivia and Adeline Van Wickle* against their grand-mother, *Hyacinthe Allain*, and their co-heirs for a partition, in which they also claimed an account of the administration of *Charles Morgan, Jr.* They allege in a supplemental petition filed by them, that a tract of land of fourteen and one-half arpents front on the Mississippi, by forty in depth, established as a sugar plantation, together with the double concession thereof, was erroneously inventoried as the property of the community; that both were the separate property of the deceased, except the improvements thereon, which were properly inventoried as belonging to the community.

*Stephen Van Wickle*, as tutor, the widow of *Charles Morgan, Jr.*, as natural tutrix, and *Aurora Morgan*, answered respectively, acquiescing in the plaintiff's demand, and also claiming that the double concession should be considered as the separate property of their ancestor.

*Hyacinthe Allain*, widow of *Charles Morgan*, in her answer, in which her two children, *James A. and Augustine Morgan*, join her, avers that all the property inventoried belonged to the community of which she was the surviving partner, and as such legally entitled to the usufruct thereof.

A report of experts shows that the property in question is not susceptible of being divided in kind between the parties without inconvenience and loss.

It is admitted by the parties that the front tract was purchased by *Charles Morgan* on the 23d of June, 1806, the year previous to his marriage, that his title to it was confirmed in 1820, and that he bought the double concession in 1835, under the Act of Congress of June 15th, 1822.

The defendants and appellants have presented two questions to our consideration: 1st, Is the double concession separate or community property? 2d, Is

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the advice of a family meeting essential to fix the terms of credit of the sale in relation to the interest of the minors ?

I. We do not think the Judge erred in deciding the first question affirmatively. That the cause of the acquisition preceded the marriage, is a matter which can hardly admit of any doubt. We think it is perfectly clear, under our jurisprudence on the subject, that the confirmation by the Government, subsequent to the date of the marriage, did not have the effect of vesting the legal title to the original tract in the community. It is, therefore, difficult to perceive in what manner the rights of the parties can be affected in this case by the distinction between complete and inchoate titles. See the case of *Paragoud v. Pace*, 10 An. 614. But we consider the decision in the case of *Barbet v. Langlois*, 5 An. 212, as decisive of this question. The only right to which the community is entitled is that of claiming the reimbursement of the sum paid on account of the entry of the double concession, if such payment has been made out of the funds of the community.

II. As it was conceded, that a sale of the property in question was necessary to effect a partition, the Judge accordingly ordered an inventory and sale thereof, on the terms demanded by the parties, to wit: two-fifths, as the shares of *James Alfred* and *Augustine Morgan*, for cash, and the residue at one, two, three, four and five years' credit, the purchasers giving notes with approved security, &c. In cases of partition, where some of the heirs are minors, Art. 1263 of the Civil Code declares: that the Judge may at the instance of their tutors, and on the advice of the meeting of their family, order the sale to be made on certain terms of credit and on proper security, &c. This textual provision, clear and free from any ambiguity, is imperative, leaving no discretion in the Judge to act without such authority. It may be true in this instance that the terms of credit are advantageous to the minors. But it is evident that the plain letter of the law cannot be disregarded under such pretext. And we cannot yield our assent to the proposition, that the appellants can have no possible legitimate interest in the determination of the question thus presented by them. They certainly have, as joint owners, an interest to see that a valid title to the property shall be vested by the sale in the purchaser. See 6 An. 755.

It is, therefore, ordered, that the judgment of the court below be avoided and reversed, so far as it regulates the terms of the sale in relation to the minors, and in every other respect that said judgment be affirmed; and it is further ordered, that the case be remanded to be proceeded in according to law, the appellees to pay the costs of this appeal.

#### PATRICK FOX v. CITY OF NEW ORLEANS.

The city cannot be held liable under a contract made by the Municipal officers in violation of law.

APPEAL from the Sixth District Court of New Orleans, *Cotton, J. Race & Foster*, for plaintiff. *J. Livingston*, for defendant and appellant. *SPOFFORD, J.* This action is based upon an alleged contract. The plaintiff declares that the late Second Municipality of New Orleans passed an ordinance

requiring the Surveyor thereof to notify certain proprietors of lots therein to fill them, and in default of their compliance within thirty days to cause the same to be filled at the expense of the owners; that the lots of one *Worthington* were ordered to be filled in pursuance of this ordinance, and the owner failing to do it, the Surveyor of the Second Municipality employed the petitioner to fill them, and "contracted with him to fill the same for the city, at the price of seventy-five cents per yard," which he did, and the work was accepted by the Surveyor.

The present plaintiff formerly brought a suit against *Worthington's* representative for the price of the filling, but was cast, on the ground that he, in connection with the Municipal officer, had acted in violation of a remedial statute which was intended to check Municipal extravagance and corruption, by requiring all contracts for public or other works ordered by the Municipality "to be let out to the lowest bidder at public auction." See *Fox v. Sloo, Executor*, 10 An. 11; Act 18th March, 1850, Sec. 12, (Sess. Acts, 131.) The consolidation Act passed a few days later, embraced the same provisions couched in even more general terms: "all contracts to be made or let by authority of the City Council, and all materials and supplies to be furnished shall be offered by the Mayor at public auction, after the usual advertisements, and adjudicated to the lowest bidder." Act 21st March, 1850, Sec. 22, (Sess. Acts, 164.)

The defence in his case is identical with that in the case of *Fox v. Sloo*. No action can be maintained upon a contract made in violation of law. If, by overriding this statute, the Municipal officers could saddle the city with the expenses of the contracts they choose to make in defiance of its mandates, the tax-payers would become an easy prey to the jobbing contracts which it was the commendable object of the statute to defeat.

Judgment reversed, and judgment for defendant, with costs in both courts.

#### SUCCESSION OF WILLIAM H. LYNE.

A minor emancipated under the Act of the Legislature of March 1855, but not yet over twenty-one years of age, is invested with all the capacities in relation to his property and obligations which he would have had actually at the age of twenty-one years, and may be appointed Administrator of a succession.

**A** PPEAL from the District Court of Pointe Coupée, *Cooley, J.*

*U. B. & E. Phillips*, for defendant and appellant. *Provosty*, for appellees.

The following reasons were given for his judgment by

COOLEY, J. The Article 1035 of the Civil Code provides that, "In the choice of an administrator the preference should be given to the beneficiary heir over every other person, *if he be of age and present in the State.*"

*John R. Lyne* was emancipated under the Act of March 15th, 1855, 444, but is not yet over twenty-one years of age, and he is one of the beneficiary heirs of the deceased, all the other children being minors.

In the case of *Briscoe and Wife v. Farthington*, 5 A. R. 692, the objection made by the Supreme Court to the appointment of a minor emancipated by marriage, as an administrator was, that "he could not bind himself by promise or obligation for any sum exceeding the amount of one year of his revenues, and that he could not alienate, affect, or mortgage his immovables or slaves

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without the authority of the Judge, which can only be granted on the advice of a family meeting," and that, therefore, he could not sign an administrator's bond.

In the case of an emancipated minor under the Act of 1855, by which he is dispensed from the time prescribed by law for attaining the age of majority, he is invested with all the capacities in relation to his property and obligations, which he would have, had he actually arrived at the age of twenty-one years. See 6 R. R. 429; 9 L. R. 570.

The Code does not seem to require any peculiar personal fitness or capacity to fill the office of administrator, at all events, we are bound to presume that the opponent is capable of managing his estate and affairs, at least as much so as he will be at the age of twenty-one years,—because the family meeting and the judgment thereon have so decided,—and besides, there is no suggestion of incompetency against him.

I presume, that when the Code required the applicant to be of age, the legislature had in view the capacity of binding himself on the part of the administrator, and not a personal fitness which may be presumed in a person of 21 years of age. It is probable, that if this latter view had been taken, the requirement of the age of twenty-one years would have been stated in express words.

SPOFFORD, J. For the reasons assigned by the District Judge, it is ordered that the judgment in this case be affirmed, with costs.

## SUCCESSION OF WM. REGAN.

When a judgment has once been signed by the Judge, it should be interpreted by the court which rendered it, as well as by all others, as the foreign writers say, objectively; that is, it should be construed with reference to the pleadings and the subject matter of the controversy, according to the natural and legal import of the terms used, without any reference to any subsequent explanation of the court of what was its intention or in its mind at the time the decree was rendered.

**A**PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*T. Gilmore and Benjamin, Bradford & Finney, for Mrs. Mary Regan,*  
administratrix, appellant. *J. Dunlap, for Mrs. Cutter, appellee.*

MERRICK, C. J. On the sixth day of February, 1855, the appellant, as administratrix of the succession of *William Regan*, deceased, filed her account or tableau of distribution.

She placed herself on the tableau for one-half of the last community. The account and this item in it were opposed by *Mrs. Fanny Cutter* and one other creditor. On a final hearing, the Judge of the District Court rendered a judgment amending the tableau and directing the administratrix to pay in the order therein regulated the creditors specified, and homologated the tableau in other particulars, and directed the funds to be distributed accordingly.

*Mrs. Cutter* took a devolutive appeal from this decree, not being satisfied with the amount allowed her. After taking her appeal, she took a rule upon the administratrix to show cause why she should not pay over to her, without prejudice to her appeal, the amount allowed her by the decree.

To this rule, the administratrix replied that she was willing to comply with the decree, but, by the terms thereof, there would be nothing due to the plaintiff in the rule, as the entire fund would be absorbed by the creditors preferred to *Mrs. Cutter* by the decree; and as to so much of said rule as asks the court to order the execution of the judgment without prejudice to the appeal, the administratrix excepted, because the court was without jurisdiction to pro-

ounce upon the legal effect of the execution of said judgment upon the rights of the several parties.

In this court, it is contended that the effect of the decree upon the rule was to change the former judgment of the court amending and homologating the tableau of distribution, and to decree the administratrix to pay over to the creditors the one-half of the community which was allowed her by the first decree. On the one side, it is contended that this proceeding was unwarranted by law, and that the judgment once signed is beyond the control of the Judge who has rendered it, and that he has no power to correct or modify it in any subsequent proceeding; and on the other, that the interpretation of the decree by the Judge who rendered it, is of the highest authority and furnishes the best evidence of what was intended thereby.

We think that when a judgment has once been signed by a court, that it should be interpreted by that court, (as well as by all others,) as foreign writers say, objectively; that is, it should be construed with reference to the pleadings and subject matter of the controversy, according to the natural and legal import of the terms, without reference to any *subsequent* explanation of the court of what was its intention or in its mind at the time the decree was rendered. In other words, this court will disregard any forced construction placed by the lower court upon its own decrees, although it may be pretended that such conclusion was in the intention of the court rendering the decree.

But if we apply this rule to the case before us, we find the decree upon the rule in accordance with the first judgment. That judgment orders certain debts to be paid in a certain order, and we understand the decree to make no reservation of a part of the fund in order to pay the administratrix, in preference to the creditors named in the decree, her one-half of the community. She is therefore bound by the decree to make payment in conformity to it, even if it should exhaust the entire fund in her hands, and leave nothing with which to pay herself the amount she has placed to her own credit on the tableau.

On the other point, it is manifest that the District Court was without jurisdiction to determine what effect the execution of the judgment should have upon the appeal. That was a question which the District Court could not determine adversely to the appellee, as appears to have been done by the unqualified manner in which the rule was made absolute. Without inquiring whether this part of the decree can prejudice the appellee or not in this court, we think she is entitled to a correction of it in this particular, and the execution of a judgment should be suffered to produce whatever effect, if any, the law gives to the same.

It is, therefore, ordered, adjudged and decreed by the court, that so much of the decree rendered upon the rule, on the 12th day of December, 1855, as makes the said rule absolute without prejudice to the appeal of said *Mrs. Fanny Cutter*, be reversed and avoided, and that the said decree be, in other respects, affirmed. Said appellee to pay the costs of the appeal.

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SAME CASE ON A RE-HEARING.

BUCHANAN, J. After the judgment and appeal which form the subject of the case No. 4324 in this court, just decided by us, a rule was taken by *Mrs. Fanny Cutter* to show cause why the administratrix should not be ordered to pay

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over the amount allowed the said *Mrs. Cutter* by the judgment appealed from, without prejudice to her further rights upon her said appeal. After hearing, this rule was made absolute.

The judgment upon this rule, as it stands, is a peremptory and unqualified judgment against the administratrix of the estate and appellant herein, for a sum of nineteen hundred and seventy-eight dollars and thirty-three cents, that being the amount allowed *Mrs. Cutter* by the previous judgment from which she had appealed.

But the administratrix has brought to our notice that the judgment from which *Mrs. Cutter* had appealed, approved and homologated the account rendered by the administratrix, so far as not specifically amended; and that one of the particulars in which the account was not amended by the judgment, was the amount in the hands of the administratrix for distribution, say four thousand one hundred and eighty-one dollars and thirty-eight cents.

Now, the judgment in question (that upon the oppositions to the account of administration) decreed, that the fund in hand, as aforesaid, should be distributed:

|                                                                                                         |           |         |
|---------------------------------------------------------------------------------------------------------|-----------|---------|
| 1st—To the payment of Clerk's fees .....                                                                |           |         |
| “ “ Sheriff's fees .....                                                                                | \$176 08  |         |
| “ “ privileged claims, according to the tableau,<br>which amount to .....                               | 821 00    |         |
| 2d—Claim of <i>Bayne</i> , assignee of <i>Kohn, Daron &amp; Co.</i> , amounting in<br>capital, to ..... | \$3718 86 |         |
| And in interest to date of judgment, to considerably<br>over .....                                      | 2000 00   | 5718 86 |
| 3d—Claim of <i>Miller's Syndic</i> , as the same figures on the tableau, say                            | 1613 56   |         |
| 4th— <i>Mrs. Fanny Cutter</i> .....                                                                     | 1978 88   |         |

It is obvious, from this statement, that, under the judgment upon the account of administration, *Mrs. Cutter* could have nothing to receive from the fund in the hands of the administratrix, according to the account, which fund would have been entirely exhausted by the two first classes of preferred creditors. The judgment of the court upon the rule was therefore unfounded in any right conferred upon *Mrs. Cutter* by the previous judgment of the District Court, and injurious to the administratrix, by imposing upon her a liability beyond that judgment.

It is, therefore, adjudged and decreed, that the judgment heretofore rendered in this cause be set aside and annulled; and it is further decreed, that the judgment appealed from be reversed, and the rule taken by the appellee, *Mrs. Fanny Cutter*, on the appellant, *Mrs. Regan*, administratrix of *William Regan's* succession, on the 5th December, 1855, be dismissed, without prejudice to *Mrs. Cutter's* rights under her appeal; and that the appellee pay the costs of said rule in both courts.

## P. H. MORGAN v. JAMES BROWN.

When an attorney's fee is contingent upon his success in collecting money for his client, the fee not being exigible until the money is collected, prescription against the attorney's demand does not begin to run from the date of the judgment he has obtained for his client.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Hamner & Haynes*, for plaintiff. *Smiley & Perrin*, for defendant and appellant.

**SPOTFORD, J.** This is a suit for attorney's fees, alleged to have been earned, under a special contract.

The defendant denies that he employed the plaintiff.

The proof is that the defendant gave to one *Dempsey P. Cain* a power of attorney, "to sue or otherwise collect all his claims" against the estate of one *Witherspoon*, and agreed to divide the proceeds with him. This power of attorney implied the power to employ counsel and to stipulate fees to be paid out of the proceeds of the claims.

*Cain*, in pursuance of this mandate, employed *J. M. Elam* as an attorney to investigate the claims. He resided in Baton Rouge, and finding it advisable to institute proceeding in the United States Circuit Court at New Orleans, he made a special contract with *T. G. Morgan* (of whom the plaintiff is assignee) to bring and conduct a suit in that court against *Witherspoon's* representatives, for a fee of ten per cent. upon the amount eventually collected, contingent upon the collection. *Morgan* brought the suit and obtained a judgment in the Circuit Court at New Orleans. A writ of error was sued out from the Supreme Court of the United States, and the judgment of the Circuit Court was affirmed. The amount of the judgment (\$14,000) and large arrears of interest has now been realized. Out of the one-half going to *Cain*, *Morgan* was paid ten per cent. by *Cain's* assignees. This suit is to recover the ten per cent. due upon *Brown's* half.

Both *Cain* and *Brown* were notified of the employment of *Morgan* to conduct the suit in *Brown's* name before the Circuit Court. Their acquiescence is a ratification of his engagement by *Elam*.

*Elam* testifies that he contracted with *Morgan* for the contingent fee of ten per cent. It is urged that, as the sum exceeds five hundred dollars, this evidence is insufficient. We find a corroboratory circumstance in the fact that *Morgan* was paid ten per cent. out of *Cain's* portion of the judgment by *Cain's* assignees without opposition.

The plea of prescription is interposed. As the stipulated reward for the services was contingent upon the success of *Brown* in collecting the money, the fees were not exigible until the money was collected. This suit was brought immediately after the collection of *Brown's* share. Moreover, three years had elapsed since the voluntary payment of the first instalment on the part of *Brown's* agent, through his assignee.

The fact that *Brown* employed other attorneys for special duties in collecting the money does not impair the claim of *Morgan* for compensation, for he was at all times ready to do whatever was requisite to be done in enforcing the judgment he had obtained in New Orleans.

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The losses experienced by the defendant in consequence of his having selected unfaithful agents or made injudicious contracts with them, furnish no sufficient ground for relieving him from the obligation of paying the attorney who appears to have performed his duties with fidelity and success.

This is not a case for damages as for a frivolous appeal.

Judgment affirmed.

W. D. MILLER v. C. & G. B. TATE.

The defendants, the factors of the plaintiff, effected insurance on their stock of tobacco and other merchandize in four different insurance companies. Some of the insurances were for six months, others for a year, and at different rates. The rate of insurance was equal to one-eighth of one per cent. per month. The plaintiff, in the accounts rendered of sales of tobacco, was charged one-fourth of one per cent. per month for insurance. *Held*: That the defendants were not to be considered as plaintiff's agents in the insurances they had effected, but they are to be considered as being themselves the insurers of the plaintiff at the rate of one-fourth of one per cent. per month, and as having re-insured at the best terms they could obtain in the different insurance offices in the city.

The plaintiff's tobacco having been lost by fire, the defendants are not entitled to charge commissions on sales not actually made. Their liability to the plaintiff is that of insurers.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*Semmes & Edwards*, for plaintiff. *Elmore & King*, for defendants and appellants.

BUCHANAN, J. The plaintiff, a tobacco manufacturer in Lynchburg, Virginia, sues defendants, commission merchants in New Orleans, for the alleged value of certain tobacco shipped by the former at various times to the latter, for sale on commission, and of which the petition states that the defendants have refused to render an account, although frequently requested so to do, under a pretence that the tobacco has been destroyed by fire.

The defendants complain, with great apparent reason, of the unfairness of this statement of the plaintiff's cause of action. In truth the defendants appear to have rendered various accounts to plaintiff; the latest some five or six months previous to the institution of this suit, embracing the whole of the balance on hand of plaintiff's tobacco at the time of a fire which actually occurred on defendant's premises about two months previous to the rendition of of that account.

The real subject of dispute between the parties is the value of said balance of plaintiff's tobacco in defendant's hands at the time of the said fire and the correctness of certain charges in defendant's last account for commissions, &c.

As much of the argument has turned upon the insurances effected by defendants in five different insurance offices, to the aggregate amount of fifty thousand dollars upon their stock, composed of tobacco and other merchandize, in the store consumed by the fire of the 16th March, 1854, and upon the settlement made by the defendants with those insurance companies, it is proper that we should premise by declaring that, in our opinion, the defendants are not to be viewed as plaintiff's agents in effecting those insurances.

Some of those insurances are for six months, others for a year; the former at three-fourths of one per cent. premium, the latter at one and one-half per

cont. premium. That rate of premium is equal to one-eighth of one per cent. per month. But defendants charge plaintiff one-fourth of one per cent. per month for insurance in the several accounts rendered; said insurance being calculated upon each lot of plaintiff's tobacco sold by defendants to the day of sale. It is clear, therefore, that the defendants became themselves the insurers of the plaintiff at the rate of one-fourth of one per cent. per month, and re-insured on the best terms they could obtain in the different insurance offices in the city.

The rate of premium charged by defendants to plaintiff appears to be the same as that charged to their other numerous customers, and by uninterrupted acquiescence on the part of plaintiff, has become binding upon him by this time, even supposing that he may have had the right to object to it originally.

It is particularly to be observed that plaintiff makes no objection to his factors becoming themselves the insurers of his tobacco.

The insurance account of defendants with plaintiff is obviously in the nature of an open policy with an uncertain term, of which the former are the underwriters. The insurances effected by defendants with the Home, the Sun, and other insurance companies, were, on the contrary, particular fire risks, with a specified term. There was no privity of contract between plaintiff and those insurance companies.

Considering, then, the defendants as the insurers of plaintiff, we are next to inquire what is the proof of loss?

At the time of the fire in defendant's store, there were in said store, unsold, belonging to plaintiff:

- 1 Box tobacco, *Natural Bridge*, weighing 100 pounds.
- 137 Boxes tobacco, *E. Lipscomb*, weighing 13,700 pounds.
- 28 Boxes tobacco, *Miller's Best*, weighing 728 pounds.
- 17 Boxes tobacco, *G. W. Norwood*, weighing 1700 pounds.
- 90 Boxes tobacco, *Norwood & Street*, weighing 9000 pounds.

To ascertain the value of these several brands of tobacco per pound, there are two methods indicated by the evidence, namely, the last sales of each brand previous to the fire and the estimation of merchants trading in the article of the market value of each brand at the time of the fire.

We find no sales of *Natural Bridge* proved.

The last sale of the *E. Lipscomb* was on the 9th March, 1854, one week before the fire, one box at 16 cents per pound.

The last sale of the *Miller's Best* was February 4th, 1854, one box at 25 cents per pound.

There is no evidence of sales of the *G. W. Norwood* and *Norwood & Street* brands.

Two merchants in the tobacco trade, *E. A. Rawlins* and *A. Glenn*, have given a certificate, which is in evidence, of the cash value per pound, previous to the damage from the fire, of several brands of manufactured tobacco, estimated from samples saved from the fire in defendants' store.

Among the brands contained in that certificate are only two of those for which compensation is claimed in this suit, namely, *E. Lipscomb* and *Norwood & Street*. The former is estimated in the certificate at thirteen cents a pound and the latter at eight cents. Both of the signers of that certificate have been examined on the trial of this cause as witnesses, and the result of their examination is far from satisfactory as to their means of judging correctly in relation to

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the value, before the fire, of the tobacco submitted to their inspection, and even in relation to the identity of the brands mentioned in their certificate. Those brands are thirty-six in number.

*Mr. Rawlins* states: "Made the appraisement a week or ten days after the fire. The tobacco was piled up in tiers—should say there were 1500 to 2000 boxes of tobacco there. There were many of the boxes badly burnt—some of them mostly burnt. Some had the brands visible and distinct. There were probably fifteen or twenty brands in the lot which they could identify. Examined a box of each particular brand, as witness thought. There were many of the brands which could not be identified by them." This witness does not specify what are the brands identified. But he says "that he was not acquainted with the *Norwood & Street* brand," and "cannot say that he ever examined the *Norwood* brand."

*Mr. Glenn* says: "This tobacco was badly burnt. There was only a portion of the tobacco that had boxes on it. Between 400 and 500 packages had boxes on it. There were about 2000 packages in their original state, without their boxes; the balance was loose tobacco in piles. The whole of the 400 or 500 boxes which he speaks of had one head burnt off, and some had two or three sides burnt off. A tobacco box has four sides and two heads. Could not decipher the marks or brands. There were between three and six of the brands which he could identify by having the smoke washed off with soap. The outside of the tobacco was changed, and the inside was badly damaged by being in the fire."

*Mr. Glenn*, no more than *Mr. Rawlins*, could specify the brands which he had identified.

Another certificate, made by two merchants at the instance of defendants, is in evidence as to the value of the *Norwood & Street* brand on the 28th November, 1853, between three and four months previous to the fire. It is stated to be 13 cents a pound.

The only other evidence of the cash value of these tobaccos at the time of the fire is that of defendants' clerk, *Smith*, who declares that he considers the same to be correctly stated in account No. four, being as follows:

*Natural Bridge*, 18 cents per pound.

*E. Lipscomb*, 9 cents per pound.

*Miller's Best*, 10 cents per pound.

*Norwood* and *Norwood & Street*, 8 cents per pound.

But this witness corrects himself immediately afterwards, by saying that he considers the *Norwood & Street* brands worth ten cents instead of eight. As there were no sales of this brand during the three months that elapsed from the date of *Twitty* and *Oliver's* certificate, and as plaintiff did not think fit to examine either of those gentlemen to contradict *Smith's* testimony as to the value of the *Norwood & Street* brands at the time of the fire, (although both *Twitty* and *Oliver* were in court as witnesses on the trial of the case,) we may infer that he could not have done so successfully.

On a review of the whole case we find actual sales of two of the brands proved, the *Lipscomb* and the *Miller's Best*. Those sales, extending through a period of many months, show a great uniformity in the market price of those brands—the former at fifteen and the latter at twenty-five cents. Actual sales are the surest criterion, and must outweigh the opinion of the clerk of defendants, as expressed in his testimony quoted above. It is true that *Goodman*,

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another witness of defendants, has placed even a lower estimate on the *Miller's Best* brand than *Smith*; but *Goodman* himself proves a sale by defendants of the whole lot of this brand to himself at twenty-five cents. He returned it indeed, having found one box inferior to sample. But he does not prove any other of the twenty-eight boxes but that one to have been so; neither does *Smith* prove anything of the sort, although the lot was in the store of defendants for some months afterwards, and five boxes were sold at different times, and all for twenty-five cents a pound, without any reclamation being made. We will, therefore, assess this brand at the value affixed by the judgment of the District Court, with the exception of one box, proved by *Goodman* to have been mouldy, and which we value at the price affixed to the brand in the defendants' account and *Smith's* testimony, say ten cents. The *Miller's Best* was in small packages of twenty-six pounds each.

The *Lipscomb* brand, as we have said, was sold in small lots at various times, running through the period of a year or more, at a very uniform rate of fifteen cents, reaching on two occasions as high as sixteen. But it evidently was very heavy at that rate; and there is in evidence a letter of plaintiff to defendants, dated 6th March, 1854, and which must have come to hand just about the time of the fire, in which defendants were instructed to *close out* this brand at ten cents a pound or ship it to Boston. It is probable from the evidence that defendants might have *closed out* the *Lipscomb* at ten cents, in conformity to those instructions, had not the fire intervened. We shall, therefore, assess this brand at that rate.

Upon the value of the *Natural Bridge* brand there is no dispute; and for reasons expressed above we adopt *Smith's* estimation, ten cents, as the value of the *Norwood* and of the *Norwood & Street* brands.

Defendants cannot be allowed commissions except upon actual sales made by them. It is a mere fiction to treat the destruction of the tobacco as a sale. And as to the auctioneer's sales of tobacco damaged by the fire, there is not the slightest proof of the identity of any of the lots sold by that officer with the tobacco of plaintiff. The number of packages of manufactured tobacco in defendants' store at the time of the fire was certainly over four thousand, of which only two hundred and seventy-three belonged to plaintiff.

The auction sales comprise twelve hundred and seventy-seven boxes, divided into fifty lots, and fourteen lots of loose tobacco. No marks or brands of any kind are affixed to any of the lots.

For the same reason the maturity of payment fixed by defendant's account, (November 5th, 1854,) seems purely fanciful and not binding upon plaintiff. Defendants liability for the plaintiff's tobacco destroyed by fire is that of an insurer. Supposing defendants to have been entitled, in that capacity, to sixty days delay for paying the loss, in the absence of any stipulation to that effect, yet the sixty days had elapsed long before the institution of this suit, and there appears no foundation for the charge made in defendants' account of two per cent. discount for anticipated payment.

We allow the charges of one-quarter per cent. per month premium for insurance, and six cents a box per month storage, as calculated upon the whole of the plaintiff's tobacco sold and burnt, to the dates of the several sales and of the fire, in defendants' account No. two in the record.

We state the account between the parties, according to the foregoing principles, under the evidence and the agreements of counsel on file, in a schedule

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hereto annexed, showing a balance in favor of plaintiff of eight hundred and sixty-three dollars and twenty-three cents.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that plaintiff recover of defendants eight hundred and sixty-three dollars and twenty-three cents, with interest on three hundred and twenty-eight dollars and twenty cents from March 16th, 1854, and on five hundred and thirty-five dollars and three cents from 3d November, 1854, with costs of the District Court, those of appeal to be borne by plaintiff and appellee.

## SCHEDULE.

*Wm. D. Miller, Dr., to C. & G. B. Tate:*

|                                                              |                  |
|--------------------------------------------------------------|------------------|
| To balance per account current rendered July 20th, 1853..... | \$2425 53        |
| To balance from <i>W. D. M.</i> in final settlement.....     | 863 23           |
|                                                              | <u>\$3288 56</u> |

*Cr.*

|                                                                     |          |
|---------------------------------------------------------------------|----------|
| By nett proceeds tobacco sold per account sales June 5th, 1854..... | \$391 97 |
| “ “ “ “ “ June 6th, 1854.....                                       | 392 24   |

Nett value of tobacco burnt March 16th, 1854, as follows:

|                                                               |                  |
|---------------------------------------------------------------|------------------|
| 1 Box <i>Natural Bridge</i> , 100 lbs., @ 18 c.....           | \$18 00          |
| 137 Boxes <i>Lipscomb</i> , 13,700 lbs., @ 10 c.....          | 1370 00          |
| 27 Boxes <i>Miller's Best</i> , 702 lbs., @ 25 c.....         | 175 50           |
| 1 Box <i>Miller's Best</i> , 26 lbs., @ 10 c.....             | 2 60             |
| 17 Boxes <i>G. W. Norwood</i> , 1700 lbs., @ 10 c.....        | 170 00           |
| 90 Boxes <i>Norwood &amp; Street</i> , 9000 lbs., @ 10 c..... | 900 00           |
|                                                               | <u>\$2636 10</u> |
| Five per cent. off for cash.....                              | 131 75           |
|                                                               | <u>\$2504 35</u> |
|                                                               | <u>\$3288 56</u> |

SPOFFORD, J., absent.

PETER LAFITON, Administrator, v. ELIEN DOIRON et al.

The first section of the Act of the Legislature of the 10th of March, 1847, conferring upon administrators and other representatives of a succession, the power of acting as auctioneers in the sale of the property of the succession, was not abrogated by the Act of the 7th of April, 1847, directing the Judge of the court to order the sale to be made by the Sheriff of the parish or such auctioneer as the parties might name.

The two Acts passed at the same session are not so utterly inconsistent with each other as to be wholly irreconcilable.

Although the action for a reduction of the price of land on the ground of deficiency in quantity be prescribed, it may nevertheless be set up as a means of defence against a demand for the price.

**A**PPEAL from the District Court of West Baton Rouge, *Robertson, J.*  
*H. M. Faerot*, for plaintiff. *Edwards & Barrow*, for defendants and appellants.

MERRICK, C. J. On the 29th day of June, 1850, under an order of court, *Louis Lafiton*, as administrator of the succession of *Widow Elizabeth Lejeune*, deceased, sold at public auction the property of her succession. Among the

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effects sold, was a tract of land described as "the plantation whereon the deceased resided, at forty arpents from the river Mississippi, measuring one arpent front by forty arpents in depth, between parallel lines, bounded above by land of *Elien Doiron* and below by lands of *McCalop*, *Felix Barnard*, and others," which was sold to the defendants, *Longuepée* and *Doiron*, for \$1,000 (according to the terms of sale), on a credit of one, two and three years, the purchasers furnishing three notes bearing eight per cent. interest after maturity. The purchasers did not sign the adjudication nor give their notes. The *proces verbal* of the sale was signed by the administrator alone and two witnesses.

The first administrator having died without obtaining the notes of the purchasers, the present administrator applied for and obtained an order of seizure and sale in April, 1855, against the purchasers, to enforce the payment of the price. The defendants did not oppose the sale, and the land was sold for \$500, July 7th, 1855.

The present action is brought to recover \$814 08, the remainder of the price, with eight per cent. interest from August 4th, 1855, until paid. Judgment was rendered by default against *Longupée*, as a debtor *in solido*, for the amount claimed. *Doiron* answered, and judgment having been rendered against him for the like sum, he has appealed.

His counsel contends :

1st. That in 1850, there was no law authorizing an administrator to act as auctioneer in the sale of the property of a succession. The first section of the Act of 10th March, 1847, p. 62, expressly conferred this power upon administrators and other representatives of a succession. The power was not abrogated by the Act of 7th of April, 1847, p. 73, directing the Judge of the court, where the succession is opened, to order the sale to be made by the Sheriff of the parish or such auctioneer as the parties may name; because the two Acts were passed at the same session of the Legislature, and they are not so utterly inconsistent with each other as to be wholly irreconcilable. Moreover the provision in the Act of 10th of March was recognized and continued by the provision in the 7th section of the Act relative to auctioneers, approved March 16th, 1848, p. 97. We think, therefore, the Judge could, in 1850, empower an administrator to sell property. It is unnecessary to consider whether the administrator could, by his adjudication, bind the purchasers to pay the price, they never having signed the notes or adjudication; for the defendant *Doiron* has substantially admitted the sale in his answer, to say nothing of his acquiescence in the proceedings under the order of seizure and sale. See Arts. 2586 and 2601 C. C. 6 Rob. 26 and 9 Rob. 416.

2d. It is urged that the Judge of the District Court erred in refusing to receive the defendants' proof in regard to the alleged deficiency in the quantity of the land sold. The reason for the refusal, we learn from plaintiff's brief, was that the action for the reduction of the price was barred by the prescription of one year. In this the District Judge erred. Although the defendants' action, were he to sue, is barred by one year, yet as a means of defence, the exception endures as long as the plaintiff's action exists, and may be used as a shield against the action. *Quae temporalia sunt ad agendum, sunt perpetua ad excipiendum*. *Davenport v. Foster*, 3 N. S. 695; *Bushnell v. Brown*, 4 N. S. 500.

3d. It is further contended, that the court erred in condemning *Doiron*, as a debtor *in solido* with *Longuepée*, to pay the remainder of said price. The pur-

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chase of property in the joint names of *Longuepée* and *Doiron* only created a joint obligation for the payment of the price. If the mortgage, the accessory obligation in a purchase of this kind, be considered as indivisible, it does not follow that the primitive obligation is of the like nature. See 9 An. 421. C. C. 2807, 2844, 2088, 2108, 1382. C. P. 65, 66 and 67.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court as to the said *Elien Doiron* be avoided and reversed, and that this cause be remanded to the lower court for a new trial, with instructions to receive testimony tending to show a diminution in the quantity of the land sold, and to be governed by the views herein expressed, and in other respects to proceed according to law; the plaintiff and appellees paying the costs of the appeal.

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STATE v. LAZARRE AND LEOPOLD REISS.

The Sheriff has no authority to receive money as security for the appearance of persons accused of crime.

Parties admitted to bail under bond, are, as it were, transferred from the custody of the Sheriff to the friendly custody of the sureties in the bond, who may at any time surrender the accused in discharge of the bond.

Courts of justice will not aid parties to enforce or relieve them from the effects of contracts made in violation of law.

**A**PPEAL from the District Court of Iberville, *Robertson, J.*  
*Z. Labauve*, for appellee.

MERRICK, C. J. *Lazarre* and *Leopold Reiss* were arrested under a charge of larceny.

On a hearing, under a writ of *habeas corpus*, the District Judge ordered that the parties be admitted to bail upon their executing their several bonds in the sum of five hundred dollars each with good and sufficient security, with a condition for their appearance at the next term of the District Court.

On behalf of *Lazarre Reiss* one *Felix Reiss* deposited cash and drafts in the hands of the Sheriff, amounting to the sum of five hundred dollars, as security for the appearance of *Lazarre Reiss*, before the Sixth District Court in and for the parish of Iberville, to answer the charge.

The Sheriff signed the receipt for the money in his official capacity, and it seems enlarged *Lazarre Reiss*.

An indictment was preferred against both defendants, and *Lazarre* failed to appear to answer the same.

After this failure of *Lazarre Reiss*, *Felix Reiss* assigned his claim to the money in the hands of the Sheriff.

The present proceeding was commenced by a rule taken by the assignee of *Felix Reiss* upon the Sheriff, to show cause why the money should not be paid to him. The State of Louisiana intervened in the rule, nevertheless it was made absolute, and the State has appealed.

There is no law which authorizes a Sheriff to receive money as a security for the appearance of persons accused of crime. Where parties are admitted to bail under bonds and recognizances, they are not absolutely discharged, but are (as it were) transferred from the custody of the Sheriff to the friendly cus-

body of the sureties in the bond or recognizance. 6 Mod. R. 231. These new keepers have the right to surrender the party accused in discharge of his bond to the Sheriff or his deputy, in open court or in the four walls of the prison. This right of surrender implies the right of arrest as an incident to it. Rev. Stat. p. 170, sec. 60; Ibid, p. 12, sec. 7.

Aside from the positive provisions of law on the subject of bail in criminal cases, it is evident, to say nothing of its liability to abuse, that the deposit of money with the Sheriff, as security for the appearance of the accused, would not be so likely to secure the end proposed as that provided by the statute.

We think, therefore, the delivery of the money to the Sheriff and his release of the accused upon the same, clearly illegal and against the policy of the law.

The assignee of *Felix Reiss* has not acquired any greater right than *Reiss* himself had. Courts of justice will not aid parties to enforce or relieve them from the effects of contracts made in violation of law. See *Davis v. Holbrook*, 1 An. 178.

The rule ought to have been discharged, but as the State alone has appealed the only decree we can render in accordance with our views of the law, is to dismiss the appeal.

Appeal dismissed.

#### JOSEPH T. LANDRY, Administrator, v. C. L. LANDRY, Executor.

To sustain an order of seizure and sale at the suit of the administrator of a succession, authentic evidence of the plaintiff's appointment as administrator is necessary.

It is too late to supply that evidence after the appeal from the order is granted.

APPEAL from the District Court of Iberville, *Robertson, J.*

*E. W. Robertson*, for plaintiff. *Z. Labauve*, for defendant and appellant.

VOORHIES, J. This is an appeal from an order of seizure and sale obtained by the plaintiff, as administrator of the succession of the late *Valéré Landry*, on an act importing a confession of judgment.

The absence of authentic evidence of the plaintiff's appointment as administrator is assigned by the defendant and appellant as an error apparent on the face of the record.

It appears that the proceedings in this case were filed on the 5th of April; the notice of seizure and sale was issued on the 7th, and served on the 8th of April; and the order granting this appeal was signed by the Judge on the 10th of the same month. The plaintiff offered to file, after the granting of the order of appeal, authentic evidence of his appointment as administrator, but the Clerk conceiving he was without authority refused to file the same.

We consider the error assigned as fatal. After the notice of seizure and sale had been served, and an appeal taken by the defendant, it was then too late to supply the evidence, which was essential to authorize the issuing of the order of seizure and sale; such evidence should have formed part of the proceedings, *via executiva*, on file, to sustain the fiat of the Judge.

It is, therefore, ordered and decreed, that the fiat of the Judge *a quo*, granting the order of seizure and sale, in this case, be set aside and avoided, the plaintiff and appellee to pay the costs of both courts.

## J. H. MARTIN v. W. S. JONES.

The appointment of a tutor by a court of competent jurisdiction cannot be questioned collaterally; such appointment must be avoided by a direct action, or in the mode pointed out by law.

**A** PPEAL from the District Court of Carroll, *Farrar, J.*  
*J. B. & C. T. Bemiss*, for plaintiff and appellant. *Short & Parham*, for defendant.

**VOORHIES, J.** This is an injunction suit. *William S. Jones* was appointed dative tutor to the minor children and legal heirs of the late *Ridden Jones*, whose succession was opened in the parish of Carroll. As such tutor, he obtained a judgment against the succession of the late *R. J. Chambliss* for the sum of \$1,217 33 with five per cent. per annum interest thereon, from the 29th of May, 1847, until paid, and costs. A twelve months' bond for the sum of \$1,721 34 was given by the defendant in execution in satisfaction of this judgment on the 5th of August, 1854. An execution, issued thereon, was enjoined by the administrators of the estate of *Chambliss*, on the ground that the District Court of Carroll was without jurisdiction to appoint *William S. Jones* as tutor, inasmuch as the minors had removed to the State of Texas, where guardians had already been appointed to them; and hence his appointment and the judgment thus rendered in his favor as such tutor were mere nullities.

*William S. Jones* died shortly after the injunction was sued out. *James A. York* then filed a petition in the District Court of Carroll, setting forth his appointment as guardian of the minors since the death of *Jones*, by one of the county courts of the State of Texas, and prayed to be recognized as such. His prayer was granted on the 12th of May, 1856. Thereupon he made himself a party to the suit and moved to dissolve the injunction, with damages.

There was judgment in his favor dissolving the injunction, allowing him additional interest and damages, and the plaintiffs appealed.

We do not think there is any error in the judgment of the court below. It is clear that the appointment of a tutor by a court of competent jurisdiction cannot be questioned collaterally; such appointment must be avoided or set aside by a direct action or in the mode pointed out by law.

The plaintiff's objection to the admission of the judgment recognizing *York* as guardian was properly overruled. As the validity of that judgment was not in question *York* was clearly not bound to offer the evidence upon which it was rendered.

There is no equitable ground of defence urged by the plaintiffs in this case. On the contrary, the circumstances disclosed by the record have fully convinced us that this injunction was sued out solely for the purpose of obtaining delay. We are, therefore, of opinion that the defendant ought to recover additional damages as prayed for in his answer to this appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below be amended, by increasing the damages from one hundred and thirty-five dollars to three hundred and forty-two dollars; and so amended, that said judgment be affirmed, with costs.

## JOHN HUNSICKER et al. v. WILLIAM BRISCOE et al.

The Legislature may constitutionally delegate to Police Juries authority to pass all such ordinances as they may deem necessary relative to roads and levees.

The Police Jury may, in order to avoid the expense of expropriation of property, authorize the owners of the soil over which the road passes, to keep up gates by which the right of way may be secured to the public with the least injury to the owner.

**A** PPEAL from the District Court of Tensas, *Farrar, J.*

*A. Snyder, Reeves, Briscoe and Alexander*, for plaintiffs and appellants. *T. P. Farrar, H. B. Shaw and F. Walton*, for defendants.

MERRICK, C. J. This suit is brought to recover damages on account of, and to abate as nuisances, certain gates across a road in the parish of Tensas.

The point of law raised for our decision by the appeal is thus stated by the appellants, viz:

"The main question for the consideration of this court is, the power of the Police Jury of the parish of Tensas to authorize the erection of gates or other obstructions across the public highways, for if such power is vested in the parochial authorities legally, this cause is at once disposed of in favor of the defendants; for we admit that the defendants erected the obstructions complained of under the sanction and by the authority of the Police Jury."

The argument of the appellants is, that "All legislative power under the Constitution of this State, is vested in the Senate and House of Representatives, and they have no power to delegate their authority to another body, for, if the proposition be admitted that the Legislature can delegate a part of its power, the same proposition would hold good as to all powers conferred by the Constitution. Police Juries are subordinate to the will of the Legislature, and whenever they are sustained in the exercise of legislative privileges, they become co-ordinate departments of the government, and cease to be subordinate."

The third Article of the Constitution is in these words: "The legislative power of the State shall be vested in two distinct branches, the one styled the 'House of Representatives,' the other the 'Senate,' and both together the General Assembly of the State of Louisiana."

We do not understand by this Article of the Constitution that the General Assembly is required to legislate upon all subjects, whether of a general or local nature, and that it has no power to delegate any legislative authority to municipal and parochial authorities and other inferior jurisdictions.

We think it was intended merely to define in what bodies the supreme legislative power should be vested. It was not intended as a restriction upon the sovereignty of these bodies. The Article is but a sequence of Article one, which declares that "The powers of the government of the State of Louisiana shall be divided into three distinct departments, and each of them to be confided to a separate body of magistracy, to wit: those which are legislative to one; those which are executive to another, and those which are judicial to another."

The State of Louisiana being sovereign, it must follow that the General Assembly, in all that concerns the law giving power, is supreme, except in those particulars in which it is expressly restrained by the Constitution. 9 Rob. 411; 11 An. 370. There is no express restriction on the power of the Legislature,

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prohibiting it from conferring such a part of its power upon the Mayors and Aldermen of towns and the Police Juries of the parishes, as may be suited to their immediate wants. On the contrary, the Constitution recognizes these subdivisions of the State, and it is to be presumed that it was the intention of the framers of that instrument to adopt with it the construction which had been placed by every department of the State government upon the like provision in the two former Constitutions. 3 Martin's Dig. 290; 2 Moreau, 240; Bullard & Curry, 640; C. C. 420; 7 N. S. p. 5.

The Act of 1855 conferred upon the Police Juries of all the parishes of the State, authority to pass all such ordinances as they may deem necessary relative to roads and levees. Acts 1855, p. 394.

This is a subject upon which the local authorities are much more competent to legislate than the General Assembly, inasmuch as they are easily convened and can readily adopt such regulations and changes as the immediate wants of the neighborhood or parish at large may require. We think the Legislature had the power to confer this authority upon the Police Juries.

As the Police Juries have power to make roads, we see no reason why this power conferred is not complete, and why the Police Jury may not, in order to avoid the expenses of the expropriation of property, authorize the owners of the soil over which the road passes, to keep up certain gates, as was done in the case before us, thus securing the right of way for the public, with the least injury to the owner. The Police Jury had the power to abandon the road altogether, as well as to open it; and if they have determined that the public shall not exercise the right of way, except as subject to the gates of owners, they have only refrained from exercising *all* the power with which they are invested.

Any gate which the Police Jury have authorized to be placed upon the road, is not an obstruction prohibited by the Statute of 1818, sec. 10; see Rev. Stat. p. 507, sec. 138. The Statute is intended to prevent obstructions to roads after they have been laid out and constructed as directed by the Police Jury. What they have sanctioned as pertaining to the road forms a part of the same.

The judgment of the lower court is, therefore, affirmed, with costs.

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#### L. D. MILLER v. R. STEWART.

In an action by an overseer for his wages, a plea in reconvention may be set up by the defendant, claiming damages for the unlawful killing of one of the negroes by the overseer. An overseer is not permitted to chastise the slaves of his employer with unusual rigor, nor to maim or mutilate them, or to expose them to the danger of loss of life.

**A** PPEAL from the District Court of Carroll, *Farrar, J.* Tried by a Jury. *L. Selby*, for plaintiff. *E. Sparrow, Short & Parham*, for defendant and appellant.

**VOORHIES, J.** The plaintiff sues to recover the sum of \$800 for services alleged to have been rendered by him as overseer on the defendant's plantation, at the rate of \$400 per annum, from the 18th of March, 1853. He alleges that he was discharged and sent away by the defendant, without any good cause, previous to the expiration of the last year, to wit: on the 18th of June, 1854, and is, therefore, entitled to the whole of his salary.

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The defendant, in his answer, after a general denial, pleads specially that he had not only good, but urgent cause for discharging the plaintiff as overseer; because said plaintiff, on the 8th of June, 1854, in total disregard of his duties as such overseer, most wantonly and cruelly whipped to death one of his negroes, named *Tom*, of the value of \$1250, which he claims as damages in reconviction; and also pleads payments made by him on account of the plaintiff's demand.

Upon the issues thus presented by the pleadings, the cause was tried by a Jury, who gave a verdict in favor of the plaintiff for the sum of \$344 15. The defendant, after an unsuccessful attempt to obtain a new trial, took the present appeal from the judgment rendered on said verdict against him.

The fact that the slave *Tom* was chastised by the plaintiff with unusual and excessive rigor, is, we think, conclusively shown by the evidence in the record. All the witnesses concur in their testimony as to the extreme severity of the whipping; one of them says that he had been very badly whipped; that from his neck to his heels, there were stripes on him so close together, that the witness could not put his finger between them; that the witness was a planter in the neighborhood, and had had a good deal to do in the management of negroes, and had seen a good many bad ones, but had never before seen one whipped so badly as the one in this case, whose punishment appeared to him to be unusually severe. There is not a scintilla of evidence showing that the slave *Tom* was vicious or that his character was bad; nor was there any attempt to show the nature of the offence which brought upon him such severe punishment. The plaintiff in his letter to the defendant merely states that it was for abusing his wife. The overseer may correct and chastise the slaves of the planter who employs him, but he cannot do so "with unusual rigor, nor so to maim or mutilate them, or to expose them to the danger of loss of life, or to cause their death." 3 An. 618. There were two physicians at the *post mortem* examination. One of them thinks that the death of the negro was produced by over exertion and exhaustion, and the other by the whipping or treatment of the overseer; that he did not see from his examination anything to induce him to believe that he died from disease; that, in some cases, excessive whipping will produce death by exhaustion. Whether the chastisement in this instance was the immediate or remote cause of the death of the negro, it appears to us to be quite immaterial. If he died of exhaustion, the plaintiff was, under the circumstances, certainly guilty of gross negligence in not taking proper care of him when he retired to his cabin. In the case of *Kennedy v. Mason*, 10 An. 519, similar in its features to the present, we held the overseer bound. See also *Humphreys v. Switzer*, 11 An. 320.

Under the circumstances of this case, the defendant had the clear right to discharge and send away the plaintiff, as overseer, before the expiration of the year.

We are of opinion that the defendant is entitled to recover from the plaintiff the sum of \$1200, which is proved to be the value of his slave, deducting therefrom \$344 as the balance due the plaintiff on his salary as overseer.

The Judge *a quo* did not err in overruling the plaintiff's objection to the plea of reconviction. The plea was clearly connected with and incidental to the main action.

It is, therefore, ordered and decreed that the judgment of the court below

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be avoided and reversed; and it is further ordered and decreed that the defendant recover of the plaintiff the sum of eight hundred and fifty-six dollars, with legal interest from the date of the present judgment, and that the plaintiff and appellee pay the costs of both courts.

SHARPLEY OWEN v. GERSHAM, BROWN et al.

A recovery against and payment by either of two persons severally bound therefor, of the value of a slave unlawfully carried away, vests the title to the slave in the one from whom the damages were claimed and received.

**A**PPEAL from the District Court of Carroll, *Farrar*, J. Tried by jury. *N. B. Caldwell*, for plaintiff. *L. Selby*, for defendants and appellants.

**MERRICK**, C. J. The motion for a new trial in this case ought to have been granted.

The plaintiff sued the defendant, *Brown*, for damages for harboring three runaway negroes, and for consenting and permitting one of them, by collusion, to go aboard of a flatboat descending the river to New Orleans, from whence, he escaped to Cairo, and thence to Pittsburg in Pennsylvania.

The jury gave a verdict in favor of the plaintiff for \$1300, the value of the slave *Tom*, and \$160, the value of the services of the two other slaves whilst in the possession of the defendant.

After the rendition of the verdict, the defendant, having discovered that the plaintiff had received from the owners of the steamboat *Niagara* six hundred dollars, in a compromise in full for the price and value of said slave, which was carried away by said boat, moved the court for a new trial, and thereupon the plaintiff entered a *remittitur* of \$600 upon the price of the slave, and the motion for a new trial was overruled.

We think the new trial ought to have been awarded, notwithstanding the *remittitur*. Although the defendant and the owners of the steamboat might be bound each for the value of the slave, still a recovery against and payment of the value of the slave by either, vested the slave in the one from whom the damages were claimed and received. If the plaintiff had already claimed and received the value of the slave from the owners of the steamboat, this *litis æstimatio*, like a sale, has transferred the property in the slave to the persons so paying. See Dig. VI, 1; Leges 21, 46, 47 and 63; see also the case of the *Succession of Samuel Martin*, 7 An. 45.

The plaintiff, if those circumstances are proven, was divested of his property in the slave, and he cannot be permitted to recover his value a second time from another, who, while he pays the price of the slave, can not become the owner.

The judgment being reversed as to *Gersham Brown*, must also be reversed as to said *Edmund Brown*.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and it is further ordered that this case be remanded to the lower court for a new trial, there to be proceeded in according to law, and it is further ordered that the plaintiff pay the costs of the appeal.

## THOMAS P. SIMPSON v. MILLS &amp; CLEVELAND.

The Article 1988 of the Civil Code, which denies the revocatory action to a creditor when the contract of his debtor, which he seeks to set aside, was entered into before his debt accrued, has no application to cases of pure simulation.

Where an apparent ownership of property has, in reality, no actual existence, no action is necessary to set aside the simulated ownership. The creditor can proceed at once against the property of his judgment debtor.

The fact of a title having been acquired at a judicial sale, does not affect the question of simulation.

**A** PPEAL from the District Court of East Feliciana, *Ratliff, J.*  
*Preston Pond, Jr.*, for plaintiff. *Bowman & Delee*, for defendants and appellants.

**LEA, J.** The defendants, judgment creditors of *Thomas Albritton*, having caused to be seized, in execution of their judgment, a negro woman, have been restrained from proceeding further herein by a writ of injunction obtained at the suit of plaintiff, who claims the negro woman as his property. The only issue which can be presented in such a case, is one of fact. Was the slave seized in execution the property of the plaintiff or of the judgment debtor?

The evidence shows that the slave *Lucy* was, on the 10th January, 1848, at a probate sale of property belonging to the succession of *Ellis Gore*, adjudicated to the plaintiff *T. P. Simpson*. The evidence, however, appears to us to establish conclusively the fact that the plaintiff never pretended to exercise any right of ownership over her, and that *Albritton* paid for her, and moreover, that, from the day of the sale until she was seized in execution, she was apparently the undisputed property of the judgment debtor.

The District Judge rendered a judgment perpetuating the injunction, on the ground that "the defendants could not maintain the plea of fraud and simulation, even if fraud and simulation were proved, as they did not become creditors of *Albritton* until some years after the adjudication to *Simpson*, and that they were, therefore, concluded by the provisions of Article 1988 of the Civil Code. This Article of the Code has, in our opinion, no application to cases of pure simulation. Where an apparent ownership of property has in reality no actual existence, no action whatever is necessary to set aside the simulated ownership. The creditor of the real owner can proceed at once against the property as that of his judgment debtor. See *Erwin v. Bank of Kentucky*, 5 An. page 1; also 6 An. p. 717.

The fact that the plaintiff acquired his apparent title at a judicial sale, does not preclude the seizing creditor from showing that the plaintiff had in fact no interest in the purchase, and merely held it for the benefit of their debtor, and we think the evidence establishes this fact, in the case at bar.

It is ordered, that the judgment appealed from be reversed; that the injunction be dissolved and set aside, and that the slave *Lucy* be decreed to be the property of *Thomas Albritton*, and as such, subject to seizure in the execution issued herein, and that the defendants do have and recover of the plaintiff \$75 as damages. It is further ordered, that the plaintiff and appellee pay costs in both court.

## A. B. JAMES v. W. B. THOMPSON—Rule on P. LABARRE, Sheriff.

The Sheriff may, in the exercise of a sound discretion, levy an execution on property apparently belonging to a third person, when he has good reason to believe that the property is held for the purpose of sheltering it from the legal pursuit of the creditors of the debtor in execution, but he renders himself liable for damages if he seizes any other property than that of the defendant in execution.

A bond of indemnity tendered to the Sheriff, neither lessens nor adds anything to his obligations or duties, nor will it justify him in making an illegal seizure.

The mere failure of the Sheriff to make a return of the execution within the legal delay will not subject him to the payment of the amount specified in the writ, if circumstances are shown to excuse his failure.

**A** PPEAL from the District Court of Jefferson, *Burthe, J.*  
*W. J. Vason*, for plaintiff and appellant. *Purvis & Dugué*, for defendant.

**VOORHIES J.** The plaintiff seeks to make *P. Labarre*, Sheriff of the parish of Jefferson, liable to him, under the Act of 1826, for the full amount specified in the writ of *feri facias* directed to him in this case, on the ground of his failure to make the return within the legal delay. The motion applies to both the original and alias writs of *feri facias* which had been issued.

The following letter in relation to the first writ was addressed to the Sheriff by the plaintiff's attorney :

"*A. B. James v. W. W. Thompson.*

To the Sheriff in and for the parish of Jefferson,

Sir—In the event that the defendant does not pay to you the amount of the execution in this case, upon demand made by you, nor point out sufficient property to satisfy the same, I am authorized by the plaintiff to direct you to levy the execution upon the house and lot in which the defendant with his family resides, situated in Rickerville, fronting the Carrollton Railroad, and advertise the same for sale. Should you wish a bond of indemnity, the plaintiff will give you one upon being obliged to do so by you.

Respectfully, &c.,

W. J. VASON,

Attorney for plaintiff."

NEW ORLEANS, 17th July, 1855.

The writ to which this letter refers, was returned on the 29th of January, 1856, the same day on which the alias was issued. Both writs were returned after the expiration of the legal delay, *nulla bona*, by *J. C. Wilson*, as Deputy Sheriff.

The Deputy testifies that he called on the plaintiff's attorney to point out the property of the defendant in execution, and that he did not seize the property described, because he was satisfied, after having examined the books of the conveyance office, that it did not belong to the defendant *Thompson*, and so informed *Mr. Vason*. He further states, that in a consultation between *Mr. Vason* and the Sheriff, he heard the latter positively decline to seize the property.

The Sheriff's return on the alias writ is as follows, to wit: "No money, no property found, after search and demand."

The insolvency of the defendant *Thompson*, we think, may be fairly inferred from the evidence.

There is an admission in the record, that the Sheriff promised, on receiving the alias writ, that he would levy it on the property, but, that he afterwards refused to do so on the advice of *Messrs. Purvis & Dugué*.

The title to the property in question appears to have been vested in *Irma Delavillebeuvre*, wife of *Theodore Rion*, by virtue of a donation, *inter vivos*, made to her by her brother, *Jean Ursin Delavillebeuvre*, on the 20th of December, 1850.

The Sheriff, in the exercise of a sound discretion, may, undoubtedly, in certain cases levy an execution on property apparently belonging to a third person, where he has good reasons to believe that such property is held for the purpose of sheltering it from the legal pursuit of the creditors of the debtor in execution. But, in making such levy, he must necessarily take upon himself whatever consequences may flow from it, he cannot, it is clear, except at his peril, seize any other property than that of the defendant in execution. Hence it follows, that a bond of indemnity can neither lessen nor add anything to the obligations or duties which the law imposes on him, nor will it justify him in making an illegal seizure.

In the case of *Lay v. Boyce*, 3 A. 622, where the Sheriff was also sought to be made liable to the plaintiff, under the Act of 1826, it was held, that that Act did not impose upon the Sheriff the payment of the amount specified in the writ of *fiery facias*, as a penalty for his mere failure to make the return within the legal delay; that, when he was sought to be rendered liable, under that Act, he might show any circumstances which would excuse him from the failure to return or execute the writ. This construction of the Act has already received our concurrence. (See the case of *Miller v. Roy*, 10 A. 744.) The reenactment of that statute subsequent to the decision of the case of *Lay v. Boyce* without any change in its provisions, affords, we think, a sufficient indication of the concurrence of the legislative will in the construction thus given to it. Session Acts of 1855, p. 477.

We are of opinion, that the proof in this case is insufficient to hold the Sheriff liable under the statute.

It is, therefore, ordered, that the judgment of the court below be affirmed, with costs.

#### A. MONTAN & BROTHERS v. R. H. R. WHITLEY.

When an appeal bond is not large enough for a suspensive appeal it will sustain a devolutive appeal.

An agent is a competent surety on an appeal bond.

In a sale of a family of slaves, the avoidance of the sale as to one child affords no reason for avoiding the whole sale.

APPEAL from the District Court of East Baton Rouge, *Robertson, J.*  
T. G. Morgan and J. Joor, for plaintiff. J. W. Seymour, for defendant and appellant.

SPOFFORD, J. The appellees have moved to dismiss the appeal, for the insufficiency of the appeal bond.

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F.  
WHITLEY.

If the bond is not large enough for a suspensive appeal bond it will sustain a devolutive appeal, and, under the late decisions, we are, therefore, authorized so to entertain this appeal.

*Falkner* was a competent surety. He has no interest in the case, and is only a party in his capacity as agent for the defendant *Whitley*.

The motion to dismiss is, therefore, overruled.

The plaintiff seeks the redhibition of the sale of a slave man and his three children, which were sold together for the sum of twenty-three hundred dollars. The defendant has appealed from a judgment avoiding the entire sale.

Waiving all the technical points, as immaterial, we find that there is no evidence sufficient to establish the existence of any redhibitory vice at the date of the sale, in any of the slaves, except the youngest child *Alexina*. The death of this slave, within a year after the sale, of a disease of which the symptoms showed themselves prior to the sale, notwithstanding proper medical attention, makes out a *prima facie* case for redhibition, which has not been rebutted. But, although the family was sold together, the avoidance of the sale as to one child affords no reason for avoiding the whole sale. The case does not fall within the principle of Article 2518 of the Civil Code; see *Audrey v. Fry*, 6 M. 696; 7 M. 33; *Bertrand v. Arcueil*, 4 An. 430. The value of the deceased slave is stated by one of the witnesses to have been \$375 had she been sound. We think this a fair estimate of her relative value, as considered by the parties when the sale was made. Twenty-five dollars were expended by plaintiff upon her in medical and burial expenses. There is some evidence of a tender and no evidence of any objection, on the part of the defendant, to the form in which it was made, or of such response by him as he ought to have made.

As to the alleged vice of the slave *John*, it was not even set up until more than sixteen months after the sale, and the evidence of its existence at the date of the sale is of the most flimsy character. The girl *Lavinia* is still living, and there is no evidence of her being incurably diseased. No complaint is made of unsoundness in the girl *Harriet* who, from her age, was the most valuable of the lot.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed; and, proceeding to render such judgment as should have been rendered, it is ordered, adjudged and decreed, that the sale of the slave child *Alexina*, from the defendant to the plaintiff, on the 2d January, 1855, be avoided and set aside, on account of the redhibitory vices and maladies with which the said slave was then affected; and it is further ordered and decreed, that the plaintiffs recover of the defendant the sum of four hundred dollars, with five per cent. interest from judicial demand, for the price of the said slave and the expenses incident to her diseased condition, the said sum to be credited by the defendant or his agent, the garnishee in this cause, on one of the notes now in possession of the defendant, and given him by the plaintiff, as part of the price of the slaves sold on the 2d January, 1855, as appears by the notarial act, of which a copy is on file in the record: it is further ordered, that in all other respects there be judgment for the defendant and for the garnishee; the costs of the District Court to be paid by the defendant, and those of the appeal by the plaintiffs and appellees.

## S. B. WIGGINS v. P. GUIER.

When the return day mentioned in a commission for taking testimony has expired, testimony taken under it is taken without authority and cannot be received.

An order extending the return day, made after it had already expired, would not render testimony admissible which had been taken without authority.

A public officer ought not to be permitted to testify as to the contents of documents in his office, without annexing copies of such documents to his deposition. The witness may annex to his answers the entries made in books and explanation of erasures.

**A** PPEAL from the District Court of Carroll, *Farrar, J.*  
*Goodrich & DeFrance*, for plaintiff. *L. Selby*, for defendant and appellant.

**MERRICK, C. J.** This is a petitory action. The plaintiff claims the land in controversy in virtue of a patent from the State of Louisiana. He alleges that the land was selected by the State of Louisiana, under the Act of Congress approved 4th September, 1841, granting 500,000 acres of land to the State of Louisiana for internal improvements, and the location approved by the Secretary of the Interior.

The defendant claims under an alleged preëmption claim of one *Elijah Dempsy*, of whose estate he is administrator, a contest before the Register and Receiver, a decision in his favor, and a patent from the government of the United States. The plaintiff replies that that patent was fraudently obtained; that he has also acquired by purchase by mesne conveyances the improvement of the said *Elijah Dempsy*, deceased, upon the land in controversy. The judgment of the lower court was in favor of the plaintiff, and the defendant appealed.

The first question presented by the record is as to the admissibility of the testimony of *L. J. Sigur*, taken under a commission. The return day fixed in the commission was the 21st day of May, 1855. The testimony was taken and the commission executed the 23d day of May, 1855. On the 30th of the same month an order was entered on the minutes in these words: "Return of commission to take the testimony of *L. J. Sigur*, fixed the first day of the next term of the court."

We do not think the commission which issues under the provisions of the Code of Practice an idle form. On the contrary, we consider it the power under which the officer taking the testimony is enabled to act, and without which his acts would be null. When, therefore, the return day mentioned in the commission had expired, the authority conferred by it was also at an end, and the testimony taken under it was taken by one without authority. C. P. 425, 433.

A subsequent order could not give vitality to that which was already null. Had the order been made before the expiration of the return day, or the testimony been taken after the renewal of the return day, it would have presented a different question. The order made by the Judge or Clerk, fixing the return day and granting the commission in the delay after the filing of the interrogatories, is not to be confounded with the commission itself. See 3 Rob. 13; 1 An. 325.

We think, therefore, the testimony of the witness ought to have been rejected.

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If this testimony is excluded, we do not think sufficient appears in the record to entitle the plaintiff to recover, but we think justice requires that the case should be remanded to the lower court for a new trial.

We further remark, that this witness ought not to be permitted to testify as to the contents of documents in his office, unless he annexes copies to his depositions. Certified copies are better evidence of what such documents contain. We see no objection to the witness annexing to his answers the entries made in books and his explanations of erasures, &c.

We further remark, that unless the plaintiff can show an approval by the Secretary of the Interior of the selection of the tract of land in controversy by the State of Louisiana, he must fail in his action unless he can further show that the defendant was under some obligation to hold the title acquired by him for the benefit of the plaintiff, or committed some fraud, not merely towards the United States, but towards *him* in obtaining the patent.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that this case be remanded to the lower court for a new trial, and there to be proceeded in according to law, the appellee to pay the costs of the appeal.

IRA E. ORCUTT v. R. BERRETT, Administrator.

The acknowledgment of a debt by a married woman in the presence of her husband, and tacitly assented to by him, will interrupt prescription.

APPEAL from the District Court of Iberville, *Robertson, J.*

*E. W. Blake* and *E. W. Robertson*, for plaintiff. *A. Tulbot* and *A. Petit*, for defendant and appellee.

SPOFFORD, J. Conceding that the debt sued for became exigible, and that prescription therefore began to run the 1st of April, 1843, we are of opinion that prescription was interrupted by the debtor's acknowledgment of the creditor's right, on the 9th March, 1850.

The evidence of *Klienpeter* is positive, and sufficiently identifies the particular debt. If there was any other mortgage debt due by the defendant's deceased wife to *Olivier Arnandez*, the mortgage records would show it, which it is not pretended they do.

The testimony of *Klienpeter* is corroborated by the cotemporaneous writing which embodied a contract between himself and the deceased, touching the property on which the plaintiff's mortgage was admitted to rest.

The husband of *Mrs. Berret* was present when she made this acknowledgment, and tacitly assented to it; he also acknowledged the debt to be due himself. He was, moreover, a party to the written contract with *Klienpeter*.

The cases referred to by the appellant's counsel, in 6 An. 121, and 10 An. 332, were cases of *renunciation* of prescription by a married woman unauthorized. This is a case of *interruption* of prescription.

Judgment affirmed.

## JOHN HILL v. ANDREW MATTA, Executor.

In an action for the liquidation of the affairs of a partnership, when one partner, the plaintiff, sets up a claim under express contract for compensation for extra services or labor, testimony is inadmissible to prove the value of the services of the other partner under a claim by reconvention on a *quantum valebant*.

No partner is entitled, unless under a special agreement, to any compensation, commission or reward for his services while employed in the partnership business.

APPEAL from the District Court of East Baton Rouge, *Robertson, J.*  
*T. G. Morgan*, for plaintiff and appellant. *J. M. Elam*, for defendant.

MERRICK, C. J. This suit is brought for the purpose of liquidating the affairs of a partnership in an iron foundry at Baton Rouge between the plaintiff and the deceased *Stephen Henderson*.

The controversy grows out of a claim of the plaintiff to one hundred dollars per month, exclusive of his share of the net profits, as an extra compensation agreed upon by the parties. The claim amounts to \$4806 56.

The contract of partnership was by parol.

The defendant in his answer admits the partnership, but denies that it contained a stipulation that *Hill* should receive for his services \$100 per month, or any other sum. The defendant, by way of reconvention, alleges that the services of *Henderson* were well worth eighty dollars per month, amounting with interest to \$4022 82, for which he prays judgment.

The suit was cumulated with the mortuary proceedings of *Henderson's* succession. The plaintiff's demand was rejected, and he has appealed.

Our attention is first called to the bill of exception taken on the trial by the plaintiff. He offered to prove, by a witness on the stand, that at or about the time the copartnership between him and the deceased was entered into, he (the plaintiff,) told the witness that, by the terms of the agreement, he was to receive one hundred dollars per month in addition to an equal share in the profits. This declaration, it is contended, forms a part of the *res gesta*, and was, therefore, admissible. It does not appear that *Henderson* was present when the declaration was made, and it was properly excluded by the District Judge.

It also appears by bill of exception that the defendant offered *John R. Dufrooy* and others as witnesses to prove the value of the services of *Stephen Henderson*, as set forth in the answer and the account annexed to the petition and opposition, which testimony of the witnesses the plaintiff objected to, on the ground that "one partner cannot claim for services unless the same was provided for by the contract or agreement of co-partnership." The Judge overruled the objection, and admitted the testimony, adding that "the proof of the personal services of *Henderson* was allowed in equity, as offsetting or rebutting the services of *Hill*, the other partner."

The testimony was improperly received. The right of the plaintiff to recover depends on his proof of the contract which he has alleged. The defendant claims for services in the answer on a *quantum valebant*, and not on an express contract.

The law on this subject is well laid down by Judge Story in his work on partnerships, in section 185. He says: "On the other hand (as we have seen) no partner is entitled, unless under some special agreement, to any compensa-

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v.  
MATTIA.

tion, commission or reward for his skill, labor or services while employed in the partnership business. The nature of the contract implying that each partner shall gratuitously give and exert all his skill, labor and services, so far as they may be properly required, for the due accomplishment and success of the partnership operation. If any allowance is intended to be made for extra services or labor, it is a fit matter to be adjusted in the articles under which the partnership is formed.

The testimony, therefore, of these witnesses was inadmissible under the pleadings to offset the plaintiff's demand, and ought not to have been received for that purpose.

The plaintiff relies upon the testimony of a single witness and corroborating circumstances as his means of recovery. The testimony of *Dufroeq* and others would be admissible for the purpose of rebutting and weakening the force of the corroborating circumstances relied upon by the plaintiff. What will amount to sufficient corroborating circumstances must depend upon the facts of each individual case, and these are submitted to the sound discretion of the Judge.

As we do not know whether the Judge may not have compensated the services of *Hill* by those of *Henderson*, or whether, from his knowledge of the witness, he considered his testimony not sufficiently corroborated, we think that justice requires that this case shall be remanded for a new trial.

We take occasion, however, to remark, that it is singular that the partnership books, which are likely to be decisive of this controversy, have not been produced.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that this cause be remanded to the lower court for a new trial, with instructions not to receive the testimony of *John R. Dufroeq* and other witnesses to prove the value of the services of *Stephen Henderson* as a reconventional demand, or as a set-off to the plaintiff's demand, and in other respects to proceed according to law; the said executor and appellee paying the costs of the appeal.

S. H. LURTY, Administrator, v. J. A. MARYMAN.

Where the answers of a witness to cross-interrogatories are imperfect and evasive, the deposition cannot be rejected on that account. The objection goes to the credibility of the witness alone, if all the cross-interrogatories have been answered.

**A**PPEAL from the District Court of West Feliciana, *Waterston*, J., presiding. *Brewer & Collins*, for plaintiffs. *Lacy & Hudson*, for defendant and appellant.

**SPOFFORD, J.** The case of *Baker v. Voorhies*, 6 N. S. 313, relied upon by the appellee, only justifies the rejection of a deposition when the cross-interrogatories have not been answered at all.

In the present case there were responses taken down by the commissioner to all the cross-questions propounded; the complaint is that these responses are imperfect and evasive. This goes materially to the credit of the witness, but does not authorize the entire rejection of the deposition as inadmissible in law,

any more than evasive answers by a witness, under cross-examination on the stand, would authorize the court to strike out the results of his examination in chief.

But on looking into the facts, and ascertaining from his deposition that the witness was the pretended vendor of the account made out by himself against the deceased person represented by the plaintiff in this suit, that the transfer was made in order to enable the defendant to off-set the plaintiff's claim with a large claim which is sought to be established by the evidence of the transferor alone, and on finding that the witness, testifying under a release, will not state that any specific price was paid him by the transferee for the large claim that he pretended to sell, and also evades other pertinent and searching questions regarding this singular contract, we do not think the evidence sufficient to authorize a different judgment from that which has been rendered.

The judgment is, therefore, affirmed, with costs.

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v.  
MARYMAN.

### LUCY McRAE v. B. M. J. BROWN and the SHERIFF.

Where the plaintiff in an injunction seeks to restrain the execution of a judgment, on the ground that the property seized does not belong to the judgment debtor, but to the plaintiff in injunction, no other issue can be made but that of ownership. An affidavit that the Sheriff had "seized" the individual property of the defendant, without any description of the property seized, or statement of its value, is too vague to authorize an injunction, and the petition which is not sworn to cannot supply the defect.

The fee of counsel for the defendant should be assessed as damages on dissolving the injunction, although it was not shown to have been actually paid. The liability to pay it, is sufficient.

APPEAL from the District Court of East Feliciana, *Waterston, J.*, presiding.  
*W. F. Kernan*, for plaintiff and appellant. *J. O. Fugua*, for defendant.

LEA, J. In this case the plaintiff sued for and obtained an injunction staying the execution of a judgment against her husband, *S. B. Nunn*, on the ground, with others, that the property seized in execution is her individual property. Where the plaintiff in an injunction seeks to restrain the execution of a judgment, on the ground that the property seized does not belong to the judgment debtor but to the plaintiff in the injunction, the question of ownership is the only one which can be examined.

The plaintiff in such a case is without interest, and therefore without right, to provoke any other issue; and with reference to the issue thus presented, the affidavit should be such as to disclose a distinct pecuniary interest, sufficient to authorize the application for a writ of injunction. The allegations of the petition in this case are not supported by the affidavit. The affidavit merely states that the Sheriff had "seized the individual property of the deponent." There is no description whatever of the property seized, nor any statement of its value. Such an affidavit is too vague to form the basis of an injunction, and the court is not at liberty to refer to the petition, which is not sworn to, for the purpose of supplying by conjecture the defects of the affidavit.

The District Judge was right in dissolving the injunction. The fee of the defendant's counsel was properly included in an assessment of damages. It is not material to show that it had been actually paid; it is sufficient that a liability has been incurred for its payment. 3 An. 588.

Judgment affirmed.

## AUSTIN SUMNER &amp; Co. v. A. T. DUNBAR.

The summary proceeding by rule can have place only in those cases expressly provided for by law.

In the case of a respite, which differs essentially from a surrender, one creditor cannot, by rule, contest a judgment and mortgage resulting from the recording of it, of another creditor. He must, for such purpose, resort to an ordinary action.

**A**PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*W. S. Stansbury*, for plaintiffs and appellants. *Durant & Horner*, for defendant.

MERRICK, C. J. The plaintiffs having instituted suit in the Fourth District Court against the defendant, upon two promissory notes, the judgment was pronounced thereon on the 9th day of January, 1855, and signed on the 13th day of the same month. In the interval between the rendition of the judgment and its signature, viz, on the 12th day of January, the defendant presented his petition for a respite to the Sixth District Court, and obtained an order from the Judge for a meeting of the creditors and a stay of all judicial proceedings against his person and property. It does not appear whether this order of the Judge was or was not notified to the plaintiffs before the judgment which they had obtained against the defent was signed.

The plaintiffs caused their judgment to be recorded. The respite was granted by the creditors, and the plaintiffs received under it the first installment of their debt according to the terms granted their debtor.

The present proceeding is a rule taken by the defendant against the plaintiffs to show cause why their judicial mortgage should not be erased and cancelled, because the judgment was signed after the order granting a stay of proceedings was obtained, and because the plaintiffs have acquiesced in the respite by receiving the first installment under the same.

To this summary proceeding *Austin Sumner & Co.*, the defendants in the rule, except, on the ground, among others, that the defendant cannot contest the judgment and the mortgage resulting from the recording of the same, except in an ordinary action.

It appears to us that the District Court erred in overruling the exception and proceeding to decide the case on the merits.

Perhaps in a case under the forced or voluntary surrender, any creditor interested might, in a like case, proceed under a rule. 2 An. 650, *Bank of Louisiana v. Delery*. But a respite differs essentially from a surrender. The surrender is based upon the supposed insolvency of the debtor; the respite upon the supposed solvency and in the confidence of the creditors in the debtor's honesty and ability to pay.

In the one case, the order of the Judge accepting the surrender and ordering a stay of proceedings, vests the property of the debtor in his creditors *sub modo*, who are in court for the purpose of ascertaining their rights upon the property surrendered by their debtor. Revised Statutes, p. 253. In the other case, the property remains in the debtor, saving to the creditors the conservatory acts to prevent their debtor from selling his effects to their prejudice. 7 Toul., No. 240; 2 N. S. 830. In the one case, the surrendered effects are managed by a syndic, the agent of the creditors. In the other, the property

of the debtor is administered by himself. The parties, therefore, stand in a different relation towards each other. In the respite, the debtor in proceeding to compel his creditor to erase a mortgage on the ground of the alleged nullity of the judgment, appears to be acting in his own interest solely against the creditor. The creditor, on the other hand, has a direct interest in maintaining his judgment and mortgage. They are apparently his property by the action of a court between these parties. How then can they be annulled except by an appeal or a direct action? The summary proceeding by rule can have place only in those cases expressly provided by for law. We have not been shown any such exceptional legislation as applicable to the case before us. 6 An. 485.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment by the lower court be avoided and reversed, and that the rule taken by the said *A. F. Dunbar* against said *Austin Sumner & Co.* be dismissed as in case of a nonsuit, and that said *Dunbar* pay the costs in both courts.

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v.  
DUNBAR.

#### W. S. THOMPSON, Agent, v. CHAUNCEY PARRENT et al.

When the homologation of the report of experts is opposed, the trial of the opposition involves the hearing of evidence on such questions of fact as are distinctly put at issue by the opposition.

There was error in the Judge's refusal to hear evidence, on the ground that it rested merely in his discretion, and that he was satisfied of the correctness of the report from its face.

After the report of experts is homologated, the matters decided by it are not open to investigation in the same court.

As between the parties to a building contract, the privilege of the builder may exist without registry.

APPEAL from the First District Court of New Orleans, *Robertson, J.*  
*T. W. Collins* and *Larue & Whitaker*, for plaintiff. *Waul, Day* and *Hunt*, for defendant.

SPOFFORD, J. The homologation of the report of the expert, *Stuart*, was formally opposed by the plaintiff. Upon the trial of the rule he offered witnesses to prove the facts stated in his opposition. The testimony was rejected by the court, on the ground that it rested merely in the discretion of the Judge of the first instance to hear evidence upon an opposition to the homologation of the report of experts or not, and that the Judge in this case was satisfied of the correctness of the report from its face.

In this we think the Judge erred. His discretion is not an arbitrary one, but he is to try the opposition summarily on its merits. The trial involves the hearing of evidence on such questions of fact as are distinctly put at issue by the opposition. C. P. 457. The cause must be reversed for this reason.

After the report is homologated, the matters decided by it are not open to investigation in the same court. We are not called upon, therefore, to notice several of the bills of exception taken after the judgment of homologation.

The bill of exceptions to the refusal of the Judge to examine two of the witnesses apart from each other, does not disclose such a state of facts as would authorize us to disturb the ruling on that point.

The Judge erred in attempting to ascertain the value of a Texas land warrant from any source outside of the testimony in the cause.

As between the parties to the building contract, the privilege of the builder

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v.  
PARMENT.

may exist without registry. The registry is required for the protection of third persons only.

Without the evidence on the opposition of plaintiff to the homologation of the report of the experts, it is impossible to pronounce finally upon the merits of the case.

It is, therefore, ordered, that the judgment of the district court be avoided and reversed, and the cause remanded for a new trial, with instructions to the District Judge to receive evidence to establish the allegations of the opposition filed by the plaintiff to the homologation of the report of the expert *Stewart*; the costs of this appeal to be borne by the defendants and appellees.

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NEW ORLEANS, JACKSON AND GREAT NORTHERN RAILROAD COMPANY v.  
R. W. ESTLIN.

The Statute of 1852, which declares that "the prescription of all other open accounts, the prescription of which is ten years, under existing laws, shall be prescribed by three years," is not applicable to the case of a demand for balance of subscription to the capital stock of a corporation.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*George W. Christy*, for plaintiff. *C. T. Estlin*, for defendant and appellant.

**SPOFFORD, J.** The defendant is sued for the balance of his subscription to the capital stock of the New Orleans, Jackson and Great Northern Railroad Company.

He admits that he subscribed for eighty shares at twenty-five dollars per share and has only paid one hundred dollars.

The plaintiff has proved that all the installments have been called for, pursuant to the articles of the company, and that due publication has been made of the calls.

The defendant relies solely upon a plea of prescription to defeat the collection of the installments of five per cent. due May, 1852; of ten per cent due September, 1852, and of ten per cent. due December, 1852.

The second section of the Act "relative to prescription," approved March 5th, 1852, (Session Acts, p. 90,) declared that "the prescription of all other open accounts, the prescription of which is ten years under existing laws, shall be prescribed by three years."

But the defendant was not sued upon an open account. The demand is based upon an express and written contract. The defendant's subscription bound him to pay a liquidated sum. The money was to be paid only in installments it is true, and these were to be fixed by the action of certain officers who were the agents of the defendant and his associates in the company. Certain prescribed notices were to be given as conditions precedent to the right of the company to enforce payment.

But these stipulations did not transform the defendant's express contract to pay the amount subscribed into an "open account."

The statute upon which he relies is, therefore, inapplicable to the case.  
Judgment affirmed.

Mr. Justice LEA recused himself on the ground of interest.

## MITHOFF v. TOWN OF CARROLLTON—McCAUGHAN v. THE SAME.

Under the law which prescribes the obligation of proprietors of lands bordering upon the river to suffer the servitude of a levee for the use of the public, the soil alone owes the servitude. When, for the public safety, it becomes necessary to construct the levee on ground on which buildings had been erected by the proprietors of the soil at a time when no immediate servitude was due the public, and the buildings are demolished for that purpose, the owners are entitled to be compensated for their value, to be estimated at the time they were taken for public purposes.

**A** PPEAL from the District Court of the parish of Jefferson, *Burthe, J.*  
*Durant & Hornor*, for plaintiff. *C. Roselius* and *F. Preston*, for defendants and appellants.

MERRICK, C. J. We see no error in the rulings of the court, as shown by the bills of exception under the pleadings in this case.

This case is distinguished from the case of *Dubose* against the Levee Commissioners, in this: that the town of Carrollton deemed it necessary to the public safety and convenience, that the houses of the plaintiffs on the line of the new levee should be torn down, and passed an ordinance for that purpose, which was carried into effect. In the *Dubose* case, the houses were left standing and the levee was built in the rear of them.

The plaintiffs in the lower court obtained judgment for the value of their houses and the land, as taken for public purposes. The defendants appealed.

It is contended by the defendant, that the case of *Dubose* is decisive of this, and that the plaintiffs are not entitled to recover either for the land or the houses which were demolished.

Whilst we acknowledge the correctness of the decision in the *Dubose* case, we think a distinction must be made between the resumption of servitude, which the soil upon the banks of the Mississippi river alone owes to the public, and the destruction of buildings (placed upon the soil before the servitude becomes due,) in order to arrive at the use of such servitude.

At the time the owners of the lots, for which compensation is claimed, built upon them, they owed no immediate servitude to the public of any kind. When they erected the buildings upon them, they had the undoubted right to build in such form and manner as they pleased. They were at liberty to put up buildings costly or plain, according to their fancy, whatever that fancy might be. When so erected, the buildings were *theirs* in the highest sense of the term, and the property thereof being vested in them, as such owners they were protected from an expropriation in order to arrive at the servitude which the soil alone came to owe, by the constitution, which requires compensation to be made in such cases; Art. 105. By the wearing away of the bank of the river, the safety of the public required the houses of *Mithoff* and *Robbins* to be demolished and a levee to be constructed over the ground occupied by their buildings. Their land, therefore, by virtue of its location and vicinity to the river, became bound, under the laws which prescribed the obligation of proprietors of lands bordering upon the river, to suffer the servitude of the levee and nothing more. The buildings had not been put up in violation of any law, and they could not be removed from the soil without compensating the owners for them. The town authorities might, as was done in the *Dubose* case, have run the levee behind

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these buildings, or in front, so as not to obstruct them absolutely, and the proprietors could not complain. But, when the public, by its proper authorities, chose to pull down the houses, it took from the owners something more than the mere servitude, which was due by the soil: it took a part of the property itself, for which the defendant owes the plaintiff compensation. Art. 105 Constitution 1852.

In *Mithoff's* case, the Judge of the lower court has expressed his opinion upon the value of the house, which we adopt. He estimates the value of the house at \$600. The materials sold for \$60. There should be judgment in favor of *Mithoff* for \$540.

In the case of *McCaughan*, who is the assignee of *Robbin's* claim against the town of Carrollton, the Judge of the lower court has not favored us with the calculation upon which his decree is based. Nor has the plaintiff introduced that certain evidence which was in his power. One of his witnesses says the cost of the buildings on *Robbin's* lots was \$11,950. Another says they were worth seven or eight thousand dollars; but he was never inside the buildings. One of defendant's witnesses, the Mayor of Carrollton, says, that he assessed *Robbin's* improvements at \$3000 or 3500; but, like plaintiff's witness, he had not been inside of *Robbin's* houses.

The proof is quite clear, that the property of both *Mithoff* and *Robbins* was greatly depreciated by the caving of the bank for some years in front, and the apprehension of a further removal back of the levee. This depreciation of plaintiff's property was the act of God, and they cannot call upon the defendants to indemnify them for it. All the plaintiffs can require is an indemnity for the value of their houses taken for public purposes at the time they were so taken.

From all the testimony, we think the estimate of the Mayor nearer the truth than the other witnesses, who seem to have testified not so much to the relative situation and value of the houses, as to their value aside from their situation. We think \$3250 the relative value of *Robbin's* improvements at the time his houses were removed and the levee built.

The statues, it appears from the testimony, were in a mutilated condition before they were set up by *Robbins*, and there is no reason to suppose that they were much injured by the removal, or that they added much to the value of the property.

The witness *Purcell's* testimony was only conjectural; he never having seen the statues in their perfect state. As they were not in that condition when placed on the property, the testimony of the witness possesses no value as the basis for the assessment of damages.

Taking the value of *Robbins'* improvements at \$3250, and deducting therefrom \$325, the value of the materials sold by *Robbins*, and it leaves \$2925, for which the plaintiff, *McCaughan*, is entitled to judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from in these cases be avoided and reversed, and now proceeding to render such judgment as ought to have been rendered by the lower court in both cases, it is ordered, adjudged and decreed by the court, that the plaintiff, *William Mithoff*, do recover and have judgment against the said defendant, the said town of Carrollton, for the sum of five hundred and forty dollars; and it is further ordered, adjudged and decreed, that said plaintiff, *J. J. McCaughan*, do recover and have judgment against the same defendant, said town of Carrollton,

for the sum of two thousand nine hundred and twenty-five dollars, and it is further ordered, that the said *Mithoff* and *Caughan* each pay one half of the costs of the appeal, and that the defendant pay the costs of the lower court.

SPOFFORD, J., dissenting, and LEA, J., dissenting. We are unanimous in adhering to the doctrine of the recent case of *Dubose v. The Levee Commissioners*, 11 An. 165. It was there settled, that the law concerning the expropriation of private property for public use, does not apply to such lands upon the banks of navigable rivers, as may be found necessary for levee purposes, and that there is no arbitrary limit fixed by law as the maximum distance at which a levee may be placed back of a caving bank.

"On the borders of the Mississippi river where there are levees, the levees shall form the banks." C. C. 448.

An enlarged discretion upon the subject of the location of levees is vested by law in the authorities of each levee district; not, it is true, an absolute and uncontrolled discretion, but one with which the courts will reluctantly interfere, and only upon a clear showing of an abuse of power by the local authorities.

In this case the District Judge found no oppression or abuse of authority on the part of the town officers of Carrollton; in his reasons for judgment he concedes the necessity of the construction of the new levee, which the plaintiffs contend has injured them so much, and it results from his opinion that he thought the levee was properly located. In this respect I see no reason to doubt the correctness of his conclusions.

But, in awarding damages, the Judge based his decree solely upon the legal ground, that the plaintiff's land owed no servitude to the public, because they did not buy with a *front on the river*; and, in this court, the case has been mainly argued on that ground.

The soundness of this distinction cannot be admitted, for the reason, that it is impossible to confine the Mississippi river to its primitive bed.

The banks of navigable rivers, and especially of the Mississippi, in this latitude, are constantly undergoing changes by attrition on one side and accretion on the other. If, in the course of time, they reach the land of a proprietor who did not buy originally with a front on the river, he becomes, by that fact alone, subject to all the servitudes imposed by law upon frontproprietors; C. C. 446, 661. As well might it be contended, that the government is bound to warrant such a proprietor against the action of the elements and the encroachments of the river upon his lands, as that he should be exempted from contributing to the public utility, by yielding his land for levee purposes, without compensation, when the advancing tide makes such a protection necessary.

And it results, as a logical inference, that when the houses he has built are upon land thus invaded by the stream and rendered indispensable to be used for levee purposes, they too, like the land on which they are built and of which they form a part, should be yielded up to the public service, without compensation, for it is not the act of man, but the act of God and the law which causes their demolition. By the location of the new levee (if it be lawfully and properly located) it becomes, under Article 448 of the Code, the river bank and no man's houses shall obstruct the bank. Their destruction is necessary to the exercise of the servitude; or rather, it becomes a part of the servitude. I am, therefore, of the opinion that, under the general principles of law which were recognized and enforced in the *Dubose* case, the plaintiffs are entitled to no compensation whatever for their land, nor for such of their houses as stood

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directly upon the line of the new levee, as located by the town authorities of Carrollton; it being conceded, or at any rate not disproved, that the levee was properly run where it now stands.

A question of greater difficulty remains. It would seem, that some of the buildings (of the number and value of which there is no evidence in the record) were not directly upon the line of the new levee, but might have been left standing, as in the *Dubose* case, between the levee and the river.

The question of compensation, in regard to these buildings, differs from the question as to the other houses by reason of some peculiar provisions of the Civil Code. It is true, that the space between the levee and the river should not be so obstructed as to interfere with commerce; C. C. 446, 661. But I think such of the buildings as might have been left standing after the construction of the levee in its present locality, should have been left until the proprietor chose to destroy them, or until they fell by their own decay; and this opinion seems to be sustained by the following Articles of the Civil Code:

"Works which have been formerly built on public places, or in the beds of rivers or navigable streams, or on their banks, and which obstruct or embarrass the use of these places, rivers, streams, or their banks, may be destroyed at the expense of those who claim them, at the instance of the corporation of the place, or of any individual of full age residing in the place where they are situated. And the owner of these works cannot prevent their being destroyed under pretext of any prescription or possession, even immemorial, which he may have had of it, if it be proved that *at the time these works were constructed* the soil on which they are built was public, and has not ceased to be so since." Civil Code 858.

There is an evident implication that, if it be not proved that the soil was not public at the time the works were built, the owner may prevent their destruction.

The next Article is even stronger: "If the works formerly constructed on the *public* soil consist of houses or other buildings which cannot be destroyed without causing signal damage to the owner of them, and if these houses or other buildings merely encroached upon the public way without preventing its use, they shall be permitted to remain; but the owner shall be bound when he rebuilds them to relinquish that part of the soil or of the public way upon which they formerly stood." C. C. 858.

But the value of the buildings which should have been left, in this case, outside of the levee, and which have been demolished, is to be estimated not at their prime cost, nor yet at their supposed worth before the new levee was built, but by an appraisalment of what their value would be with the levee in its present position. For, the necessary depreciation of the property by reason of its being thrown without the protection of the levee, as in the *Dubose* case, is *damnum absque injuriâ*; the acts of God and of the law injure nobody.

As the number of the buildings which might thus have been saved, and their value in case they had been, cannot be deduced from the evidence in this record. I am of opinion, that the causes should be remanded to ascertain the truth upon these matters.

It appears that the assignor of one of the plaintiffs had embellished his grounds with marble statues of Jupiter, Mars, Diana and Neptune. There is a complaint that these works of art were mutilated and defaced by the carelessness of the town agents when the houses were demolished, and that damages

should be allowed for this. But the evidence shows that they were delapidated and disfigured before the servants of the town laid hands upon them; and, that they were removed with all the caution that the nature of the case required.

I think, therefore, that the judgment of the District Court should be avoided and reversed, and that the demands of the plaintiffs in these consolidated suits for damages against the town of Carrollton for running a levee across their lands, and demolishing structures immediately upon the line of said levee should be rejected, as also any claim in damages for depreciating the value of their property, by the location of the levee; and that their claim in damages for the demolition of such of their buildings as might have been spared without preventing the construction of the levee in its present position should be recognized, and the causes remanded to the District Court for the purpose of ascertaining the number and assessing the value of such buildings, according to the principles hereinbefore stated.

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### STATE v. JOHN C. WILSON.

District Judges have power to admit the accused to bail, at chambers, without proceeding by *habeas corpus*. An error in the mode of proceeding will not invalidate the decree or the bond taken under it.

Deputy Sheriffs are expressly authorized by law to represent the Sheriff in all duties confided to the latter. They have the power to receive an appearance bond and discharge the accused upon its execution, although the order of the Judge directed it to be taken by the Sheriff.

When the bond has not been filed it cannot be considered as in evidence, or as produced on the trial.

**A** PPEAL from the District Court of the Parish of Iberville. *Robertson, J.*  
*E. W. Moise*, Attorney General, for the State. *Z. Latour*, for accused.

MERRICK, C. J. The accused having been arrested on the charge of inveigling a slave, applied to the Judge of the District for a writ of *habeas corpus*.

It does not appear that any writ actually issued, but the Judge of the District Court made an order admitting the accused to bail, on furnishing his bond with two good and solvent sureties, in the sum of three thousand dollars. The Sheriff was directed to take the bond.

A bond comes up with the record in due form purporting to have been signed by *J. C. Wilson* and three sureties. It was acknowledged before the Deputy Sheriff. *It does not appear to have been filed in the District Court.*

An indictment was preferred against the accused, and, failing to answer, a judgment *nisi* was rendered against him and his sureties, which was made final, and his sureties have appealed.

We will consider the questions presented by the appellants in their order:

I. Could the Judge make the order to admit to bail, at chambers, without having the accused before him on a *habeas corpus*? The District Judge had power to admit the accused to bail, and we do not consider an error in the mode of proceeding as invalidating the decree or the bond taken under it.

II. Could the Deputy Sheriff receive the bond when the order of the Judge directed it to be taken by the Sheriff? We think the Deputy Sheriff had the power to take the bond.

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Warrants, executions and other orders are commonly addressed to the Sheriff, yet, no one doubts but they may be executed by the Sheriff through his deputies. See form of *fi. fa.*, Act, 1855, 477. See *Sewell v. Sheriff*, 33, 35.

The Deputy Sheriff is expressly authorized by law to represent the Sheriff in all duties confided to the latter. C. P. 771; Act, 1855, 366; see 5 An. French text.

In judicial sales, nothing is more common than for the Deputy Sheriff to take the twelve months' bonds and other obligations given at such sales. We see no reason why he may not perform the duty imposed upon the Sheriff in taking an appearance bond and discharging the accused upon its execution. Were it not so, the discharge of the accused from custody would depend upon the presence of the Sheriff, and the imprisonment might be prolonged on account of his absence.

III. The third point made is, that the bond does not make proof of itself, that the forfeiture of the condition was not proven, and that the bond was not offered in evidence. Had the bond been filed we might, perhaps, have inferred from the orders declaring its forfeiture, that it was in evidence, and before the court as a part of the proceedings. But, as the bond has never been filed, we think it cannot be considered as in evidence, or as produced on the trial. Under the authority of the case of the *State v. Cooper*, 3 An. 225, the judgment must be reversed. We will remand the cause.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed as to the said *Henry Keller*, *Mathews Marr* and *Charles F. Stubbs*, and that this cause be remanded to the lower court, there to be proceeded in according to law.

#### GEORGE W. LEWIS v. THE CITY OF NEW ORLEANS.

The principles of law settled in the case of *Stewart v. The City of New Orleans*, 9 An. 461, reaffirmed.

Under that authority, *held*, that the city was not liable in the present case for the nonfeasance or misfeasance of the officers of the police jail.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Durant & Hornor*, for plaintiff and appellant. *J. Livingston*, for defendant.

VOORHIES, J. The plaintiff alleges in substance that on the 9th of January, 1855, he placed *Jesse*, a slave belonging to him, in the parish jail of the city of New Orleans for safe keeping and correction; that whilst imprisoned, he was under the care and charge of the officers employed by the defendant, who derived thereby a pecuniary profit by receiving a per diem compensation; that during his imprisonment, he was employed in doing sundry work and labor incident to the daily routine of such an establishment, in the course of which he was necessarily exposed to cold and wet, so that he took sick; that his sickness continued to increase for some weeks, until he became dangerously ill, and no care was taken of him; that the jailkeeper neglected and failed to notify the petitioner of the sickness of *Jesse* or to dispose of him as required by the city ordinances; that some three or four months after his slave was in jail, he heard by accident that he was very sick and required his immediate attention;

thereupon he forthwith proceeded to the jail and took him away—but being then so far overcome by his sickness he died a few days thereafter; and that the city is bound to repair the damage which he has thus sustained in consequence of the gross negligence of its agents in exposing his slave unnecessarily and in failing to take care of him whilst sick, or to give notice of his sickness.

The plea set up in the answer is, that there is no cause of action disclosed on the plaintiff's petition, the defendant not being liable for the illegal or malicious acts of any of its employees.

The plea was sustained and the plaintiff appealed.

We do not think the Judge erred. The power of the corporation to erect a police jail, to employ officers to superintend it, and to pass ordinances for its government, is in effect a power granted for public purposes, and not private advantage or profit, as contended for by the appellant. According to the principle announced in the case of *Stewart v. The City of New Orleans*, 9 An. 461, and which we consider conclusive upon the subject, the city cannot be made liable in the present case for the nonfeasance or misfeasance of the officers of the police jail.

It is, therefore, ordered, that the judgment of the court below be affirmed, with costs.

SPOFFORD, J., dissenting. This case went off without evidence, upon an exception that the petition disclosed no right of action. Its averments are therefore, in the present inquiry, to be taken as true.

These averments are, that the plaintiff entrusted his slave to the agent of the city, to be placed in the parish jail for safe keeping and correction; that the city derived a pecuniary profit therefrom in the daily compensation paid by the owner; that the agents of the city, in disregard of the laws and ordinances, unnecessarily exposed the slave; failed to take care of him while sick, to return him to his master, to send him to the hospital, or even to notify the master of his illness; and that he died in consequence of the gross negligence and want of care of the city's agents under these circumstances, to the damage of the petitioner in the sum of \$1,500.

Is there any cause of action stated? According to the uniform jurisprudence of this State, up to the 9th Annual Reports, I think there is.

In *Chase v. Mayor et al.*, 9 La. 346, the city was released from a claim for the value of a slave sent to the calaboose, and who had runaway from the chain-gang, on the ground that the agents of the city forthwith gave notice to the master's agent of his escape.

In *Houston v. The Police Jury of St. Martin*, 3 An. 566, the proprietor of a showboat descending the river Têche, in the parish of St. Martin, had been detained and caused to lose time by the neglect of the person employed to open a draw in a drawbridge which obstructed the navigation of the river. The court said: "From an examination of the evidence we have come to the conclusion that there was neglect on the part of those for whose acts the parish is responsible, and that the parish is bound to repair the damage caused thereby." The proprietor of the boat had a judgment against the parish.

In *McGary v. The City of Lafayette*, 4 An. 440, the Supreme Court rendered a judgment in damages against the city beyond the actual injury suffered by the plaintiff, "for the violent and illegal proceedings of the officers of the corporation."

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The case of *Johnson v. Municipality No. 1*, 5 An. 100, was entirely analogous to the case stated in the present plaintiff's petition. The owner of a slave who had died from neglect of the keeper of a prison where he was confined, had judgment against the municipality for his value. The court unanimously adopted the opinion of the District Judge, which commences with the proposition that "the liability of municipal corporations for the acts of their agents, is, as a general rule, too well settled at this day to be seriously questioned."

In 5 An. 504, *McLaughlin* recovered judgment against the Municipality No. 2, for damage occasioned by loss of rents in consequence of the commissioners of that municipality having warned him to stop building under certain proceedings which had been commenced for opening a street, but which was afterwards discontinued.

In *Walling v. Mayor, &c. of Shreveport*, the incorporated town had pleaded an exception that it was not responsible in damages for a trespass done by its officers and agents in laying out a street. The exceptions were overruled, the court observing: "the case, as the record presents it, is that of a corporation exercising through its officers, in an unskillful and improper manner, powers avowedly vested in the said corporation by its charter. It does not differ in principle from that of *McGary v. The City of Lafayette*, in which the plaintiff recovered large damages from the city of Lafayette because the agents of the corporation had executed in an improper manner the corporate power delegated to them.

"We understand the exception pleaded by the defendants to be applicable only to cases in which officers or agents of corporations do acts injurious to others in the pursuit or accomplishment of objects not within the scope of the powers of the corporation. The distinction appears to us clearly stated in the case of *Anthony v. The Inhabitants of Adams*, 1 Metcalf, 286."

It is contended, that this series of decisions was overruled by the judgment in *Stewart v. City of New Orleans*, 9 An. 461, in an opinion which made no allusion to either of them. It is not necessary to question the correctness of the decree in the case of *Stewart*. There was judgment for the defendant upon a claim by the owner against the city, for the value of a slave of his who had been killed by a detachment of police officers. But the reasons assigned for the decree, whether right or wrong, are not binding on this court as a precedent, because they were not the opinion of a majority of the court, but of two Judges only; two Judges dissented altogether, and the third only concurred in the conclusion that the municipal government was not liable in that particular case, without assenting to the doctrine of the opinion.

Without at present going into the grounds of the opinion pronounced by two Judges in the *Stewart* case, founded mainly upon the opinion of a court not of the last resort in the State of New York, I deem it sufficient to say, that the plaintiff in this case has, in my judgment, stated a legal cause of action against the city, under the authority of the cases hitherto adjudged in Louisiana.

I think the exception should be overruled, and the cause remanded for a trial upon the merits.

Justice BUCHANAN took no part in the decision of this case.

CATHARINE L. CAMPBELL, wife of JOHN WALKER, v. JOHN M. BELL, Sheriff, et al.

Where the wife had obtained a judgment of separation of property from her husband, and subsequently purchased property in her own name, and the proceedings were charged by the creditors of the husband to have been fraudulent and collusive between the wife and the husband—*Held*: That to support the wife's separate title, the judgment of separation is not sufficient. The creditors have a right to demand the evidence on which it was rendered. It must also be shown that the property was purchased with the wife's separate funds.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*J. Q. A. Fellowes*, for plaintiff and appellant. *G. P. McPheeters*, for defendants.

BUCHANAN, J. This is an injunction of the execution of a judgment against the husband of the plaintiff as a defaulting administrator of a succession, and was dissolved by the District Court for the following reasons, in which we entirely concur:

"In February, 1851, *Walker* was appointed curator of the succession of *Spencer Gates*. His administration resulted in a judgment against him, and in favor of the estate, in the sum of \$737 89, with interest at the rate of twenty per cent. on the sum of \$909 40 from the 8th of August, 1851.

"Under this judgment, execution issued and property was levied upon.

"His wife has enjoined the sale. She had obtained a judgment in March, 1843, dissolving the community of acquets which existed between herself and husband, and also in her favor for \$2200, amount of paraphernal property which her husband had used.

"Subsequent to this judgment, she purchased at succession sales some of the property, the sale of which she has enjoined here, and the rest she purchase at a Sheriff's sale, made under an *alias fi. fa.* issued in October, 1855, on the judgment obtained by her.

"The representative of the succession of *Gates* has put her upon the proof of the verity of this judgment. He alleges that it was obtained by fraud and collusion between herself and her husband, upon illegal and insufficient testimony, and that no attempt has been made to execute it by *bona fide*, nor interrupted suit. He specially denies what is alleged in her petition, that these purchases were made with her paraphernal and individual funds, and avers that she has not been possessed of nor has she exercised any rights of ownership over the property.

"Thus put her upon defence of her judgment, she has given in evidence the publication of the decree dissolving the community, but she has offered nothing but the judgment, which, under the allegations in the answer, is not sufficient. She does not offer the evidence upon which it was rendered, and this the defendant herein had the right to demand, and this it was her duty to furnish. Her not having done so must be taken as evidence against her. *Mure v. Turbough*, 11 L. 533.

"Neither has she shown that desire to enforce a prompt and *bona fide* execution of the judgment, which is required by Art. 2402 C. C. She introduces in evidence an *alias fi. fa.* issued in October, 1855, (the judgment was obtained

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in 1843); but what became of the first *fi. fa.*, which should have been returned before the second issued; when it was issued, what was made of it, or whether it issued at all, are facts which could have been easily proved, which she was bound to produce under the pleadings, if they existed, and which are not to be found in the record, this being the case within the rule laid down in *Mure v. Tarborough*, 11 L. 533; *Bostwick v. Gasquet*, 11 L. 513; *Berlie v. Walker*, 1 R. 431; *Longino v. Blackstone*, 4 An. 513. But admitting the correctness of the judgment, she does not attempt to show that the money with which she purchased property in 1846 and 1850 was purchased with her paraphernal funds, which she was called upon to do. It no where appears that her paraphernal property, if she ever had any, amounted to more than \$2200. She has not shown by proper evidence any attempt to make this judgment, until long after she pretends to have acquired property with her own funds. Neither is it shown, that after the dissolution of the community she ever made or could have made by her industry the money with which this property was purchased.

"Upon the whole, I am forced to say that the judgment of separation is not binding against third persons, and that the act of the parties seem to have had for their object the securing of the husband's property from the pursuit of his just creditors, and those are proceedings which courts of justice cannot sanction."

The appellee has filed an answer to the appeal, praying that the judgment of the District Court be amended by allowing damages of twenty per cent upon the judgment enjoined against the principal and surety in the injunction bond, according to the Act of 1833.

We think this is a case for the application of the statute in question. The record informs us that the present is the third injunction which has been issued to stay the collection of a debt incurred by the misconduct of the plaintiff's husband. See the case of *Gates' Succession v. Walker*, 8 An. 277. It is fit that a warning should be given to those who lightly affix their signatures to bonds for such purposes.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended; that the injunction herein issued be dissolved, and that the succession of *Spencer Gates*, appellee, recover of *Catherine L. Campbell*, widow of *John Walker*, and of *J. T. Slingerland*, principal and surety in the injunction bond, *in solido*, one hundred and forty dollars, as damages, with costs in both courts.

#### J. T. MASON AND WIFE v. E. B. TOWNE.

An action to compel the specific performance of a verbal contract to sell land, with an alternative prayer for damages, resulting from the breach of the contract, cannot be sustained, even if the contract be proved by competent evidence, unless there has been an actual delivery of the property sold.

**A**PPEAL from the District Court of Madison, *Farrar, J.*  
*J. J. Ammonet*, for plaintiff and appellant. *Short & Parham*, for defendants.

**SPOFFORD, J.** This is a suit to compel the specific performance of an alleged verbal promise to sell a tract of land. In an amended petition the plaintiffs

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introduced an alternative prayer for damages resulting from the breach of the contract.

"A promise to sell amounts to a sale, when there exists a reciprocal consent of both parties as to the thing and the price thereof; but, to have its effect, either between the contracting parties or with regard to other persons, the promise to sell must be vested with the same formalities as are above prescribed in Articles 2414 and 2415 concerning sales, in all cases where the law directs that the sale be committed to writing." C. C. 2437.

The Article 2415, thus referred to as applicable to the promise to sell as well as to an actual sale, is in these words:

"All sales of immovable property or slaves shall be made by authentic act, or under private signature. All verbal sales of any of these things shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted." C. C. 2415.

There is no exception to this rule embodied in Art. 2255: "Every transfer of immovable property or slaves must be in writing; but if a verbal sale, or other disposition of such property be made, it shall be good against the vendor, as well as against the vendee, who confesses it when interrogated on oath, provided actual delivery has been made of the immovable property or slaves thus sold."

Conceding that this Article also applies to a promise to sell, (upon which it is not necessary to give an opinion,) the plaintiffs must fail in the present action, because they have not alleged or proved an actual delivery of the property sold. Nor have even the allegations of the petition been established by competent evidence. See *Marionneaux v. Edwards*, 4 An. 103.

Judgment affirmed.

#### STATE v. JEAN LACOMBE.

The District Judge did not err in refusing to charge the Jury, that the law under which the prisoner was indicted for larceny is contrary to Article 117 of the Constitution of 1850 and the corresponding Articles in the Constitutions of 1812 and 1845, prohibiting the adoption by the Legislature of any system or code of laws by general reference thereto.

The 63d section of the Act of May 4th, 1805, was in force when the first of those Constitutions was adopted, and they have no retrospective operation.

Since the adoption of the first State Constitution, it has been recognized that the common law of England is the law of Louisiana, to the extent and with the limitations provided in that section of the law of 1805.

The District Judge is prohibited by law from charging the Jury on matters of fact.

The constitutional jurisdiction of the Supreme Court, in criminal matters, not extending to facts, the depositions of witnesses form no part of the record of appeal, and the copying of such by the Clerks of the District Court, into the transcript, is consequently improper.

The Act of 1855, relative to crimes and offences, does not violate the 115th Article of the Constitution of 1852.

**A**PPPEAL from the District Court of the Parish of East Baton Rouge, *Robertson, J. E. W. Moïse*, Attorney General, for the State. *J. J. Burk*, for the accused.

**B**UCHANAN, J. The prisoner was convicted of larceny on an indictment framed under the 28th section of an Act relative to crimes and offences, approved 14th March, 1855. He was sentenced to an imprisonment at hard labor for one year, and has appealed.

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The District Judge did not err in refusing to charge the Jury that the law under which the prisoner was indicted is contrary to the Article 117 of the Constitution of 1852, and the corresponding Articles in the Constitutions of 1812 and 1845.

The 33d section of the Act of May 4th, 1805, (Bullard & Curry, page 248,) was in force when the first of those Constitutions was adopted. In numerous decisions of this court, since the adoption of the first State Constitution, it has been recognized that the common law of England is the law of Louisiana, to the extent and with the limitations provided in that section of the law of 1805, which section is moreover expressly preserved in force by the 73d section of the Act relative to criminal proceedings, No. 121 of the Session Acts of 1855. In the face of these judicial and legislative recognitions of the validity of the Act of 1805 in its adoption of the common law of England as the standard of definition of crimes and the rule of criminal proceedings, we cannot think of giving the 117th Article of the Constitution of 1852, and the corresponding Articles of the Constitutions of 1812 and of 1845, a retrospective operation.

The other portion of the charge requested by the counsel of prisoner from the District Judge, refers, as we understand the bill of exceptions, to a matter of fact upon which the Judge was prohibited by law from charging. His refusal to give the charge was, therefore, perfectly correct. The argument of the counsel of appellant upon this point, in this court, turns principally upon depositions of witnesses before the committing magistrate, which, by some means or other, have found their way into this transcript. Our constitutional jurisdiction in criminal matters not extending to facts, we only notice those depositions for the purpose of admonishing the Clerks of the District Courts that the depositions of witnesses in criminal cases are no part of the record of appeal; and that the copying of such into the transcript is consequently improper.

A point is made by appellant's counsel, that the court refused to charge the jury in writing, as provided by the statute; but by reference to the bill of exceptions, it appears that the charges required in writing by the counsel, were charges which we have just decided the Judge correctly refused to give the Jury, either orally or in writing. Of such refusal there can be no record, except the bill of exceptions. A written charge of the court to the Jury, contrary to the opinion of the Judge upon the law, is a self-contradiction and an absurdity.

The Act of 1855, relative to crimes and offences, does not, in our opinion, violate the 115th Article of the Constitution of 1852.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

SPOFFORD, J., concurring. The only bill of exceptions in the record is in these words:

"The defendant, by his counsel, required the court to charge the Jury in *this writing*: That the three Constitutions, these hitherto adopted—that in 1812, superseded by that in 1845, superseded by that in 1852, this actually reigning; each and all prohibited the Legislature from adopting any foreign system of laws, specially contemplated the adoption of the common law of England in criminal matters, and more specially the instructions that larceny formed any exception to the otherwise universal rule that the jurisdiction to inquire of crimes was the place of commission, and that our statute can only be construed to have adopted of the common law of England in criminal matters the

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instances denominated precised in our statute; and that the instruction that larceny forms an exception to the otherwise universal rule of the common law, is not denominated precised in our statute, but must be considered under the universal rule of our system of laws, that the jurisdiction to inquire of crimes, larceny, is the place of their commission, and not elsewhere. In the clear, uncontrovertible sense, that under our system that larceny cannot be inquired of wherever, but only where committed. The court refused to charge conformably, and to such refusal, counsel tendered this, his bill of exceptions, to be signed; this the court refused in this form, but stated it would afford counsel the opportunity to except to the court's refusing to charge the matter orally, when counsel required the oral charge, which the court refused, and signed this bill of exceptions accordingly.

(Signed) W. B. ROBERTSON, Judge."

I do not think the Judge erred in refusing to charge either in "this writing" or orally, as requested by the prisoner's counsel. The object of a charge from the Judge is to enlighten Jurors as to their duties, and not to darken their understanding. The desired instructions, as detailed in the bill of exceptions, are confused and unintelligible; and I think that was a sufficient reason for refusing to give them.

Upon the constitutional questions treated of by Mr. J. BUCHANAN, I concur in his opinion.

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JOHN M. TRECOTT—HART, LABATT & Co., Transferees, v. W. LEWIS.

If proper parties join issue upon questions either of law or fact, before a competent court, they must abide by the decision.

The form of procedure, by a rule instead of an injunction, to arrest an execution, having been resorted to without objection, and a decision rendered thereon after issue joined on the merits,

*Held:* that the defendant in execution, by whom the rule was taken, could not afterwards renew the litigation by resorting to an injunction.

The judgment discharging the rule was precisely equivalent to a judgment dissolving an injunction, in lieu of which the rule was taken.

Such judgment, if not appealed from within the legal delay, would have the finality requisite to sustain the plea of *res judicata*, and although the time for appealing from it may not have elapsed, it precludes any further action of the court on the matters set up on the rule.

**A** PPEAL from the District Court of East Feliciana, *Ratliff, J.* Tried by a jury. *J. O. Fuqua*, for plaintiff and appellant. *Muse & Hardee*, for defendant.

**STOFFORD, J.** The case was formerly before us on a motion to quash the execution issued upon a judgment against the defendant. 11 An. 184.

Within a month after the mandate of this court was filed in the court below, *William Lewis* took another rule on *Hart, Labatt & Co.*, transferees of *Trecott*, to show cause why the seizure made under the judgment should not be released, and the writ of execution quashed, on the grounds, first, that *Hart, Labatt & Co.* were not owners of the judgment; secondly, that the twelve months' bond given for the judgment had been fully paid by him; and thirdly, that the bond was barred by the prescription of five and ten years.

*Hart, Labatt & Co.* joined issue upon the rule by a formal plea, denying every allegation therein, except the fact that a *fi. fa.* had been issued at their

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instance, and property of the defendant seized; they further pleaded *res judicata* as to that part of the rule which related to the twelve months' bond.

It appears that there was a trial of these issues before a competent Judge, that a note of testimony offered was taken, and that a judgment was rendered and signed in the following terms:

"This case having been taken up for trial on the rule by consent, by reason that the law and evidence is in favor of defendants therein, *Hart, Labatt & Co.*, and against the plaintiff, *William Lewis*, it is, therefore, ordered, adjudged and decreed, that this rule be discharged, at plaintiffs' costs.

(Signed)

G. W. WATERSTON,

Judge of Eighth, presiding in Seventh Judicial District.

April 28th, 1856."

On the 28th May, 1856, *William Lewis* sued out an injunction in regular form against the same execution, upon the same allegations in substance as were set forth in the rule which had been thus discharged after a hearing upon the merits; to wit: that *Hart, Labatt & Co.* did not own the judgment; that it had been paid, and that it was prescribed.

The defendants in injunction (plaintiffs in execution) interposed to the injunction suit the plea of *res judicata*. They at the same time filed another special plea in these words: "In this case *Hart, Labatt & Co.* now come, in addition to the exception of *res judicata* herein filed, further excepting, say, that said *Lewis* had no legal right to obtain said injunction, for the reason that he had previously taken a rule upon these defendants to dissolve the execution herein; that said rule had and was designed to have the same effect as an injunction, viz: the dissolving of the execution and release of the property seized, and was really a substitute for one; and that the facts set up in said petition, if they ever existed at all, existed at the time of the taking of said rule, and that said rule having been dissolved, he is precluded from setting up any matters existing at or prior to the time when it was taken." Wherefore a dissolution of the injunction was prayed for, with damages.

Both these exceptions having been overruled, an answer to the merits was filed, and after a hearing, there was a verdict and a judgment perpetuating the injunction, from which the present appeal is prosecuted.

We are of opinion that the court should not have gone into a trial of the merits of the injunction, but should have sustained the exception quoted above.

It is apparent upon the face of the pleadings, and was also proved *aliunde* by the plaintiff in injunction himself upon the trial of the exception, that the rule raising the question of ownership, payment and prescription, was intended as a substitute for an injunction; the motive for resorting to such a form of proceeding was a representation by one of the counsel for *Lewis* to the counsel for *Hart, Labatt & Co.* that *Lewis* was not in a condition to give an injunction bond.

It matters not that the proceeding by rule was irregular, since the party against whom it was taken, as a favor to his adversary, waived all questions of form and joined issue upon the merits. Here are all the elements of a suit at law, *actor, reus, et judex*. The form of procedure is immaterial; if proper parties join issue upon questions, either of law or fact, before a competent court, they must abide by the decision. *Exceptio rei judicatae, obstat quoties inter eandem personas, eadem quatio revocatur vel alio genere judicii.* See *Plique & Lebeau v. Perret*, 19 L. 323.

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The tenor of the judgment which discharged the rule shows that it was rendered upon the merits of the controversy; all the proceedings under the rule tend to the same conclusion. Under such circumstances a judgment discharging the rule was precisely equivalent to a judgment dissolving an injunction, in lieu of which it appears that the rule was taken, and a judgment dissolving an injunction upon the merits, after answer filed, has the finality which is requisite to sustain the plea of *res judicata*. *Wells v. Hunter*, 5 N. S. 120. The court discharged the rule on the 28th April, 1856, for the expressed reason that the law and evidence on the trial were in favor of defendants, *Hart, Labatt & Co.*, and against the plaintiff, *William Lewis*.

We conclude that, had the proper time elapsed, this decree would have sustained the plea of *res judicata* in all its technicality.

But the year for appealing from the decree had not expired when the exceptions were interposed, nor has it yet. Article 3522, No. 9, of the Civil Code declares that the "*thing adjudged*" is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or because the time fixed by law for appealing is elapsed, or because it has been confirmed on the appeal."

If, therefore, the technical plea of *res judicata* will not hold, because there is time yet to appeal from the judgment on the rule rendered 28th April, 1856, still the question recurs, should not the other branch of the defendant's exception to the injunction have been sustained, and the plaintiff left to his appeal, instead of litigating over again in a new action the matters already decided by the same court.

The question has been settled affirmatively by two decisions of this court.

In *Florance v. Wilcox*, 14 L. 58, a cause very similar to this, and one where the year for appealing from the first judgment had not expired when the second rule was taken, the court held that where the legality of issuing the order of seizure and sale had previously been put at issue by the defendant, in a formal opposition, and the injunction granted at the instance of the defendant had been dissolved, the Judge did not err in discharging the rule for another injunction.

"The previous decision precluded any action of the court in relation to the matters set up in the rules which were substantially those which were included in the defendants' previous opposition.

The doctrine was expressly affirmed by us in the recent case of *Moch v. Gartheaite, Giffen & Co.*, 11 An. 287.

A plaintiff in execution might be perpetually baffled in collecting his money if injunction after injunction can be sued out from the same court on the same grounds, as fast as they are dismissed. If the judgment debtor acquiesces in the decree overruling his first opposition, it becomes *res judicata* as to the points there put at issue. If he does not acquiesce, his remedy is by appeal, and if he pursues that, then there is *lis pendens*, and he should not bring a new suit for the same cause.

It is, therefore, ordered, that the judgment of the District Court be avoided and reversed, and the injunction sued out in this case be dissolved without damages, and without prejudice to the right of appeal from the judgment of 28th April, 1856; the plaintiff in injunction paying costs in both courts.

## WINTER IRON WORKS v. JOHN TOY.

The Acts of the Legislature, approved March 7th, 1816, and March 16th, 1818, pointing out the manner of obtaining residence within the State, related to the acquisition of political rights.

They prescribed conditions on which a political domicile could be acquired.

A person who actually lives in the State, *animo manendi*, must be sued personally. He cannot be brought into court by attachment, because he has occasionally gone out of the State, for temporary purposes, in each year since he came to the State to live.

**A** PPEAL from the District Court of West Baton Rouge, *Robertson, J.*  
*David N. Barrow*, for plaintiffs and appellants. *Samuel P. Greeve*, for defendant.

**SPOFFORD, J.** The plaintiffs have appealed from a judgment dissolving the attachment sued out in this case.

The attachment was procured on the sworn allegation that the defendant resides out of the State. He contends that, at the the date of the attachment, he resided in the parish of East Baton Rouge, in this State.

We think it clear, from the evidence, that he did so.

The appellant's counsel indeed seems to admit that the defendant *in part* resided in this State, but urges that, as the State of Indiana was the domicile of his origin, and he had not remained uninterruptedly in the State for any entire year since he came here to live, he had not, at the time of attachment, acquired a legal residence in Louisiana pursuant to the Acts of 1816 and 1818. "Bul. & Cur. Dig. 286, 287.

We are of opinion that these statutes, if still in force, relate to the acquisition of political rights, and do not conflict with the rule of natural justice, that a person who actually lives in this State, *animo manendi*, should be personally cited, and not brought into court by attachment on an allegation that he resides out of the State.

It is true a different interpretation was given to the Acts of 1816 and 1818 in the case of *Boone v. Savage*, 14 L. 169, a case cited with approbation in the case of *State v. Judge of Probates of New Orleans*, 2 Rob. 451.

But we think the correct construction of these statutes was indicated in the later case of *Amis v. Bank of Louisiana*, 9 Rob. 350, where they were spoken of as prescribing the conditions on which a political domicile in this State was to be acquired.

We are of opinion that the defendant cannot be said to reside out of the State in the sense of the Code of Practice, because he has occasionally gone out of the State, for temporary purposes, in each year since he came hither to live. He does not "reside out of the State" while he lives in it *facto et animo manendi*.

Judgment affirmed.

## NOLAN'S HEIRS v. LOUISA JANE TAYLOR et al.

The fees for services of an attorney at law, although he has acted under an appointment by the court, as tutor *ad litem*, for minors, cannot be recovered in a proceeding by rule, after the determination of the litigation in which he has been employed.

APPEAL from the District Court of West Baton Rouge, *Robertson, J.*  
*R. G. Beale*, for appellant. *A. S. Herron*, for appellee.

MERRICK, C. J. It is admitted by the appellee's counsel, that the statement of facts contained in the brief of the counsel for the appellant is correct. We adopt it. It is as it follows:

"*John Nolan*, of West Baton Rouge, died about the year 1852, leaving an estate worth about three hundred thousand dollars."

"Said *Nolan* left no forced heirs. His family consisted of his wife and her two children by a former husband. *Nolan* left a will by which he gave to his said wife and her two children, legacies of fifty thousand dollars each; also, appointing his said wife sole executrix of his will."

"*Nolan's* heirs at law, who were his two brothers, and the descendants of his deceased brothers and sisters, instituted suit to set aside the provisions of said will by which said legacies were given. *Mrs. Nolan*, not having qualified as natural tutrix to her said children at the time said suit was instituted, the plaintiffs prayed that a tutor *ad litem* should be appointed to represent said minors in said suit. The court appointed *James M. Elam*, tutor *ad litem* to said minors. But very soon after said appointment *Mrs. Nolan* qualified as natural tutrix, and the court then appointed *J. M. Elam* under tutor. *Mrs. Nolan*, as soon as she had qualified, employed counsel to defend the interests of her children, in common with her own, and excepted to the appointment of *Elam* as tutor *ad litem*. A compromise was then concluded between the heirs of *Nolan* and *L. J. Taylor*; (*Mrs. Nolan*,) the latter acting for herself and for her minor children, being authorized thereto by a family meeting."

"By said compromise, *Mrs. Nolan* agreed to take for herself and children eighty thousand dollars, instead of one hundred and fifty thousand, and pay all the costs of the suit, and also to resign the trust of executrix."

"Soon after the compromise *John T. Nolan* was appointed dative testamentary executor, and *J. M. Elam* filed in the court a motion to have his fee as tutor *ad litem* fixed, which motion he caused to be served on *Robert G. Beale*."

"The court appointed two attorneys as experts, to examine into the matter, and report as to what *Elam's* services were worth. Said experts reported that the services were worth three thousand dollars, and in pursuance thereto the court gave judgment to that amount in favor of *Elam*, and against *John T. Nolan*, executor of *Nolan's* will."

"Before rendering the above judgment, by the court, *R. G. Beale* filed an exception to the proceedings, upon the following grounds:

1st. For the reason that there was no litigation pending to authorize the proceeding by rule.

2d. Appraiser has not been cited as attorney for any of the parties to show cause why the fee should not be assessed.

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3d. By the compromise referred to in the said motion, *Mrs. L. J. Taylor* agreed to pay whatever amount should be due to *Elam*.

4th. Appearer was not and is not counsel for *Mrs. Nolan* in said case, but was counsel for the opposite party.

5th. There has been no default taken in this case."

[Signed]

R. G. BEALE

It is urged by the appellant in this court, that it was irregular and illegal to proceed by rule in order to recover the attorneys fees against the estate, and that the service on *Robert G. Beale* was an insufficient service, because he was not the attorney of *Mrs. Nolan* and her children but was the attorney for *John T. Nolan* and others, *Nolan's* heirs.

It is further urged, that the claim is not due by the succession but by the legatees for whom the services were rendered, and must be paid by them out of their own means.

We think the first of these objections well taken, and express no opinion upon the other, which involves the construction of the compromise.

The fees for services of an attorney at law, although he has acted in the relation of a tutor *ad litem*, under an appointment by the court, we think cannot be recovered in a proceeding by rule after the determination by a final judgment of the litigation in which he has been employed. It comes within the rule laid down by this court in the case of *Thomas, administrator, v. Bourgeois*, 6 Rob. 437, where it is said, that "The right to proceed by rule or on motion implies the pending of a suit between the parties, and is confined to incidental matters which may arise in the progress of the contestation, except in certain cases where the summary proceeding is expressly allowed by law." See 3 An. 434; C. P. 170.

We know of no law providing for the trial of the demand of the curator *ad litem*, for his fees, after final judgment, by way of a summary proceeding. Perhaps, under the present law, it would be more regular, except *in concursu*, to commence such proceeding by petition and citation in all cases. See Acts 1855, 162, § 1.

One of the great evils complained of under the law previous to the Constitution of 1845, was the allowance of fees to attorneys acting as curators, &c., on a simple motion. To prevent this abuse, the 71st Article of that Constitution was adopted. Under that Constitution, the Act of 21st March, 1850, was passed, which provides, "That in any suit or proceedings where a fee or compensation not established by law be involved, it shall be allowed to either party to pray for a trial by jury, whether said fee or compensation be claimed from an insolvent estate or a succession, whether by way of opposition or otherwise."

This statute has been reenacted by the first section of the Act of 1855, just cited.

Under this law, which allows the trial by jury, it is the duty of the courts to prevent the recurrence of those evils which were incident to the loose manner in which compensation was allowed, under the old law, to attorneys and others.

A regular suit in which the opposite party is cited, and has an opportunity of being heard by way of answer, is one of the best safeguards, and ought not to be dispensed with, where the same can be conveniently resorted to, even during the pendency of the suit.

In the case before us, however, the judgment between the parties to the

original suit had become final before the rule was taken, and, consequently, there was no suit on which it could be engrafted, conceding a rule to be a regular mode of proceeding.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that said rule be discharged as in case of a non-suit, the plaintiff in the rule paying the costs therein in both courts.

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DANIEL SEARLES v. JAMES J. COSTILLO.

Actual possession of the land is a fact indispensable to be proved in order to sustain the possessory action. C. P. 47.

A mere civil or legal possession is insufficient, unless it is shown to have been preceded at some time by a natural possession in the plaintiff or his authors.

APPEAL from the District Court of the parish of East Baton Rouge, *Robertson, J. J. J. Burk*, for plaintiff and appellee. *A. M. Dunn*, for defendant.

SPOFFORD, J. The defendant appeals from a judgment against him in a possessory action.

The plaintiff offered a witness, who proved that the land which is the object of the action has been lying vacant and unoccupied ever since the plaintiff pretends to have acquired it, up to the time of the alleged disturbance by the defendant.

To show possession as owner, the plaintiff offered a parish tax collector's deed purporting to have conveyed this land to him on the 4th January, 1849, it being sold for taxes said to be due upon it by *Elihu Henderson's* heirs, for the year 1847: he also offered the Auditor's certificate to the effect that, the property in question was assessed in the name of the heirs of *Elihu Henderson*, for the year 1847, and that since 1850 it has been assessed in the name of the plaintiff. Numerous receipts for the payment of his State and parish taxes were also offered by the plaintiff, and there he rested his case.

He must suffer a non-suit. There is no evidence that he, or his authors, ever had a real actual possession of the land, a fact indispensable to be proved in order to sustain this possessory action. C. P. 47; *Davis v. Dale*, 2 An. 205. A mere civil or legal possession is insufficient, unless it be shown to have been preceded at some time by a natural possession in the plaintiff or his authors. *Ellis v. Prevost*, 19 L. 251. It is not shown that *Henderson's* heirs, the plaintiff's authors, ever had even a civil possession, and it is shown that the plaintiff himself never had a natural possession. The payment of taxes may announce the possessor's intention to preserve the possession of the thing, when he or his predecessor has once had a corporal possession, but it will not constitute a corporal possession. C. C. 3467.

It is, therefore, ordered, that the judgment of the District Court be avoided and reversed, and that the plaintiff's petition be dismissed as in a case of non-suit, he paying costs in both courts.

BLANCHE E. BOURGEAT, wife of A. PLAUCHÉ, v. CONSTANCE DUMOULIN  
AND HUSBAND.

A donation *inter vivos*, in which the donor makes a reservation in favor of himself of an annuity sufficient for his subsistence according to his previous habits and condition in life, is not a donation "*omnium bonorum*," prohibited by Article 1484 of the Civil Code.

**A**PPEAL from the District Court of West Baton Rouge, *Robertson, J.* Tried by a Jury. *U. B. & E. Phillips* and *W. H. Cooley*, for plaintiff and appellant. *Louis Janin* and *Provosty & Farrar*, for defendant.

**SPOFFORD, J.** This suit was brought by one of the collateral heirs of *Onil Bourgeat*, deceased, to annul an act of donation *inter vivos*, made by said *Onil Bourgeat* to the defendant, his sister-in-law, nearly a year before his death. The plaintiff has appealed from a judgment rendered upon the verdict of a jury in favor of the defendant.

The donation is formal upon its face, but the appellant maintains that it was absolutely null, because it was a donation *omnium bonorum*, prohibited by the Article 1484 of the Louisiana Code: "The donation *inter vivos* shall in no case divest the donor of all his property (*dépouiller entièrement le donateur*); he must reserve to himself enough for subsistence; if he does not do it, the donation is null for the whole."

The fact that it was a donation *omnium bonorum* is denied by the appellee. It appears that some household furniture, a horse, a watch, &c., and a claim to a tract of land in St. Landry, which had never been reduced to possession by the donor, were not embraced in the donation. Moreover, the act itself makes the following reservation in favor of the donor: "La présente donation est ainsi faite à la charge ci-après expliquée savoir: que la demoiselle donataire s'oblige par ces présents, solennellement et fidèlement, de donner chaque année au sieur donateur une somme de quatre cents piastres et pendant toute sa vie pour le soutien et l'entretien du dit sieur donateur et en outre à cause de l'attachement et de l'amitié que le dit sieur donateur porte à la dite demoiselle donataire, et parceque telle est la volonté du dit sieur donateur."

It is in proof that the sum of four hundred dollars annually would have been quite sufficient for the subsistence of the donor, according to his previous habits and to his condition in life; that he was passionately addicted to hunting, and spent much of his time in the woods; that the land and slaves which form the subject of this donation, for many years previous thereto had failed to yield him a net revenue much exceeding the sum of four hundred dollars, and sometimes not so much; and that he could live more comfortably and to his tastes with a fixed income of this sum, and without the cares of a planter's life, than by retaining the property with its precarious and fluctuating revenues.

But it is contended by the appellant that the Article 1484 contemplated a reservation of property in kind, and that this annuity or charge cannot be considered as property in the sense of that Article. This construction would be too narrow; it is not even borne out by the literal terms of the French text; it does not represent the fair meaning of the English text.

By a donation with the reserve of an annuity a man might render his subsistence for life more sure and ample than by retaining the property itself, and

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a donation under such a charge is not prohibited, as is the donation with a reserve of the usufruct to the donor. C. C. 1520.

Donations *inter vivos* are liable to be revoked or dissolved for the non-performance of the conditions imposed on the donee. C. C. 1546.

"In case of revocation or rescission on account of the non-execution of the conditions, the property shall return to the donor free from all encumbrances or mortgages created by the donee; and the donor shall have, against any other persons possessing the immovable property given, all the rights that he would have against the donee himself." C. C. 1555.

"In all cases in which the donation is revoked or dissolved, the donee is not bound to restore the fruits by him gathered previous to the demand for the revocation or rescission. But in case of the non-fulfilment of conditions which the donee is bound to fulfil, if it be proved to have proceeded from his fault, he may be condemned to restore the fruits by him received since his neglect to fulfil the conditions." C. C. 1562.

The punctual payment of the annuity is thus fully guarded by law, and unless it be paid, all the property donated reverts to the donor unincumbered by any act of the donee.

The annuity thus guarded is itself a property, and the donor reserving it has not stripped himself *omnium bonorum*. He remains his own master, with an income to spend as he pleases.

We do not question the correctness of the decision of the case of *Lagrange v. Barré*, 11 Rob. 302, which is relied upon by the appellant. The donor there reserved no property, nor any sum of money to be paid to himself; he threw himself upon the bounty of his donee; he reduced himself to the condition of a penniless man, dependant for food, clothing, medical attendance, and the other necessities of life, upon the promised gratitude of the person to whom he gave his all; the very imprudence which it was the object of the prohibitory law to remedy. The court rightly held that "the law-maker never intended that on a simple stipulation of alimony a man should divest himself of all his property by donation *inter vivos*."

The only question then must be one of fact: was the sum of four hundred dollars a year enough to support the donor in his condition in life? The jury found that it was, and our perusal of the evidence has led us to the same conclusion.

The judgment is, therefore, affirmed.

#### CITY OF NEW ORLEANS v. W. NORTH.

Under the city ordinance providing that "every keeper of a transient theater, circus, menagerie, or other public exhibition or show, shall pay in advance a tax of ten dollars for each performance," &c., a tax cannot be levied on one who keeps a *permanent* establishment for an exhibition consisting of natural and artificial curiosities, for admission to which visitors are charged a certain price.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*  
F. C. Larille & Morel, for plaintiff. Simons & Fenner, for defendant and appellant.

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MERRICK, C. J. This case comes up on the following agreed statement, viz:

"It is admitted that the defendant has kept, as charged in the petition, a certain exhibition, consisting of natural and artificial curiosities, such as animals, fishes, paintings, cosmographic views, &c., &c., on St. Charles street, opposite the St. Charles Hotel, for admission to which he charged each visitor the sum of twenty-five cents, and that the same is a *permanent* establishment, and that the defendant resides in the city of New Orleans, and that no performances are exhibited there except as above stated."

The petition charges the defendant with "conducting the trade or profession of exhibiting a museum and other curiosities, both natural and artificial, as a show, daily and nightly each day," and claims from the defendant three hundred and fifty dollars for thirty-five days' exhibition of the curiosities of said museum, at ten dollars per day.

There is also a demand in plaintiff's petition for seventeen dollars and fifty cents, it being a tax of five per cent. levied under an ordinance of the city to pay the interest on the bonds due the Pontchartrain Railroad Company. As this tax is a per centage upon the tax of ten dollars per day, it is evident that it cannot be levied unless the other tax is rightfully assessed.

If the defendant is indebted to the city at all it is in virtue either of the *fourth* or *seventy-first* sections of the "ordinance to establish a uniform rate of taxes and licenses on professions, callings, and other business, and on carriages, hacks, drays, and other vehicles."

Those two sections provide that the taxes and licenses shall be fixed, assessed and collected at the following rate, viz:

"Sec. 4. On every keeper or lessee of a theater or amphitheater, \$300.

"Sec. 71. Every keeper of a transient theater, circus, menagerie, or other public exhibition or show, shall pay, in advance, a tax of ten dollars for each performance, unless the same takes place in one of the establishments on which the annual tax has been paid; and every violation of this section shall be punished by a fine of twenty-five dollars, enforced by imprisonment as the law directs."

The question presented by the appeal in this case is whether a tax has been levied upon the calling of the defendant by either of these sections.

It is clear that the defendant is not the keeper of a theater or amphitheater, and therefore not within the fourth section of the ordinance. His business is not of that kind which admits of a convenient exhibition of his curiosities at a building constructed as a theater or amphitheater, hence the "performances" could not well take place at one of the establishments on which an annual tax has been paid, unless the annual tax be considered as the ordinary city tax fixed by law, which is paid by every owner of real estate. Therefore, if the defendant is liable to a tax at all, he is liable to pay for his "daily and nightly exhibition each day" the enormous tax of \$7,300 per annum.

But the agreed statement of facts in this case shows that the defendant is a resident of New Orleans, and that his establishment is a *permanent* one. The seventy-first section of the ordinance has reference only to *transient* theaters, circuses, menageries, or other public exhibitions or shows. The permanent occupation of the defendant is therefore not provided for by this section, and as it is not pretended that any other section of the ordinance has made provision for the levying of a tax upon the permanent business or calling of the defendant, it must be held to be a *casus omissus*, and the defendant left to the effect of the ordinary taxation upon property.

The judgment of the lower court condemning the defendant to pay the tax must be reversed. NEW ORLEANS  
S.  
NORTH.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment appealed from be avoided and reversed, and that there be judgment in favor of the defendant; the plaintiff paying costs in both courts.

ROSA MAHIER, f. w. c., v. V. V. LEBLANC, JR., et al.

A charge of simulation in a judgment or contract will be controlled by an accompanying averment, that certain specified credits were not allowed, which, if they had been allowed, would still have left a balance due the party obtaining the judgment, or in whose favor the contract was made. The draft sued upon being an instrument *sous seing privé*, and no proof *allunde* offered of its date, the only date which can be assigned to it is that of its protest. The mortgage and seizure by executory process of the defendants having been made before the debt of plaintiff accrued, the latter is precluded, by Art. 1988 of the Civil Code, from having them annulled, as made in fraud of her rights.

APPEAL from the District Court of West Baton Rouge, *Robertson, J.*  
J. J. Burk, for plaintiff and appellant. E. B. Robertson and F. R. Brunot, for defendant.

BUCHANAN, J. This is a revocatory action instituted by a free colored woman, as bearer of an acceptance of the late *Villeneuve LeBlanc, Senior*, of a draft in her favor, of the following tenor:

"OUEST BATON ROUGE, 80 *Novembre*, 1849,

\$5533 92.

Le premier novembre, mil huit cent cinquante (1850) veuillez payer à mon ordre et au Bureau du Recorder de cette paroisse, la somme de cinq mille cinq cent trente-trois 92-100 piastres, valeur reçue, que vous passerez sur le compte de votre servante,

ROSA MAHIER."

"*Monsieur Villeneuve LeBlanc, Ouest Bâton Rouge.*"

Signed across the face

"V. LEBLANC."

Endorsed in blank

"ROSA MAHIER."

By a notarial protest filed with the draft, it is certified that the same was presented on the 4th November, 1850, to the drawee for payment; and that the drawee replied to said demand that he had no funds to pay the same or any part thereof.

The object of this suit is to annul and set aside certain judgments, and the seizure and sale of property in execution thereof, in favor of the defendants, children of *Villeneuve LeBlanc, Senior*, the acceptor of the above described draft, as having been rendered and made in fraud of the plaintiff, as creditor of said *Villeneuve LeBlanc, Senior*.

The petition alleges simulation as well as fraud in the judgments and contracts complained of. But this allegation is viewed by us as controlled by subsequent allegations in plaintiff's petition, to the effect that *Villeneuve LeBlanc* had not been allowed certain credits in his accounts with his children, which credits are specifically set forth, and which, if allowed, would still have left a balance due his children by him.

To this action the defendants have pleaded, as peremptory exceptions:

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1st. The plaintiff has no right to sue to annul an obligation or contract made before her debt accrued.

2d. This being a revocatory action, is barred by the prescription of one year.

The defendants also pleaded, by way of answer, in case their exceptions should be overruled, that the acceptance and draft held by plaintiff was a disguised donation to a concubine, made to evade the law, and without any legal consideration.

The case was tried upon the exceptions, which were maintained by the District Court, and the suit dismissed. The plaintiff has appealed.

Upon the first exception: the draft held by plaintiff purports to be dated the 30th November, 1849; but, being a writing *sous seing privé* it has, *per se*, no date as against third persons. The acceptance of the draft bears no date, and for the determination of the antiquity of the claim of plaintiff, as compared with the contracts and judgments which she seeks to annul, the only date which can be assigned to that claim is the date of the protest, to wit: the 4th November, 1850; for no other proof has been adduced of the existence of the draft, or of any other legal consideration for the same, at a previous date to that protest.

On the other hand, the defendants are proved to have held mortgages granted them by three several authentic acts, dated the 27th February, 1850, for balance of account acknowledged to be due them, severally, by *Villeneuve LeBlanc*, senior, as their natural tutor; on which mortgages importing confession of judgment, three several writs of seizure and sale were regularly issued on the 16th September, 1850; and after demand of payment made of the debtor on the 30th October, 1850, the property mortgaged was duly advertised, and was sold by the Sheriff on the 7th December, 1850, to the defendants, as the last and highest bidders. This statement of facts shows that the mortgages and the seizures by executory process of the defendants were made before the time the draft of plaintiff accrued, and, consequently, under Article 1988 of the Civil Code, cannot be annulled at the suit of plaintiff, as made in fraud of her rights. 12 L. R. 201; 17 L. R. 353.

Our opinion upon the first exception renders it unnecessary to examine the plea of prescription.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

#### J. L. DELEE v. SANDEL & HARDEE, Administrators.

The assignor of a claim, being bound to warrant the existence of the debt assigned, is not a competent witness to prove the debt, without a previous release, and cannot establish such release by his own testimony.

The usual and proper course is, for the release to be tendered to the witness before he is sworn in the cause; and when the testimony is taken under commission, to insert it in the return, with the Commissioner's certificate that it was so tendered.

**A** PPEAL from the District Court of East Feliciana, *Ratliff, J.*

*J. R. Bowman*, for plaintiff and appellant. *Muse & Hardee*, for defendant.

**BUCHANAN, J.** This is a claim against the succession of *Wade H. Gauden*, brought by an assignee and attempted to be proved up by the testimony of the

assignor, *John Jeter*. The defendant excepts to this witness, on the ground that he is bound in law to warrant the existence of the debt assigned. This objection ought to have been sustained, *Jeter* was clearly incompetent without a release, and there is no release in the record. He was examined under a commission, and in answer to the fourth interrogatory propounded to him by plaintiff he says, "I am in no manner whatever bound as warrantor or otherwise on said account. I have a written lease signed by *John S. Delee*, somewhere among my papers, releasing me from all responsibility on account of this claim. But I cannot now lay my hand on it." This will not suffice. The plaintiff ought to have put on record a release of the liability of this witness over to him, in such a shape that it would have appeared beyond the possibility of being afterwards contradicted by him, plaintiff, that this witness when he gave his testimony, was free from the risk of loss by the result of the suit. As it is, we have nothing emanating from the plaintiff. We have merely the say so of the witness, that he has been released. And the obliviousness of this witness, upon the natural facts upon which he was examined, as for instance: the particulars of the settlement between himself and *Gaulden*, and of the consideration of the transfer by himself to plaintiff of the claim now in suit, is not calculated to inspire us with confidence in the accuracy of the witness's recollection of the release which, he tells us, is *somewhere among his papers*, but which he does not take the trouble to hunt up and produce. The usual and regular course is, for the release to be tendered to the witness before he is sworn in the cause; and that the release be inserted in the return to the commission with the certificate of the Commissioner that it was so tendered.

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Another witness has been examined, also under a commission, to prove the pretended settlement between *Gaulden* and *Jeter*, on which this suit is founded. But the evidence of this witness (*Dyer*) is inconsistent with the allegations of the petition, for the petition alleges that, some time in the year 1849, *Gaulden* became indebted to *Jeter* "in a settlement had between the parties, in the sum of eight hundred dollars besides the sum of two hundred and eighteen dollars and forty cents, omitted in said settlement by the said *Jeter* and *Gaulden*." The witness *Dyer* states, "I was present when the settlement was made, and assisted the parties in making it, and the balance due to *John Jeter* by *Wade H. Gaulden* was one thousand and eighteen dollars and forty cents, and was agreed to by both the parties." This is obviously not the settlement declared upon in the petition. At all events, the rejection of *Jeter's* testimony leaves the plaintiff's case supported by one witness alone, which would be insufficient to entitle him to a judgment, the amount demanded being over five hundred dollars.

Turning to the evidence of defendants, we find that, while the testimony of plaintiff relates entirely to a verbal acknowledgment of indebtedness by the deceased, *Gaulden*, (the date of which acknowledgment is fixed by the amended petition at the 5th March, 1849,) defendants have produced the following document signed by *Jeter*, of that same date:

"KELLARTOWN, March 5th, 1849.

This is to certify, that I have this day made a full and final settlement with *Wade H. Gaulden*, which is in full of all and every demand up to this date.

JOHN JETER."

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There is a bill of exceptions taken by plaintiff to the admission of this document in evidence; but it was clearly admissible under the plea of payment, in the answer.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that there be judgment for defendant, with costs in both courts.

MERRICK, C. J., was recused in this cause.

GABRIEL LOUBIÈRE v. OCTAVE LEBLANC et al.

The acceptance of a succession may be established against an heir by proof of payment of its debts by him. He may however rebut the legal presumption arising from such proof, by showing that it was done under protestation or with other motives and intentions than that of accepting.

Where the heirs have formed a partnership, acts done in the partnership name, which would imply an acceptance of the succession, are presumed to be concurred in by all, and will bind them all in the absence of contrary proof.

**A**PPEAL from the District Court of West Baton Rouge, *Robertson, J.*  
*S. P. Greeves*, for plaintiff and appellant. *E. W. Robertson*, for defendants.

MERRICK, C. J. This suit is brought against the defendants to charge them, as heirs of their father *Villeneuve LeBlanc, Sr.*, with a debt of \$729 89, and interest, due upon a promissory note given by the deceased.

The defendants are interested as partners in the plantation and slaves which belonged to the deceased, and which they caused to be sold during his life time, it seems, to satisfy a large sum of money due them by him, their said father, as tutor.

On the trial in the lower court, in order to prove the acceptance of the defendants as heirs purely and simply, the plaintiff offered to prove by witnesses that the defendants had paid certain debts of the deceased; but it turning out, on an examination of the witnesses, that the debts were paid by the partnership *Villeneuve LeBlanc, Jr. & Co.*, it was objected by defendants' counsel that the testimony was inadmissible to charge the heirs in their individual capacities. This objection being sustained by the court, the plaintiff excepted, and judgment having been rendered in favor of the defendants, he has appealed.

It is not doubtful that the heir may testify his acceptance of a succession by the payment of debts as well as other acts. The principle is recognized in Article 995 of the Civil Code. It is as follows:

"An act of piety or humanity towards one's relations is not considered as an acceptance; it is not, therefore, an acceptance to take care of the burial of the deceased, or to pay the funeral expenses even without protestation."

The principle implied by this Article has its origin in the Roman law.

"Cum debitum paternum te exsolvisse alleges: proportione hereditaria agnovisse te hereditatem defuncti non ambigitur. Code L. VI, T. 30, Const. 2; Ibid. L. III, T. 28, § 1, Const. 8.

But, as the heir may have other motives in paying the debts of the deceased, than those of accepting the succession, he may rebut the presumption arising from the payment of debts, by showing that it was done under a protestation or with other motives and intentions. See 8 N. S. 556, 557, *Flower v. O'Conner*.

The testimony offered was not the less admissible, because the receipt was taken in the name of the firm. It should have been received, leaving to the heirs who did not join in the payment, the right to show that it was done without their knowledge or approbation. For it is clear that the acceptance of a succession can be as effectually brought about by the joint act of all the heirs as by the separate act of each; and where the heirs have formed a partnership and do an act in their partnership name as heirs, they must all be presumed to have concurred in it, and if the contrary be pretended, they should be left to rebut the presumption by showing the real facts under which such payment was made. As the furniture and other movables in the possession of the defendants appear to have been claimed by the heirs prior to the death of their ancestor, the testimony now in the record is insufficient to charge them as heirs on that account; for it appears they claimed it under another title than that of heirs. But, as we shall remand the case on account of the rejection of testimony, we shall leave the whole case open.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that this cause be remanded to the lower court for a new trial, with instructions to the court to receive the testimony offered to prove the payment of the debts of the deceased by the defendants, although it shall appear that such payments were made in their partnership name; and it is further ordered, that the defendants pay the costs of the appeal.

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E. HÉBERT et al. v. J. C. WOODS.

Plaintiffs' claim to 574 63-100 *arpens* of land was confirmed by Act of Congress of 23th February, 1823. He claimed 574 63-100 *acres*, and in 1849 his claim was surveyed as containing this latter quantity, and the survey approved. *Held*: That the plaintiffs' title to the whole 574 63-100 *acres* would no doubt be good against third persons, and against any one not claiming under the United States Government; but that it is not so as against a purchaser from the Government, whose patent must prevail against a mere survey without title.

APPEAL from the District Court of West Baton Rouge, *Robertson, J.* Tried by a Jury. *David N. Barrow*, for plaintiffs and appellants. *J. E. Elam*, for defendant.

MERRICK, C. J. This suit is brought to recover of the defendant a small tract of land. The controversy grows out of a conflict in the boundaries of the respective tracts of land claimed by the plaintiffs and defendants.

The original grant through which the plaintiffs claim by mesne conveyances was reported to Congress, January 6th, 1821, in these words:

"CLASS THIRD.

"No. 104. \* \* \* \*

"*John Baptist Hébert* claims a tract of land situated in the parish of West Baton Rouge, containing five hundred and seventy-four *arpens* and sixty-five hundredths, fronting on the Mississippi, and bounded on the upper side by lands of *Alexis Hébert*, and on the lower side by lands of *Charles Hébert*.

"The claimant proves uninterrupted possession and cultivation ever since the year 1792."

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This claim so reported was confirmed by the Act of Congress approved 28th February, 1823. 3 vol. Statutes at Large, p. 727.

In the applications to the different Boards of Commissioners, as well as in the accompanying survey, the claim was for 574 63-100 acres instead of arpents.

The tract of land does not appear to have been finally surveyed until 1849, when it was surveyed as containing 575 81-100 acres, and the survey approved by the Surveyor General.

By this survey, the tract of land extends in the rear diagonally into township 8, Range 11 East, and cuts off 28 acres from the East half of the South-East quarter of section 23 in said township, the land claimed by the defendant.

Now, if plaintiffs' claim is limited to 574 63-100 arpents, it will not interfere with the land claimed by defendant.

The defendant claims title to the said East half of section 23, in township 8, range 11 East, in virtue of the Receiver's receipt, dated 14th November, 1842, and a patent issued in May, 1843.

The question is thus presented: which of these titles must prevail?

The plaintiff contends that the Act of Congress was but the recognition of a pre-existing right, and that the courts can go behind the confirmation, in order to ascertain the true boundaries and quantity of land contained in claimants' grant or claim.

The plaintiffs either claim under the Act of Congress or under some prior valid grant from the French or Spanish authorities. If the latter, it should have been produced, and the Act of Congress would not have been necessary. But the plaintiffs produce no such title. It is clear, therefore, that their title depends upon the Act of Congress. When we examine the Act, we find that plaintiffs' author claimed 574 63-100 acres, and that Congress granted him 574 63-100 arpents, and the United States Surveyor, in making the survey, set off to plaintiffs 575.81 acres, including 28 acres of the land claimed by the defendant under his purchase and patent.

The plaintiffs' title to the whole 574 63-100 acres would no doubt be good against third persons and against any one not claiming under the United States Government. But as between the defendant's patent and the claim of the plaintiffs for all contained in the tract covered by the patent, (which still leaves the plaintiffs their 574 63-100 arpents,) it is evident there is a patent for title on one side and on the other only a survey without title.

The patent must prevail. But it is suggested that the entry of the half quarter section has been cancelled. If this be so, it should have been made to appear by proof in the record. It is further said, that the survey made by the United States Deputy Surveyor shows no conflict between the plaintiffs' tract of land and the East half of the South-East quarter of section 23 in township 8, range 11 East, as shown by the Parish Surveyor.

We think the plaintiffs are precluded from questioning the conflict in the boundary, after admitting on the trial that "there was no dispute about the *locus in quo* of the property in dispute." The plat furnished by the Parish Surveyor is the only one showing the relative positions of the tracts, and the admission must be considered as having reference to the plat. Moreover, it is not pretended that the defendant has cut any wood or trespassed beyond the boundaries of his half quarter section.

Judgment affirmed.

## J. P. HEISS v. DENIS CRONAN.

Where the true agreement between the parties in relation to the transfer of real estate, can only be arrived at by consulting parol evidence which is inadmissible, a title cannot be established.

**A**PPREAL from the Second District Court of New Orleans, *Lea, J.*  
*A. N. Ogden & Stansbury*, for plaintiff and appellant. *G. B. Duncan*, for defendant.

**SPOFFORD, J.** The plaintiff sues to be recognized as co-proprietor with the defendant to the extent of an undivided half interest in a tract of land purchased, in the name of the defendant, at a syndie's sale.

The petition alleges that the original purchase was made in the name of *Cronan*, for the joint interest of *Cronan* and the plaintiff, but that the former fraudulently withholds the property and claims the whole.

Parol evidence was offered to prove the verbal acknowledgments of *Cronan*, that the facts are as alleged. The testimony was properly rejected. C. C. 2255, 2256, 2415. The allegation of fraudulently denying the original bargain, does not take the case out of the rule, for a verbal agreement of this sort, touching immovable property, is only capable of being enforced at law when the party to be charged confesses it on oath and actual delivery has been made. Every refusal to carry out an oral agreement for the conveyance of land, might in one sense be charged to be fraudulent, and thus the rule would be made nugatory.

But the plaintiff further relies upon an unsigned draft of a power of attorney in the handwriting of *Cronan*, empowering the latter, as agent of the plaintiff, to represent him in any suit at law which might be brought against any interest he might have in the tract of land bought by *Cronan* at the syndie's sale. This document was never executed by the plaintiff, nor accepted by the defendant. At the time it was written, there may have been negotiations between the parties as to an interest which were never consummated. It is not an admission in writing by the defendant, that the plaintiff was owner of an undivided moiety of the land the title to which was adjudicated to *Cronan* alone; nor can this unfinished and indefinite instrument be eked out by parol.

Finally, the plaintiff relies upon the fact, that in a former suit prosecuted in the name of *Cronan* alone, (*Heiss* being in no manner a party,) against the syndie and the succession of *John McDonogh*, to clear the title to the land in question from a pretended claim of the *McDonogh* estate, the counsel of *Cronan* offered as a part of his evidence, a *projet* of an act of sale of the land in dispute purporting to be from the syndie, "to *Denis Cronan* and *John P. Heiss*, the said *John P. Heiss* being herein represented by the said *Denis Cronan*."

The act was not dated nor signed by a notary, or any one else.

If this *projet* had been offered in a suit to which *Heiss* was a party, or in which there was any issue as to their respective interests in the land, it would have constituted an admission sufficient to estop the defendant *Cronan* from denying that *Heiss* was jointly interested in the land with himself. The authority cited by the appellant from 5 An. 22, *Denton v. Irwin*, would then have been applicable.

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But there is no judicial admission in the former suit, that *Heiss* was equally interested in the purchase, *Cronan* claimed the whole tract, conducting the suit in his own name. The adjudication was to *Cronan* alone, and the adjudication was the title; after the adjudication and before the formal act of sale was passed, there might have been a negotiation between *Cronan* and *Heiss* to give the latter an interest in the purchase, and a *projet* of an act might have been drawn up with that view, which was afterwards abandoned. The *projet* although offered in evidence by *Cronan*, under these circumstances, does not prove the land was sold at the syndic's sale to *Cronan & Heiss*, and cannot prove that they ever were co-proprietors thereof, unless it is supplied by *parol* proof, which, as we have already stated, is inadmissible.

It is proper to remark that there seems to have been some mistake also in offering this *projet*; for the notes of evidence in the former suit, also relied upon by the plaintiff in the suit, speak only of a *projet* of sale to *D. Cronan*, not to *Cronan* and *Heiss*, and it appears in this case that such a *projet* was drawn.

The true agreement of the parties can only be arrived at by consulting *parol* evidence, which we are not permitted to do.

Judgment affirmed.

#### DALZIRE LACOUR v. JOHN P. WATSON.

Plaintiff and defendant had acquired their estates from one common proprietor, the sale to the former was of the most ancient date and was not a sale *per aversionem*—the lower boundary of plaintiff's tract was fixed after the date of the sale to plaintiff. *Held*: That in an action of boundary preference should be given to him whose title was of the most ancient date, unless an adverse possession had produced a difference in the situation of the parties. C. C., Art. 843.

Although the limits had been fixed, as there was no adverse possession to defeat the plaintiff's right by prescription, any errors in the operation of fixing the limits could be corrected in a court of justice.

There was error in condemning the plaintiff to pay any of the costs of suit. The costs produced by the call in warranty should be borne by the defendant.

**A** PPEAL from the District Court of Pointe Coupée, *Robertson*, Judge of the Sixth District, presiding. *A. Protosty*, for plaintiff. *George S. Sawyer* and *W. H. Cooley*, for defendant and appellant.

**VOORHIES, J.** This is an action of boundary. The parties derive their titles from the same author, *François Vincent Bouis*. The plaintiff in her petition alleges that her purchase was made previous to the defendant's, and prays that a survey be made of the premises, that she be adjudged to be the proprietor of five arpents front from *Zacharie Honoré's* boundary, as established on the 5th of November, 1846; that the boundary between their respective tracts be established in conformity with said survey and their titles, and that she be put in possession of the part of her land now occupied and held by the defendant.

The defendant pleads a general denial, and specially that, at the time of his purchase from *Bouis*, on the 5th of June, 1847, the plaintiff's land had been measured and surveyed and her lower boundary established, and that she took possession in accordance with said boundary with reference to which he purchased; that *Bouis* sold four arpents front of his concession to *A. Ledoux &*

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Os. and two arpents front, immediately above the plaintiff's land, to *Zacharie Honoré*; and that if there is any error in the measurement of the plaintiff's tract, such error proceeded from the measurement or division of the two tracts. The defendant cited his vendor in warranty, and the latter obtained an order making his different vendees parties to the suit for the purpose of establishing their respective limits.

The court below decreed the boundary between the plaintiff and defendant to be fixed in accordance with a survey made under its order, giving to the plaintiff five arpents front, measured by a perpendicular line from *Zacharie Honoré's* lower boundary, and decreed the costs of suit to be equally borne by the plaintiff and defendant; and the latter appealed.

The plaintiff has filed an answer, praying for an amendment of the judgment in her favor, by extending her lower boundary, in order to meet the calls of the two tracts above previously conveyed by her vendor, and by condemning the defendant to pay all the costs.

The proceedings in relation to the call in warranty, &c., producing a large amount of costs, as we infer from the record, have not been noticed in the judgment of the court below. We do not think they were sanctioned by law; and the defendant was consequently bound for the costs arising therefrom. See the case of *Duplessis v. Lastrapes*, 11 R. 451.

The record shows that *François Vincent Bouis* was the owner of a large tract of land fronting on the Racecourci bay, in the parish of Pointe Coupée, which he sold in separate portions to different persons; the first, containing four arpents front from the upper limit, to *A. Ledoux & Co.*; the second, containing two arpents front, to *Zacharie Honoré*; the third, containing five arpents front, to the plaintiff; and the fourth, containing ten arpents front, to the defendant—all contiguous to each other. The plaintiff's tract is described in the conveyance to her as being bounded above by *Zacharie Honoré's* tract, and below by the land of the vendor, *Bouis*, and the defendant's tract, in the deed to him, as being bounded above by the plaintiff's tract.

The Civil Code, Art. 843, declares: "If the parties claim under simple acts of sale, or other acts which can transfer property, without being supported by any anterior concessions, and if they, or the persons from whom they acquired their estates, have acquired them from one common proprietor, the preference shall be given to him whose title is of the most ancient date, unless an adverse possession has produced a difference in the situation of the parties."

The right of the plaintiff to the five arpents front, as set apart to her in fixing her lower boundary, appears to us to be perfectly clear under this Article. There is nothing to show that an adverse possession has produced a difference in her situation, so as to defeat her right by prescription. The sale to her was clearly not a sale *per aversionem*; the land was not sold by specific boundaries, the lower boundary being fixed after the date of the sale. By the effect of the sale, the plaintiff and her vendor became proprietors of contiguous estates, giving rise to the action of boundary. The limits were fixed, but the parties did not lose thereby their right of resorting to a court of justice to rectify any errors which may have been committed in the operation. C. C., Articles 821, 835, 840.

The doctrine of estoppels pressed on our consideration by the appellant, we think is inapplicable in the present case; for the date of the plaintiff's alleged acquiescence in the fixing of her lower boundary, as directed by her vendor,

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it is not shown that such acquiescence was given in presence of the defendant; nor is it shown that the plaintiff ever made any representations to him previous to his purchase in relation to said boundary.

We think the Judge *a quo* erred in condemning the plaintiff to pay any of the costs of suit. See the case of *Andrews v. Knox*, 10 An. 604.

There was no error in fixing the plaintiff's boundary according to the prayer of the plaintiff's petition.

It is, therefore, ordered and decreed, that the judgment of the court below be amended in favor of the plaintiff and appellee, by condemning the defendant and appellant to pay all the costs of suit in the court below; and, so amended, that the same be affirmed, with costs.

#### SUCCESSION OF HENRY FLOWER—On the Opposition of the BANK OF LOUISIANA.

An inscription of a mortgage which is not renewed until after an interval of ten years, ceases to have effect against any third person having an adverse interest.

The subsequent reinscription only gives it effect from the date of such reinscription.

Prescription against the creditors of an insolvent is suspended by a surrender of his property, but the same principle is not applicable to successions whether solvent or insolvent.

The right of a mortgage creditor is lost by the failure to reinscribe within ten years, although before the ten years had expired the mortgagor had died.

**A**PPEAL from the District Court of West Feliciana, *Ratliff, J.*  
*U. B. & E. Phillips*, for administrator. *Hudson and Brewer & Collins*, for opponent and appellant.

**LEA, J.** The Bank of Louisiana obtained a judgment against *Henry Flower*, which was duly recorded in the mortgage office on the 9th of June, 1831. It was reinscribed in August, 1840, and again reinscribed on the 10th of February, 1854. An interval of more than ten years elapsed between the first and second reinscription. *Flower* died previous to the year 1840.

It is contended on behalf of the appellant, that this judicial mortgage is in full force. *First*, because no reinscription is necessary; and, *second*, that if necessary the reinscription in 1854 had the effect to revive the mortgage as against the other creditors.

We cannot give our assent to either of those propositions. It is unnecessary to discuss the policy of the law, at least for the purpose of interpretation, when its provisions are absolute.

Prescription runs against a vacant estate even though no curator may have been appointed. C. C. 3492. Prescription runs against all persons unless they are included in some exception established by law. C. C. 3487. An inscription of a mortgage which is not renewed until after an interval of ten years, ceases to have effect against any third person having an adverse interest. A subsequent reinscription could give it effect only from the date of such reinscription. 2 An. 100.

It is urged that the rights of all mortgage creditors are fixed by the death of an insolvent debtor; that all judicial proceedings being stayed by the death of the debtor, prescription ceases to run against mortgage creditors, and their rights remain unalterably fixed until the estate is disposed of according to law.

This argument is alike incorrect in its premises and in its conclusion. Judicial proceedings are not necessarily stayed against the estate of an insolvent debtor, and there is nothing peculiar in this case which prevented the opponent from preserving her rank as a mortgage creditor by a timely reinscription. See 3 An. 714; 12 Rob. 507.

On the second point, the provisions of the Code are clear and explicit. "If a succession which is administered by a curator or beneficiary heir is not sufficient to satisfy the creditors, an inscription made by one of them *after it is opened*, shall have no effect against the others." C. C. 3327. The opponent's right as a mortgage creditor having been lost by a failure to reinscribe within ten years, could not be reinstated by an untimely reinscription. No *new right* could be created by such a proceeding. The statutory provision of the Code quoted above, must, in our opinion, control the rights of parties in this case; and however strong the analogy between the administration of an insolvent succession, and that of property, surrendered by an insolvent debtor, we are not at liberty to overlook the absolute provisions of the Code for the purpose of preserving a supposed uniformity in such cases.

Prescription against the creditors of an insolvent is suspended by a surrender of property. The property ceded is supposed to be given in pledge by the debtor to his creditors, and while that pledge continues, it is considered a standing acknowledgment of the debt. Whether this theory is well founded or not, as respects an insolvent debtor, it evidently can have no application to successions whether solvent or insolvent.

We think the judgment should be affirmed.

Judgment affirmed.

#### FREDERICK ARBOUR v. J. A. NETTLES et al.

A sale of a preëmption right acquired under the Act of Congress of 1841, made prior to the issuing of a patent, is null and void.

The distinction between a transfer of the right of preëmption and a transfer of the occupancy and improvement upon which the right of preëmption is based, commented on, and declared not applicable to this case.

**A** PPEAL from the District Court of East Baton Rouge, *Robertson, J.*  
*R. G. Beale*, for plaintiff and appellant. *A. M. Dunn*, for defendants.

BECHANAN, J. This is a suit upon three notes, amounting to twelve hundred dollars, given for the price of a preëmption right and Register's certificate thereto, of a tract of public land containing one hundred and forty-seven and sixty-eight one-hundredths acres, and all the improvements thereon. In the act of sale, dated April 3d, 1854, it was covenanted that the vendor should continue in the uninterrupted possession of the tract of land until the 1st of January, 1855.

The defence to the action rests upon two grounds:

1st. That the payee of the notes sued on (the vendor of the preëmption right, &c.) violated his covenant, by moving from and vacating the premises sold, before the 1st of January, 1855; in consequence of which abandonment, the dwelling house, the only improvement of any value, was neglected and

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was consumed by fire; and by such removal the said vendor lost all right of preëmption as an actual settler, in and to the land described in the act of sale.

2d. That the Act of Congress conferring the right of preëmption upon actual settlers on the public lands, forbids the settler to sell or transfer, or assign the right of preëmption, and declares all such transfers null and void.

The Act of Congress of 1841, chapter 16, entitled an Act to appropriate the proceeds of the sales of the public lands and to grant preëmption rights, section 12, declares: "That prior to any entries being made under and by virtue of the provisions of this Act, proof of the settlement and improvement thereby required, shall be made to the satisfaction of the Register and Receiver of the land district in which such lands may lie, agreeably to such rules as shall be prescribed by the Secretary of the Treasury, who shall each be entitled to receive fifty cents from each applicant, for his services to be rendered as aforesaid; and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void."

The contract which was the cause or consideration of the notes sued upon, is upon its face unlawful, so far as it imports a sale of a preëmption right to public land, and of a Register's certificate of such right. An obligation with an unlawful cause, can have no effect. Civil Code, Art. 1887. The vendor, *Eames*, might himself have treated the sale as a nullity. *Poirier v. White*, 3 An. 934.

But the counsel of plaintiff contends that the sale of *the improvements on the land* is not liable to that objection, and constitutes a valid consideration for the notes.

It was held by our predecessors in the case of *Jenkins v. Gibson*, 3 An. 208; *Wood v. Lyle*, 4 An. 145; *Hollon v. Snapp*, 4 An. 519; *Price v. Curran*, 5 An. 686; *Norman v. Ellis*, 5 An. 694; and *Bryan v. Glass*, 6 An. 740—that the sale of improvements on the public lands of the United States was a valid consideration of a note, provided both the vendor and the vendee were in a situation to claim the right of preëmption under the Act of Congress. And in the case of *Price v. Curran*, the court established a presumption, in the absence of contrary proof, that the contracting parties possessed the conditions required by the statute for preëmptors. Perhaps, after so many decisions, this doctrine of the transferability of the actual occupancy and improvement of the public domain, with a view to its subsequent acquisition by preëmption, must be viewed as too firmly settled to be disturbed; although, if it were a new question, we should hesitate much before adopting it, in the face of the very plain and positive enactment confining the right of preëmption to the identical party who has made the improvement. The tenth section of the Act already quoted, declares:

"That from and after the passage of this Act, every person being the head of a family, or widow, or single man over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration to become a citizen, as required by the naturalization laws, who, since the first day of June, A. D. 1840, has made or shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the Register of the land district in which such land may lie, by legal subdivisions, any

number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of said land, subject, however, to the following limitations and exceptions," &c.

The distinction between a transfer of the right of preëmption and a transfer of the occupancy and improvement upon which the right of preëmption is based, is in fact not at all obvious. But accepting the doctrine, such as our predecessors have handed it down to us, it is clearly not applicable to the present case. For here we have not a sale of the improvement alone, but a sale of the preëmption right and the improvement. And the reason given in *Dryan v. Glass*, namely, "that the court had reason to believe defendant intended to purchase the right of occupancy, with a view to acquire the land by preëmption, upon his own possession," cannot apply here; for *Eames* sells, along with the right of preëmption and the improvement, "the certificate of the Register" that he had made the proof required by the twelfth section of the Act of Congress, and "delivers the certificate and plat of said land to the purchaser." Again, there is one price (twelve hundred dollars) given for the preëmption right, the certificate and the improvement, collectively; and the value of the improvement is proved to have been trifling in proportion to the whole price stipulated in the act of sale. In all the cases cited above, the sale was a sale of the improvements alone. Lastly, the proof sustains the allegation of the answer, that the vendor abandoned the land in violation of his agreement contained in the act of sale, in August 1854, and that the house, the only improvement of value, worth from a hundred to a hundred and fifty dollars, was consumed by fire in November or December, 1854; at which time the vendor ought, by his contract, to have been occupying it. So far, then, as the improvements were concerned, there was an entire failure of consideration, by the fault of the vendor.

Judgment affirmed, with costs.

#### WM. GIL v. WILLIAMS & DAVIS.

A contract stipulating a compensation for services to be rendered in procuring an Act to be passed by the Legislature for the relief of the party promising to pay therefor, is *contra bonos mores*, and cannot be enforced, even although no improper means are alleged or shown to have been resorted to by the agent in obtaining the passage of the Act.

In a case of this kind, which is an exception to the general rule, the party himself will be permitted to allege that the contract was contrary to good morals.

**A** PPEAL from the District Court of East Baton Rouge, *Robertson, J.*  
*J. J. Burk*, for plaintiff and appellant. *J. M. McCutcheon* and *Coze & Breauz*, for defendants.

**SPOFFORD, J.** One *Wm. H. Williams* having been convicted of importing slaves into the State in violation of the first section of the statute of the 29th January, 1817, the slaves were judicially declared forfeited to the State by virtue of the statute. See the *State v. Williams*, 7 Rob. 252, where a report of the facts may be found.

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Subsequently one *Thomas N. Davis* executed the following obligation, which is the basis of the present suit:

"\$1500.

BATON ROUGE, March 13th, 1850.

"For value received, I promise to pay to *A. M. Dunn, Wm. Gil and J. G. Patterson* the sum of fifteen hundred dollars, on condition that the State of Louisiana shall pay indemnity for a certain lot of slaves, which were seized by this State as the property of *William H. Williams*, indemnity for which is now claimed by *Thomas N. Davis* and *William H. Williams*."

(Signed)

THOMAS N. DAVIS."

The plaintiff has appealed from a judgment dismissing his claim for five hundred dollars on this agreement.

There are various defences, but as we concur in the opinion of the District Judge that the obligation sued upon was founded on an illicit cause, we shall only notice that feature of the case.

The plaintiff alleges that the consideration of the contract was his professional services as a lawyer, in presenting and prosecuting the claim of said *Davis* and *Williams* before the Legislature of Louisiana, and that he diligently and effectually served until the condition of the obligation was fulfilled, and the indemnity granted by the Legislature. In proof of his having complied with his part of the contract, the petitioner offered in evidence "An Act for the relief of *William H. Williams*," approved March 18th, 1852, (Sess. Acts, 186) and another Act with the same title, approved Jan. 23d, 1856, (Sess. Acts, 8). He also offered a witness who testified that the plaintiff was active in circulating documents relative to the application of *Williams* among the members of the Legislature. The Acts offered in evidence both state upon their face that they are "acts of clemency" to *Williams*. They were so styled because they relieved him from some of the effects of a forfeiture legally and justly incurred under the laws of the State.

Here, then, we have the case of a man, with no claim in law, petitioning the Legislature for a special Act of pecuniary bounty to himself, and contracting to pay a lawyer a specific sum of money only upon the condition that the lawyer succeeds in inducing the Legislature to grant the bounty. If the scheme fails, the lawyer is to get nothing, no matter how great his labor; if it succeeds, he is, in effect, to partake of the bounty.

If it were consistent with-law, public order and good morals for men to make such contracts as this, we would be called on to inquire further into the history of this novel cause; but we are stopped at the threshold by a conviction that law, public order and good morals strike all such contracts with nullity. C. C. 1887, 1889.

These bargains, to profit jointly by what can be procured from the legislative generosity at the public expense, have a direct tendency to seduce legislators from the line of their duty, and to foster that system of special and exceptional legislation which is a marked vice of the times.

We believe it has been uniformly held that a contract for a contingent compensation for obtaining an Act of the Legislature is void by the policy of the law. It is not necessary that improper influences should have been used in a particular case to affect such a contract with nullity. The law looks to the general tendency of things; it opposes the beginnings of evil; it shuts the door against temptation by sweeping rules, which admit of no evasion.

The plaintiff in this case cannot recover, not because he has resorted to bad

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means in order to procure the passage of laws in which he had a direct pecuniary interest, for of this there is no proof and no imputation, but because he has made a contingent contract, which, if enforced in this case, might open the door to a practice of corruption and to the use of sinister influences.

Upon the general subject we may refer to the cases of *Fuller v. Dame*, 18 Pick. 470; *Hatzfield v. Gulden*, 7 Watts, 152; *Clippenger v. Hepbaugh*, 8 Watts and Serg., 315; *Wood v. McCann*, 8 Dana, 366; *Hunt v. Test*, 3 Ala. 719; *Commonwealth v. Callaghan*, 2 Virginia Cases, 460; all cited in the recent case of *Marshall v. Baltimore and Ohio Railroad Company*, 16 Howard, 314.

The propriety of the rule which turns a suitor upon such a contract out of court is thus forcibly vindicated by the Supreme Court of the United States in the case just referred to: "Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are 'proper means,' and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or careless members in favor of his bill. The use of such means and such agents will have the effect to subject the State governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private—a compact corps of venal solicitors, vending their secret influences—will infest the capital, of the Union, and of every State, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome, '*omne Roma censele*.'"

The defendants can even be heard to plead, as they have done, that a contract into which they have voluntarily entered is *contra bonos mores*; for the authorities make this an exception to the general rule *nemo allegans suam turpitudinem est audiendus*, an exception founded upon the necessity of the case, and the paramount interest of the public.

But in this instance the infirmity which taints the alleged obligation is patent upon the record, and it would have been the duty of the court, even had no such exception been pleaded, to notice *ex officio* and to discountenance any attempt to enforce, by the authority of justice, a contract which is reprobated by morality and law.

Judgment affirmed.

#### S. M. DE MERVILLE et al. v. VILLENEUVE LEBLANC, JR., & Co.

Where usurious interest was stipulated before the passage of the Act of 20th March, 1856, "relative to the rate of interest," but paid since the promulgation of that Act—*Held*: That the whole of the interest paid could be recovered back under the second section of the Act of February 19th, 1844. The contract relative to interest was void at the time it was entered into, and it remained unaffected by the subsequent law in existence when the payment was made.

APPEAL from the District Court of West Baton Rouge, *Robertson, J.*  
*Seymour & McHatton*, for plaintiffs and appellants. *David N. Barrow*, for defendant.

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SPOFFORD, J. The only question presented by the appellants is, whether usurious interest, stipulated before the passage of the Act of March 20th, 1854, "relative to the rate of interest," (Session Acts, p. 130,) but paid since the promulgation of that Act, can be recovered back under the second section of the Act of February 19th, 1844. (Session Acts, p. 15.) They contend that the payment having been made under the new law is only void for the excess above the legal rate, and that the whole interest paid is not therefore recoverable.

As a general rule, laws prescribe only for the future. The Act of March 20th, 1856, is no exception to the rule, but, with a caution that was perhaps unnecessary, it declares upon its face that the validity or obligation of any contract entered into before the going into operation of this Act shall be unaffected by it.

The whole contract relative to interest, at the time it was entered into between these parties, was void, it being in contravention of a prohibitory law. And an action was given to recover back the amount paid under the contract, if demanded within twelve months after the payment. No vitality was imparted to the void contract by the Act of March 20th, 1856; nor did the latter Act take away the right of action given by the former law as to payments which might thereafter be made under contracts prohibited by the Act of 1844, and entered into while it was in force.

The payment did not constitute a new contract, as contended for by the appellants; it was simply an attempt to execute the old one.

Judgment affirmed.

#### SUCCESSION OF JOHN MCLEAN.

The executor has the right, whether *asciain* be given to him in the will or not, to cause sufficient property of the estate to be sold to pay the debts, unless the heirs furnish him with money.

He represents the succession fully when he applies to the court for an order for that purpose.

The widow has a vested interest in the community property after the death of her husband, but her acceptance of the community will no more take the administration out of the hands of the executor or administrator of her husband's estate than would a like acceptance on the part of the heir.

The administration of the succession of the deceased husband involves with it the administration of the community, and the executor or administrator may rightfully cause the community property to be sold for the purpose of paying the debts of the succession.

The purchaser at a sale thus ordered, acquires all the interest which the widow in community could have had in the property.

**A**PPEAL from a judgment on a rule taken by *John Thompson*, testamentary executor, on *Patrick Halpin*.—Second District Court of New Orleans, *Morgan. J. F. Haynes*, for plaintiff. *Thomas Gilmore*, for defendant and appellant.

MERRICK, C. J. *John McLean*, whose domicil was in this city, died last year, leaving a will, which was admitted to probate. He bequeathed one-third of his estate to his wife, who is now in Scotland on account of her health, and two-thirds to *John Thompson*.

The inventory amounted to \$7,745. There being debts due by the deceased amounting to \$3,845 52, the executor under the will applied for the sale of

two lots of ground situated in the First District of New Orleans, which were encumbered with a mortgage of \$1,500. They were the least valuable belonging to the succession.

The petition, which alleges that the sale of the property was necessary to pay debts, was submitted to the attorney for absent heirs, who made no objection to the same. The sale was ordered, and at the probate sale the lots were adjudicated to *Patrick Halpin* for \$2,725. The property sold belonged to the community existing between the deceased and his wife, and the debts, to pay which the sale was made, were also community.

The purchaser having refused to comply with the terms of sale, the executor took a rule upon him to show cause why he should not comply, which being made absolute, he has appealed.

He resists the rule on the ground that, by the death of the husband, the partnership which existed between the husband and wife was dissolved, and the surviving spouse became the absolute owner of one-half of the property sold; that the deceased, if he had survived the wife, could not have sold her interest; that the testamentary executor, who is but the mandatary of the deceased, cannot pretend to exercise any greater right over the share of the surviving wife, and that the decree of the court ordering the sale will not protect the purchaser against the action of the wife or her heirs.

The passage of the Act of 1837 (page 95) has strengthened as well as continued the powers of the testamentary executor, who represents the succession of the deceased, so far as it concerns the collections of money, the sales of property, and the payment of debts, as well as legacies, as fully as administrators or curators of vacant estates. C. C. 1661, 1663. And now, by the sixth section of the Act approved 12th March, 1855, it is provided that the representatives of successions (viz: executors, administrators and curators) shall have the right to cause sales of the property administered by them to be made either by the Sheriff or by an auctioneer, or to make it themselves; but in the event of making it themselves they shall receive no commission. Acts of 1855, p. 79. They are to continue in office until the estate is wound up; they are to file an account once in every twelve months, and to deposit the money in bank, &c.

We think it results from the whole Act, taken in connection with the Code, that unless the heirs furnish the executor with money to pay the debts, he has the same right which the administrator has, whether seizin be given him in the will or not, to cause sufficient property of the estate to be sold to pay the debts, and when he applies to the court for that purpose, like the administrator, he fully represents the succession.

The widow, the partner in the community, after its dissolution has a vested interest in it, which she may accept, nevertheless her acceptance will no more take the administration out of the hands of the executor or administrator than will the like acceptance on the part of the heir.

Before the dissolution of the community by the death of the husband, the wife has only an eventual interest in it. The husband is the head and master of the community, and may sell and dispose of the same by onerous title as he sees fit, without her permission or consent. He may even bestow the movables by gratuitous titles. Now as the husband is responsible for the debts of the community, and must answer for the same out of his separate estate, if the community is insufficient, and as the wife may renounce and claim that her paraphernal rights shall be paid out of his estate, the settlement of the com-

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munity is a natural consequence of the settlement and payment of the debts of his succession.

The funds of the community, out of which the debts are to be paid, ought to be placed in the hands of him who is charged with the payment of the debts, hence the settlement of the succession of the husband naturally carries with it the sale of sufficient effects of the community as are incident to the payment of its debts.

In the case of *Lawson et als. v. Ripley*, the court said: "The succession of the husband is so far connected with the community as to form together, at the time of his death, an entire mass called his estate, which is not only liable for the payment of the common debts, but for the portion of the wife or her heirs to the residue, if they have not renounced. The widow or her representatives have consequently such an interest in the mass of the estate or succession of her husband, with regard to whom no distinction is made between his separate property and that of the community until the net proceeds, or amount of the acquets and gains, are ascertained, that their assistance at the inventory and their concurrence at all the proceedings relative thereto, which are to be carried on contradictorily with them, are generally required."

It is thus evident that the administration of the succession of the deceased husband involves with it the administration of the community. The testamentary executor could, therefore, rightfully apply for the sale of the property of the community, and the order of the Judge decreeing the sale must be considered as a protection to all persons purchasing under it. As the purchaser at the probate sale acquired all the interest which the widow in community could have in the property, there is no reason why he should not comply with the terms of sale.

Judgment affirmed.

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#### STATE v. J. H. H. CRAVEY et als.

There must be an order of court admitting to bail one charged with murder, and fixing the amount of his bond, otherwise the bond taken by the Deputy Sheriff is not binding on the sureties.

**A**PPEAL from the District Court of East Feliciana, *Ratliff, J.*  
*E. W. Moise*, Attorney General, for the State. *Muse & Hardee*, for defendants and appellants.

**BUCHANAN, J.** The record shows no order of court admitting to bail *J. H. H. Cravey*, charged with murder, nor fixing the amount of his bond.

Without such order the bond taken by the Deputy Sheriff is not binding on the sureties, who are appellants herein. *State v. Longineau*, 6 An. 700; *State v. Clendenin*, 6 An. 745.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; and judgment is hereby rendered in favor of the appellants, as in case of non-suit.

## CONSTANCE SEMEL, Tutrix, v. J. M. GOULD et al.

Where work was done on the road and levee under a contract with the Police Jury, in which it was stipulated that the contractor should not look to the parish for payment but to the owner of the land, and it turned out that the land on which the road and levee was made belonged to the United States, it was held that the parish was liable.

There was an implied warranty on the part of the Police Jury, that the land on which the work was to be done belonged to persons whose property could be reached under their ordinances, to defray the expenses of such work.

**A** PPEAL from the District Court of West Baton Rouge, *Robertson, J.*  
*Provosty and Farrar*, for plaintiff. *U. B. & E. Phillips and Haralson*,  
 for defendants and appellants.

**VOORHIES, J.** The plaintiff, as surviving spouse of the late *Charles Semel* and natural tutrix of her minor child, *Eudora Semel*, sole issue of her marriage with deceased, instituted suit against the defendant, *John M. Gould*, for the recovery of \$800, alleged to be for work done on a road and levee on his land fronting on the Mississippi, under a contract entered into between the deceased and the Police Jury of Pointe Coupée on the 22d of September, 1849, said land being then assessed as the property of *Verbal* and *Chambers*.

The defendant, *Gould*, filed an answer setting up various matters of defence, among others, that he had purchased said land subsequent to the existence of said claim or privilege, if any existed upon it, from *Jean Lachand*, with a general and special warranty. Whereupon he prayed for and obtained an order to cite his vendor in warranty.

The warrantor filed an answer alleging that he had purchased the land on which the claim or privilege was sought to be enforced from the United States as public land subsequent to the period when the alleged work was done under the police regulations; and, consequently, acquired the same free from all liens, privileges and mortgages whatever.

The plaintiff thereupon filed a supplemental petition, alleging that if the land belonged to the United States when the alleged work was performed, and was not subject to the charge thus imposed upon it, then the Police Jury of the parish of Pointe Coupée was liable for the payment of her claim, as the work had been performed in good faith by the deceased for the benefit of the parish; and prayed that the Police Jury be cited and condemned to pay her the price thus stipulated for said work.

The Police Jury, in answer, claimed to be exempted from liability under the following clause of the contract, to wit:

"And the said *Paul Jeffrion* does, by these presents, stipulate that the parish of Pointe Coupée will in no manner be bound for the payment of said work, and that the aforesaid owners must and ought to be bound for the payment of the same. To all of which the said contractor agrees."

There was judgment in favor of the plaintiff against the Police Jury, and the latter appealed.

The evidence shows conclusively that the land on which the work was performed, under the contract, was a portion of the public domain and continued to be so long after the completion of said work; that said road was of great service to the parish, and the levee a protection to a large portion thereof from inundation.

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We consider the appellants, under the authority of the case of *Cronan v. Municipality No. One*, 5 An. 537, to be liable to the plaintiff. The clause of the contract under which they seek to shelter themselves, was certainly not intended to secure to the public the benefit of work so essential to its use and protection from inundation at the expense of the contractor. In making the contract, there was an implied warranty on the part of the Police Jury that the land on which the work was to be done belonged to persons whose property could be reached under their ordinances to defray the expenses of such works.

It is, therefore, ordered, that the judgment of the court below be affirmed with costs.

### STATE v. FELIX LENARES.

The Judge has the right to assume, in his instructions to the jury, a hypothetical state of facts, and say to the jury, if they believe such a state of facts to be proved, that it amounts to a commission of the crime or offence charged.

But the jury are the sole judges of the facts, and, under the instruction of the court, they have the right to say whether the offence charged is a violation of the statute or not.

**A** PPEAL from the District Court of East Baton Rouge, *Robertson, J. E. W. Moise*, Attorney General, for the State. *R. G. Beale*, for defendant and appellant.

VOORHIES, J. This appeal is brought up by the defendant, who was convicted of the offence of keeping a banking game, and sentenced to pay a fine of \$1000, and the costs of prosecution.

He complains that the Judge charged the jury on the facts of the case.

The Judge charged "that the game of 'keno' was a banking game, according to the decision in the case of the *City v. Miller*, 7 A. 651." That the court and jury must be governed by the interpretation and definition given to the statute upon the game of "keno" being a banking game by that decision.

The statute on which the indictment was framed declares:

"Whoever shall keep a banking game, or banking house, at which money, or anything representing money, or any article of value, shall be bet or hazarded, or shall aid or assist in keeping one, shall, on conviction," &c.

The indictment in this case charges that the defendant "did keep, carry on and play a certain banking game called keno, at which money was bet and hazarded." Whether the game of keno is a banking game or not is a mixed question of law and fact. The Judge has the right to assume in his instructions to the jury a hypothetical state of facts, and say to the jury, if they believe such a state of facts to be proved, that it amounts to a banking game. But the jury are the sole judges of the fact, and, under the instruction of the court, they have the right to say whether the game played is a violation of the statute or not.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed, and the case be remanded for a new trial according to law.

## P. H. GARY v. E. D. BURQUIERES.

No privilege, as to third persons, exists in favor of the vendor of an engine and gearing for a sugar mill, if he permits it to be attached to a plantation, without having enregistered the contract of sale.

**A**PPEAL from the District Court of Terrebonne, *Cole, J.*  
*Beatty & Bush*, for plaintiff. *Connolly & Rightor*, for defendant and appellant.

MERRICK, C. J. The plaintiff sold to the defendant an engine and gearing for a sugar mill.

This engine and machinery was attached to a plantation which the defendant had bought from *A. J. J. Burrus*. *Burrus* obtained an order of seizure and sale on his mortgage and vendor's privilege, for the price of the plantation, which still remained unpaid.

Before the sale under the order of seizure and sale, the plaintiff filed his suit against the defendant and *Burrus*, in the nature of a third opposition, to prevent the sale of the engine and gearing confusedly with the plantation, and praying that his vendor's privilege on the engine, etc., be recognized.

A separate appraisalment was made of the land and engine. The Judge of the lower court recognized the plaintiff's privilege upon the engine, and ordered *Burrus*, who had become the purchaser of the property at the Sheriff's sale, to pay the plaintiff the balance of the price due him. *Burrus* appealed.

The appellant contends, among other things, that the engine and machinery, having been attached to the plantation, became a part thereof, and was subject to the mortgage and privilege of *Burrus*, and that if plaintiff ever had any privilege as vendor of the engine, it was lost for want of registry.

The plaintiff contends that as he did not suffer the property to be sold confusedly with the plantation, he has preserved his privilege in virtue of Articles Nos. 3194, 3195, 3198 and 3235 of the Civil Code. He also cites Troplong on Privilege and Mortgage, No. 113.

We think that the engine and gearing, after having been attached to the plantation with the presumed consent of the vendor, must be considered as forming a part of the immovable itself. C. C. 455, 460.

After being so attached, its nature, it is true, was not changed so that it was less an engine and machinery than before. But as it could not be used on any plantation without being necessarily attached to the soil, when so attached it became as much a part thereof as the doors, shutters and blinds become a part of the immovable to which the house is attached, of which they form a part. The engine and machinery could not be removed to another plantation without breaking up the masonry and taking the engine and machinery in pieces. It could not be put in successful operation without being again reset in brick and mortar, and again attached to an immovable.

The passage cited from Troplong applies to such movables as are attached to the plantation only by a fiction of law: such as the animals which are employed upon a plantation, the farming utensils, wagons, &c. These movables, which can be used in one place as well as another, Troplong thinks do not so become a part of the immovable, to which they are only intellectually attached, as to

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defeat the vendor's privilege. As to him, they are as much movables as they were when he sold them.

The engine and machinery having become a part of the immovable sold, and the contract being for a sum over \$500, the privilege could only be preserved by a registry of the contract, in conformity to Article No. 3239 of the Civil Code.

For the want of such registry, the mortgage and vendor's privilege of *Burrua* attached to the entire plantation, although increased in value by the accession of the machinery and engine, and he is entitled to the proceeds of sale, notwithstanding the appraisalment made at the instance of the plaintiff.

Therefore, the judgment of the lower court must be reversed.

It is ordered, adjudged and decreed by the court, that the judgment of the lower court appealed from be avoided and reversed, and now, proceeding to render such judgment as should have been rendered by the lower court, it is ordered, adjudged and decreed, that there be judgment against the demand of the plaintiff and in favor of the said *A. J. J. Burrua*, and that the plaintiff pay the costs of both courts.

WIDOW AND HEIRS OF CARLILE POLLOCK v. THE CITIZENS' BANK OF  
LOUISIANA.

The Act of the Legislature of 1852, which relieved the Citizens' Bank from the decree of forfeiture of its charter, while it restored the "rights and privileges" of the corporation, is not to be understood as having restored those of the individual corporators, so as to entitle the original stockholders to a credit at the hands of the Bank, as at present organized, of thirty-three dollars per share, as a loan payable in instalments, according to the original charter.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J. G. Legardeur*, for plaintiffs and appellants. *A. Pitot*, for defendants.

**BUCHANAN, J.** The plaintiffs, original stockholders of the Citizens' Bank to the extent of 215 shares, claim to be entitled to a credit, at the hands of the Bank, as at present organized, of thirty-three dollars per share, as a loan repayable in annual instalments of two per cent., according to the provisions of the Act of April 1st, 1833, which was the original charter of the Bank.

The defendants plead that the original charter has been forfeited, and, although since revived, yet that it has been so modified, with the consent of the stockholders, as to preclude the latter from claiming, as a right, the credit accorded to them by the original charter; moreover, that it would be a violation of the obligations of the Bank towards the State and towards the holders of the bonds of the Bank, as well as a breach of faith towards the subscribers of a cash stock in this institution, to grant the mortgage stockholders a credit such as is asked.

The argument of the learned and able counsel for plaintiffs, may be summed up in the two following propositions:

1st. The Act of the Legislature of 1852, No. 141, entitled "An Act for the relief of the Citizens' Bank of Louisiana," in its first section, declares, that the Bank is relieved from the decree of forfeiture of its charter, and the administration and control of the affairs of said Bank shall be restored to the stock-

holders thereof, in the same manner, with the same rights and privileges, to the same extent, and with the same restrictions, as if the said decree of forfeiture had never been rendered: and consequently, one of the rights and privileges of each stockholder, before the decree of forfeiture rendered, being a credit to the amount of a certain proportion of his stock, estimated at par, each stockholder is now entitled to the same credit.

2d. Plaintiffs were not a party to the compact of the 26th July, 1853, between the mortgage stockholders and the cash stockholders of the Citizens' Bank, and are not bound by said compact.

Both these propositions are fallacies.

I. The Act for the relief of the Citizens' Bank recites that the charter of the Bank, under which plaintiffs claim, had been forfeited by a judgment ten years previously. Of this fact, indeed, there is no question. It is likewise a matter admitted on all hands, that the State is largely interested in the success of the Citizens' Bank, being bound, as the preamble of the Act declares, for the payment of upwards of six millions of bonds negotiated for the benefit of the Bank. The preamble proceeds to state, that the managers, appointed by the State for the Citizens' Bank, have represented that the stockholders will be enabled to secure the State from the risk of loss, if they be restored to the control and administration of the affairs of the Bank, with the rights, privileges and immunities possessed by said Bank at the date of the decree of forfeiture rendered against it in the First District Court, &c. •

In consequence of this representation, the Act declares, in its first section, the charter revived, as stated in the argument of plaintiffs' counsel. Now, what are the "rights and privileges" which "shall be restored?" Taking the first section in connection with the preamble, of which that section is but the repetition and the complement, it is obvious that we are to understand the rights, privileges and immunities *possessed by the Bank under its forfeited charter*—privileges so immense, that they constituted a legislation apart for this favored corporation. For *it*, the Article 2412 of the Civil Code did not exist, neither did the insolvent laws, neither the statute of distributions. No legal incapacity could be pleaded by its debtors. No exceptional jurisdiction could obstruct the collection of debts due to it. See sections 24, 25, 26, Acts of 1833, p. 190.

Not only is it clear from the context that the "rights and privileges" are those of the corporation, and not of the individual incorporators, but the assurance of the State against loss, the avowed object of this law, must have been defeated by the opening of a credit on the books of the Bank, in favor of each stockholder, to the extent of one-third of his stock at a par estimate; stock which, so far from having any value in the market itself, depreciated the value of any property on which it was secured.

Again: we find in the second section "that this Act shall not take effect until the Citizens' Bank of Louisiana shall have restored to the Governor of the State bonds of the State to the amount of eight hundred thousand dollars, and shall have raised, by contribution from its stockholders, independently of its present means, additional assets for at least eight hundred thousand dollars." The other sections of the Act contain provisions having reference to the conditions and revival of the corporation, contained in the 2d section. There is no evidence in this record that those conditions were ever fulfilled; that the sixteen hundred thousand dollars *bonus*, in bonds and cash, was ever forthcoming. It is certain that the corporation, as we now find it, is the offspring of the legis-

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lation of the succeeding session, (1853,) which will be presently the subject of our examination.

The Act of 1852 appears to have failed of its purpose of resuscitating the defunct corporation. For this, as well as for the reasons inherent in the Act itself, it appears to us that no weight is to be attached to the argument derived from the general and somewhat vague expressions of the first section of that Act.

II. On the 28th April, 1853, was passed an Act to authorize the Citizens' Bank of Louisiana to convert shares secured by mortgage into cash shares.

This Act made a radical change in the constitution of the Bank, by divesting it, in part, of its character of a joint stock association of the owners of real estate, trading upon a capital raised by the negotiation of bonds secured by the hypothecation of lands and slaves. It provided, that the Directors might raise a million of dollars, by opening books of subscription for ten thousand shares of one hundred dollars each, in which subscription the preëxisting or mortgage stockholders should have a preference to the extent of one share for every fifteen already possessed by them; said ten thousand shares to be paid in full, at the time and in the manner to be determined by the Directors, in order to constitute a cash stock.

The second section enacts, that those who shall become the owners of said cash stock, shall be designated as the cash stockholders of the Bank, and shall, besides any yearly interest which they may receive on the stock so paid in, if any be allowed, share in the profits or losses of the Bank in the proportion of the amount of said stock paid in, to the amount of the available banking assets of the Bank, to be estimated and fixed by the Board of Directors, and on such terms and conditions as shall be fixed by said board; the same, when so determined, to be binding on and between the holders of said cash stock and mortgage stock respectively.

The third section enacts, that subscriptions to the cash stock shall be received at the office of the Bank in New Orleans, under the superintendence of the Board of Directors, after thirty days previous notice of the terms and conditions agreed upon by said board, which shall be considered as binding upon the subscribers.

And by section fifth, the Act to be in force only after having been accepted, in writing, by a majority in number and amount of the stockholders of the Citizens' Bank of Louisiana.

It is proved that this Act was accepted by three hundred and eighty stockholders, owning eighty-six thousand nine hundred and ninety-two shares of stock, and rejected by three stockholders, owning four hundred and fifty-eight shares; the total number of stockholders at the time being six hundred and ninety-six, and the total number of shares, one hundred and forty-three thousand eight hundred and ninety-two. Therefore, there was a majority in number and amount, of all the stockholders and stock, which accepted. And it is admitted, that the plaintiffs were among those stockholders who accepted.

After this acceptance of the Act, which was then by its terms in force, the Board of Directors, as they were authorized and required to do by the second section, fixed, on the 26th July, 1853, before opening books of subscription, the terms and conditions of a compact and agreement as to the manner of administering the affairs of the Bank and dividing its profits between the cash stockholders and the mortgage stockholders; which compact and agreement,

after being formally ratified by a committee of the mortgage stockholders, was advertised during the term of thirty days, in six different newspapers, as the basis of subscription to the cash stock. The whole of the ten thousand shares of cash stock were thereafter subscribed, and the Bank went into operation under the amended charter of the 28th April, 1853, and in the mode and upon the terms and conditions fixed by the articles of compact and agreement of the 20th July, 1853, adopted in conformity and obedience to that statute, and which are to be considered as the constitution of the corporation at the present time.

There is no doubt that all the mortgage stockholders, including the plaintiffs, are bound by that compact. It is in vain that the plaintiffs claim to stand aloof and to repudiate the nearly unanimous assent of their fellow-corporators. See on this subject Angell and Ames, on Corporations, chapter 13, section 7; 3d Kent's Commentaries, lecture 33d, page 236. Upon these authorities, plaintiffs would be bound, even had they been among those few corporators who voted to reject the amendment of the charter. *A fortiori* are they bound, having voted to accept it.

Judgment affirmed, with costs.

Mr. Justice VOORHIES being a stockholder in the Bank did not sit on the trial of this case.

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F. B. LeBEAU v. THE CITIZENS' BANK OF LOUISIANA.—WIDOW G. M. PLIQUE v. THE SAME.—GASTON BRUSLÉ v. THE SAME.

Decision in the preceding case of *The Heirs of Carlile Pollock v. The Citizens' Bank*, affirmed.

APPEAL from the Second District Court of New Orleans, Morgan, J.

BUCHANAN, J. For the reasons given in the case of *The Heirs of Carlile Pollock v. The Citizens' Bank of Louisiana*, it is ordered, adjudged and decreed, that the judgment of the District Court in this case be affirmed, with costs.

F. HARDESTY v. MARY STURGES, Executrix, et al.

When the liability of the surety had been fixed by the same judgment in which the principal was condemned, *held*, that an agreement under which, without the formality of a Sheriff's sale, a twelve months' bond was given by the principal, to cover the debt and costs, as if the property seized had been adjudicated on a second crying for that amount, did not have the effect of releasing the surety.

APPEAL from the District Court of East Feliciana, Ratliff, J.

P. Pond, for plaintiff. Muse & Hardee, for defendants and appellants.

BUCHANAN, J. The plaintiff, Hardesty, having obtained judgment against the principal and surety upon a bond, took out execution, which was levied upon property of the principal, who, by written consent of plaintiff, was permitted, without the formality of a Sheriff's sale, to give a twelve months' bond with security for an amount sufficient to cover the debt and costs, as if the property had been adjudicated.

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dictated at a second crying for that amount. Even if this can be considered as a giving of time to the principal, (which it scarcely can be under the circumstances,) the surety was not thereby released, for two reasons: first, because his liability was already fixed by a judgment; Story on Promissory Notes, No. 417; 2 An. 456. The counsel of appellant relies upon the case of *Callihan v. Turner*, 3 Robertson, and *Gustine v. Union Bank*, 10 Robertson, which are inconsistent with the doctrine here stated. But we prefer and adhere to the ruling of *The Louisiana State Bank v. Haralson*, 2 An., quoted above. Secondly, because the surety had sued and obtained judgment by confession against his principal, as the record shows, for the amount of this identical bond, simultaneously with the judgment obtained by plaintiff against both of them, and issued executions against his principal upon the judgment thus obtained. It is, therefore, evident, that the defendant's testator, the surety in question, was never delayed or impeded in the least by the supposed giving of time to his principal by plaintiff. In the very peculiar facts of this case the surety appears to have even exercised a right beyond the law; for the confession of judgement in his favor gave him a virtual subrogation to plaintiff's rights against his principal without having satisfied the debt or any part of it.

Judgment affirmed, with costs.

MERRICK, C. J., recused himself in this case.

CELESTINE MOLAISON v. V. HEBERT, Executor, et al.

There is no law authorizing the court to appoint a curator *ad hoc* to represent the slaves of a testator in a suit brought by his forced heirs to annul the disposition of the will enfranchising them.

APPEAL from the District Court of West Baton Rouge, *Robertson*, J. *Andrew S. Herron*, for plaintiff. *Barrow & Petit*, for defendants and appellants.

SPOFFORD, J. This suit was brought by certain persons alleging themselves to be forced heirs of *Jacques Molaison*, deceased, against his testamentary executor, for the purpose of annulling a nuncupative testament by public act, and setting aside a disposition by which the testator had sought to enfranchise certain slaves.

The District Judge thinking it necessary that the slaves should be represented, appointed a curator *ad hoc* for them. Upon a hearing, there was judgment setting aside that portion only of the will which purported to manumit the slaves.

The curator *ad hoc* alone has appealed, and no answer to the appeal has been filed.

We have been referred to no law authorizing a curator *ad hoc* to stand in judgment in such a proceeding as this, and we do not think it was contemplated by the law-giver.

The only decree we can make is to dismiss the appeal.

Appeal dismissed.

LEA, J., absent.

## A. G. PENN v. J. J. OTT.

The sale of a right of preëmption acquired under the Act of Congress of the 4th of September, 1841, is null and void.

A right of preëmption and improvements on the public domain, are not susceptible of mortgage under the Code.

An order of seizure and sale on a mortgage of such objects, is a nullity.

The vendor's privilege on movables can only be exercised whilst such movables remain in the possession of the purchaser or where the vendor claims a preference on the price over the other creditors of the purchaser.

APPEAL from the District Court of St. Tammany, *Waterston, J.*

*Hennen & Penn*, for plaintiff and appellant. *J. R. Jones*, for defendant.

VOORHIES, J. This is an injunction to restrain the execution of an order of seizure and sale obtained by the defendant against *Abraham Penn*.

The property seized under this writ and advertised to be sold by the Sheriff, is described as "a certain pretended preëmption claim and improvements on the south west section No. 23, township No. 6, Range No. 10 east." The land on which the alleged right of preëmption existed, was purchased by the plaintiff from the United States, on the 13th of November, 1854, under a special Act of Congress, approved 1st August, 1854. The defendant transferred to *Abraham Penn* the right of preëmption and improvements, reserving a special mortgage to secure the payment of the price thereof.

The plaintiff alleges that the sale thus made was null and void, because the defendant could not, as he then owned 640 acres of land, acquire a right of preëmption to the land in question, under the Act of Congress of September 4th, 1841; and neither could *Abraham Penn* acquire such right, as he too owned 320 acres of land at the date of the sale. He further alleges, that the preëmption right and improvements thus conveyed to *Abraham Penn*, were seized and sold under an execution issued on the 21st of June, 1854, on a judgment rendered against him in favor of the Union Bank of Louisiana; that he held said judgment as transferee of said bank; and that in consequence of his prior seizure, as said property was not susceptible of mortgage, he was entitled to be paid out of the proceeds of the sale thereof, in preference to all the other creditors of the seized debtor. His petition concludes with a prayer for damages resulting from the illegal seizure, and to be declared to be the lawful owner of said land, &c.

The defendant avers in his answer, that he is the holder of a promissory note of *Abraham Penn* for the sum of \$750, dated the 11th July, 1849, payable the 1st of January, 1851, with eight per cent. interest per annum thereon, from maturity until paid, and secured by mortgage and the vendor's privilege upon a certain tract of 160 acres of land, with the improvements thereon, upon which he alleges he had a right of preëmption. He avers, that the plaintiff's right to said land was acquired by virtue of this preëmption, and that he is, therefore, bound for the payment of the note of *Abraham Penn*, given for the price thereof. He therefore prays for the dissolution of the injunction, with twenty per cent. damages.

The injunction was dissolved, and the plaintiff appealed.

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The record shows that, on the 11th of July, 1849, the defendant sold to *Abraham Penn* the following described property, viz :

"All the right, title, interest and claim of the vendor, in and to a preëmption right situated upon the south west quarter of section No. 23, township No. 4, south of range No. 10 east, acquired by the vendor under the provisions of the Act of Congress approved the 4th of September, 1841, and the certificate of the Register of the Land Office at Greensburg, Louisiana, dated 9th of May, 1848, and paraphed by me, Notary, even date with this act, together with the saw-mill, running two saws, and grist mill, all driven by water power, in the river Tchefuncta, with all the fixtures, appendages, blacksmith's shop, tools," &c.

The consideration stipulated was \$2,000 cash and \$3,000 in four promissory notes given by the vendee to the vendor, each for the sum of \$750, payable on the 1st of January and 1st of July, 1850, and the 1st of January and 1st of July, 1851, with eight per cent. per annum interest thereon from maturity until paid, and to secure the payment thereof said property to remain specially mortgaged.

On the 10th of June, 1854, the defendant obtained a judgment against *Abraham Penn*, for a balance due on the first of these notes, to wit, \$586 66, with eight per cent. per annum interest. *L. Klopman*, as endorsee of the second note, also obtained a judgment against *Abraham Penn*, for the use of *J. B. Byrne & Co.*

The order of seizure and sale enjoined in the present case, was obtained to enforce the payment of the third note, which matured on the 1st of January, 1851.

The right of preëmption and improvements in question, were seized as alleged under the judgment of the Union Bank, for the use of the plaintiff, and advertised on the 30th of June, 1854, to be sold by the Sheriff for cash, on the 2d of September, 1854. In the mean time, the plaintiff entered into an agreement with the defendant and *Klopman*, the other judgment creditors, whereby he stipulated to become the purchaser of the property thus levied upon, at twelve months credit, for a price sufficient to cover the special mortgages, and to amount to at least two-thirds of the appraised value thereof, and to give his separate bonds for the amount of each judgment. It was stipulated that the plaintiff should have the right to contest said bonds, or in other words to urge his right of preference to be paid out of the proceeds of said sale over the other creditors, in consequence of his prior seizure; and that said agreement should not be considered as a waiver of any legal right which either party had on the property. Said property was accordingly adjudicated to the plaintiff for the price of \$3,656, for which he executed his two twelve months bonds, one in favor of the defendant and the other in favor of *L. Klopman* for the use of *J. B. Byrne & Co.*, amounting in the aggregate to the sum of \$1,805 66, with eight per cent. per annum interest thereon, from the 2d of September, 1854, and retained the residue in his own hands.

It has been repeatedly held by this court, that the sale of a right of preëmption acquired under the Act of Congress of the 4th of September, 1841, was null and void. See the case of *Arbour v. Nettles et al.*, recently decided by us, and the authorities there quoted.

But we consider it clear that a right of preëmption and improvements on the public domain, cannot be considered under our Code as an object susceptible of mortgage. It is not an immovable subject to alienation. C. C. 3256; 10

LA 234. Hence, it follows, as a necessary consequence, that the order of seizure and sale enjoined in the present case, must be considered as a mere nullity.

It is, however, contended by the defendant and appellee, that he is entitled to claim the vendor's privilege. We do not think the right, if it exists, can be exercised in the form of action to which he has resorted. The vendor's privilege on movables can only be exercised whilst such movables continue to remain in the possession of the purchaser, or where the vendor claims a preference on the price over the other creditors of the purchaser. But such right must be exercised seasonably and in the mode prescribed by law. C. C. 3194; 1 An. 80; 11 R. 140; C. P. 396, 401.

It is, therefore, ordered and decreed, that the judgment of the court below be reversed; that the injunction obtained in this case be reinstated and made perpetual; and that the defendant and appellee pay the costs of both courts.

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G. F. GILBERT v. ALEXANDER G. PENN.

The principles in the preceding case of *Penn v. Ott*, reaffirmed.

APPEAL from the District Court of St. Tammany, *Waterston, J.*  
*J. R. Jones*, for plaintiff. *Alfred Hennen, G. W. Penn* and *G. W. Martin*, for defendant and appellant.

VOORHIES, J. This is an hypothecary action. The plaintiff alleges that *Jacob J. Ott* sold to *Abraham Penn*, on the 11th of July, 1849, "a certain preëmption right, with all the buildings and improvements thereon situated," for the price of \$5,000, \$2,000 of which in cash and the residue on terms of credit, for which the purchaser gave his four promissory notes, each for the sum of \$750, payable on the 1st of January and 1st of July, 1850, and 1st of January and 1st of July, 1851, with eight per cent. per annum interest thereon from maturity until paid, the payment of which being secured by a special mortgage and the vendor's privilege on said property now in the possession of the defendant, who acquired the same by purchase at Sheriff's sale, subject to said mortgage and privilege; that he is the holder and owner of the note which was made payable on the 1st of July, 1851, and thus secured by mortgage on said property. He, therefore, prays that the defendant be condemned to pay him said note with interest, and that the property thus mortgaged be sold to satisfy the same.

The pleadings in this case present the same issues as those presented in the case of the defendant against *Jacob J. Ott*, just decided by us.

We think it is clear that a right of preëmption and improvements on public land cannot be considered as objects susceptible of mortgage under our laws, and, therefore, cannot form the basis of an hypothecary action.

It is insisted by the plaintiff in his brief that he is entitled to claim the vendor's privilege on the property. We think not, for the reasons given in the case of the defendant against *Ott*, to which we have already adverted.

It is, therefore, ordered and decreed, that the judgment of the court below be reversed, and that the demand of the plaintiff against the defendant be rejected at his costs in both courts.

ANDREW C. FINLEY *v.* H. V. BABIN, Sheriff, et al.

A judicial sale made to effect a partition among co-heirs, has the effect of extinguishing mortgages given by some of the heirs on their undivided portions, and of transferring such mortgages to the proceeds of the sale.

**A**PPEAL from the District Court of East Baton Rouge, *Robertson, J.* Joseph Joor, for plaintiff and appellant. F. M. Brunot, for defendant.

MERRICK, C. J. The wife of the plaintiff, *Emeline Gilmore*, and the wife of the defendant *Bernard Bailey*, were two out of five heirs of *John and Martha Gilmore*, deceased. Before any partition or sale of the effects of said succession, and before the marriage of the plaintiff, *Mrs. Bailey* sold her undivided interest in these successions, consisting of a sugar plantation, slaves, &c., to her sister, *Emeline Gilmore*, and her brother, *John A. Gilmore*. They mortgaged the interest acquired and their undivided individual interests in the said successions, to secure the price.

The price not being paid at the maturity of the notes given therefor, *Bernard Bailey*, in his own name, instituted his suit against the wife of the plaintiff and her brother upon the notes, in order to obtain judgment thereon, and to cause the mortgage to be recognized. The plaintiff was cited as usual in actions against the wife.

During the pendency of the suit, the plantation, slaves and other effects, belonging to *John and Mary Gilmore*, were sold at probate sale. At the sale the plaintiff and *John A. Gilmore* bought the plantation for \$9,200. The plaintiff also bought the slaves *Bill, Sarah*, and their children *Pierce, Augustus, Henry and Julia*, and negro man *Lige*. After this purchase, the judgment was rendered upon the notes in favor of *Bernard Bailey* against *John A. Gilmore* and the wife of plaintiff, *in solido*, recognizing the mortgage upon the undivided interest bought by them and their own undivided interest in the succession, constituting three undivided fifth parts of said successions. *Bailey* issued a *fi. fa.* upon his judgment against *Emeline Finley* and *J. A. Gilmore*, and the Sheriff disregarding the probate sale seized among other things the plantation and the slaves bought by the plaintiff, and advertised the same for sale.

The plaintiff enjoined the sale of the slaves and his undivided interest in the plantation. His injunction having been dissolved in the lower court with damages, he has appealed.

The judgment of the lower court must be reversed. *Finley* was not bound for the debts of his wife, and the judgment in the case of *Bailey* against his wife did not bind him. His purchase of property at the probate sale in his own name must be held to be on his own account. That sale had the effect of extinguishing the mortgages given by the heirs upon the property itself, and transferring the mortgage to the proceeds. Act 1843, p. 44; C. C. 1484; *Succession of Pinguay*, 12 Rob. 450; 9 An. 212.

The defendants, therefore, were not authorized by the judgment against the wife, to seize the property of the husband to pay the same.

There have been no damages proven in this case, and we have no basis before us on which to estimate the same.

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It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and that the defendants be perpetually enjoined from selling plaintiff's undivided half of said plantation known as the Gilmore plantation, and more particularly described in the plaintiff's petition, which said undivided half is hereby recognized as belonging to the plaintiff, and also from selling the plaintiff's said slaves *Bill, Sarah*, and their children *Pierce, Augustus, Henry* and *Julia*, and the negro man *Lige*, described in plaintiff's petition. And it is further ordered, that plaintiff's demand for damages for the unlawful seizure of his property be dismissed as in the case of a nonsuit. It is further ordered, that the defendants pay the costs of both courts.

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JOSEPH OULLIBER v WILLIAM JOUBLANC, f. m. c.

An appeal will not be dismissed merely on account of the carelessness of the officer in an obvious omission of a word in his return of the service of the copy of the petition of appeal. Such a case is completely within the scope of the Act of 1839.

Where an injunction has been sued out on grave charges of fraud and simulation, and the plaintiff offers no evidence whatever to sustain them, the maximum of damages allowed by law should be awarded to the defendant on the dissolution of the injunction.

APPEAL from the District Court of St. Tammany, *Waterston, J.*

*Penn & Mouton*, for plaintiff. *H. Griffon*, for defendant and appellant.

BUCHANAN, J. The appellees move to dismiss this appeal, on the ground that no copy of petition of appeal was served on them. There are three appellees, and three citations of appeal are annexed to the transcript. On each is written a return in these words: "Received this original with a copy and copy of appeal, January 13th, 1857, and on the 14th of the same month and year served said copies, &c." We understand the words *copy of appeal* in these returns to mean *copies of petition of appeal*. They either have that meaning or no meaning at all; and the court cannot consent that the carelessness of the returning officer in omitting a word so obvious shall deprive the party of the benefit of his appeal. A case cannot be imagined more completely within the scope of the Act of 1839, (Session Acts, 170.)

The motion to dismiss is overruled on the merits we have presented, a case of abuse of the process of injunction which calls for an infliction of the maximum of the discretionary penalty inflicted by the Act of 1831.

*William Joublanc*, the defendant, having sued out executory process upon a note for the sum of \$6413 64, subscribed by *Joseph Oulliber*, and past due, the said *Joseph Oulliber* applied for an injunction upon allegations, that he was induced by the fraudulent representations of the payee of the note to give his seven promissory notes, forming a series payable at different times, of which the note enjoined was the first due, and amounting, in the aggregate, to the sum of twenty-two thousand dollars and upwards, and payment secured by special mortgage on a tract of land in the parish of St. Tammany. That the aforesaid seven notes were obtained as aforesaid by the payee of the same, for the alleged purpose of having them discounted, and the proceeds to be used for the benefit of a partnership existing between plaintiff and the payee of the notes, in a saw-mill, estab-

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lished on the tract of land mortgaged. That the payee fraudulently retained said notes in his possession, and never discounted and placed the same to the credit of the partnership. That the proceeds of said saw-mill proved amply sufficient to carry on the partnership without resorting to the discounting of the said notes. That the revenues derived from the said mill were all placed in the hands of the said payee of the notes and partner of plaintiff, who made disbursements on account of said partnership, but not equal in amount to the income; hence it was not necessary to discount said notes. That, being in possession of the note sued on at its maturity, and having funds on hand sufficient to liquidate and pay it, the pretended sale of it afterwards was a fraud upon the plaintiff's rights. Plaintiff charges collusion and fraud between defendant and the partner of plaintiff, that the pretended sale and subrogation of the note and mortgage, to the former by the latter, are simulated and fraudulent, and the name of defendant merely used as a color to enable plaintiff's partner to carry on a suit to compel plaintiff in injunction to pay said note, or have the mortgaged property sacrificed, and thus force, at an unseasonable moment, the dissolution of the partnership, to the great injury of the plaintiff in injunction. Plaintiff alleges that, without any consideration whatever, paid or expressed, defendant has accepted of a pretended sale and subrogation of said note from plaintiff's partner, the payee of the note, and has commenced executory proceedings, under which the property mortgaged has been seized and taken into the possession of the Sheriff. The sale of the property was enjoined on these allegations, and on the plaintiff making the affidavit and giving the bond required by law, and by the order of the court, on the 4th January, 1856.

When, nearly a year afterwards, this case came to trial plaintiff did not offer a tithe of evidence in support of the very grave and circumstantial charges of fraud and simulation contained in this petition, nor, indeed, any evidence whatsoever. On the other hand, the defendant has proved by the testimony of witnesses, and by letters and other documents signed by the plaintiff himself, that the charges of misconduct and fraud, simulation and collusion, between defendant and plaintiff's partner to injure plaintiff are entirely contrary to the truth. The District Judge dissolved the injunction, with five per cent. damages against the plaintiff and his sureties on the injunction bond. The defendant has appealed, and claims that the damages be increased to the maximum allowed by law. The record demonstrates that this request is not unreasonable. The petition states the property seized to be in the possession of a keeper appointed by the Sheriff. This keeping has now lasted for more than fourteen months, and the legal charge of the Sheriff for keeping will probably amount to more than double the damages allowed by the court below, and as costs of court, will be of course privileged upon the proceeds of the Sheriff's sale. The judgment enjoined, amounts, exclusive of interest, to six thousand four hundred dollars and upwards.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended; that the injunction be dissolved, and that *William Journélan*, *f. c. m.*, defendant in injunction, recover of *Joseph Oulliber*, principal, and of *William H. Merritt* and *José Colomer*, sureties in the injunction bond, *in solido*, twelve hundred and eighty dollars damages, with costs in both courts.

## WM. F. FLYNN v. N. G. RHODES et al.

When the defendant had no acknowledged domicile or residence in the parish in which he was sued, held, that the return of the Sheriff that he had left the copies of the petition and citation at defendant's place of residence in the parish with a white person over the age of fourteen years, "residing at said residence," was manifestly bad.

The judgment rendered against the defendant after default thereupon was null and void, as the defendant made no appearance in the cause.

Counsel fees in the suit to annul the judgment and enjoin its execution were properly disallowed to the plaintiff as damages.

**A**PPPEAL from the District Court of East Feliciana, *Ratliff, J.* Tried by a jury. *Bowman & Delee*, for plaintiff and appellant. *Muse & Hardee*, for appellees.

**SPOTFORD, J.** This suit was brought to annul a judgment rendered against the plaintiff, upon default, without previous citation according to law; it was accompanied by an injunction to restrain the defendants from proceeding with an execution which they had sued out under the judgment, and concluded with a prayer for damages.

The injunction was perpetuated without damages, and the plaintiff has appealed.

The plaintiff had no acknowledged domicile or residence in the parish of East Feliciana at the date of the pretended service of citation there. The service, as indicated by the return, was manifestly bad, and the judgment rendered against the plaintiff, after default thereupon, was null and void, as he made no appearance in the cause. The injunction was, therefore, properly made perpetual.

The plaintiff and appellant complains of various alleged irregularities in the rulings of the court *a qua*, and contends that the cause should be remanded for a new trial upon the question of damages.

If all the rulings complained of had been otherwise, and the rejected evidence admitted in its full extent, we do not think damages should have been awarded in this proceeding. The only damages suffered must have arisen from the seizure under the judgment and the necessity of enjoining it. As to the seizure, the extravagant conjectures of the plaintiff's witnesses are wholly unsupported by the facts. The costs of the suit have already been awarded to the plaintiff, under the authority of the cases of *Smith v. Bradford*, 17 L. 266, and *Hill v. Noc*, 4 An. 304. Counsel fees for prosecuting this suit was correctly disallowed.

Judgment affirmed, the appellant to pay the costs of appeal.

CITY OF NEW ORLEANS v. THE COMMISSIONERS OF THE ESTATE OF  
JOHN McDONOGH.

The commissioners are the mandataries of the cities of New Orleans and Baltimore, and derive no power from the will of the testator. (See case of *Society for relief of Orphan Boys v. New Orleans and Baltimore*, 12 An. 62.)

The commissioners and agents cannot stand in judgment for the cities without the authorization of the latter.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*F. C. Laville and C. Morel*, for plaintiff and appellant. *P. E. Bonford*,  
for defendants.

SPOFFORD, J. It has been decided that the cities of New Orleans and Baltimore are the universal heirs of *John McDonogh*.

They are, therefore, co-proprietors of the property of the succession situated in New Orleans; each city is owner of an undivided moiety.

The commissioners and agents have no powers independent of the cities whose mandataries they are. They represent nobody but the cities which appointed them, and derive their authority, not from the will of *John McDonogh*, but from their principals, whose instructions they must obey. *Society for relief of Orphan Boys v. New Orleans and Baltimore*, 12 An. 62; *Howard & Mayer v. New Orleans and Baltimore*, 12 An.

The city of New Orleans sued the commissioners alone for municipal taxes upon the whole of this property. The suit was dismissed.

The argument for the appellants, filed in this court, discloses a sufficient reason for affirming this judgment. It is stated in that argument that "the cities of New Orleans and Baltimore have no interest in and are not parties to this suit."

The commissioners and agents cannot stand in judgment for the cities without the authorization of the latter. No such authority appears in this case. They do not represent in any manner the beneficiaries who for a time are to share in the revenues of the *McDonogh* estate. The tax bills are not made out against those beneficiaries, and they have had no notice of this action.

It is plain that, so far as the city of New Orleans is concerned, it would be an idle ceremony for the city to tax itself; such a claim would be instantly extinguished by confusion.

There is no such *contestatio litis* between proper parties as to enable us to decide whether the city of New Orleans has the right to tax the interest of its co-proprietor, Baltimore, in the property common to both.

Judgment affirmed.

## HENRY HAWFORD v. MOSES AND SOLOMON ADLER, Administrators.

A notary public cannot be allowed to increase his legal fees for those acts which he does in his official capacity, by testimony as to the value of extra services.

A motion filed in the Supreme Court by the defendant, who is appellee, to have the judgment of the lower court amended by dismissing plaintiff's demand, is a substantial compliance with Articles 688 and 690 of the Code of Practice, and authorizes the entire reversal of the judgment of the lower court and a judgment of the appellate court in favor of defendant.

APPEAL from the District Court of East Feliciana, *Ratliff, J.*

*J. O. Fuqua*, for plaintiff and appellant. *Muse & Hardee*, for defendants.

BUCHANAN, J. The plaintiff, a notary public in the parish of East Feliciana, made the inventory of the estate of *Benoit Adler*, of which the defendants are administrators, under an order from the District Court in which the succession was opened.

This inventory occupies between six and seven pages of this record, and contains about fifteen hundred words, counting every figure as a word. The petition admits that the plaintiff has received one hundred and twenty-five dollars for making this inventory, and he claims five hundred and two dollars and fifty cents additional, upon the following plea: "That by virtue of and in obedience to a commission from your honorable court, issued on or about the 9th of November, 1853, your petitioner, in his capacity of notary public, made inventories of the property and effects of said succession of *Benoit Adler*, deceased. That before said inventories could be made, it was necessary to go into a general and minute examination of the affairs of the commercial firm of *A. Levi, Adler & Co.*, of which firm deceased was a partner, and to make a detailed statement of said affairs, before the experts could make any estimation of the interest of deceased in said firm. That said examination and detailed statement of the business and condition of affairs in said firm were accordingly made by your petitioner, as will be seen more fully and in detail by reference to the annexed statements marked 'A' and 'B,' which are made part hereof. That your petitioner also made inventory, and performed other services for the benefit of said succession, as will be more fully seen by reference to the annexed statement or account marked 'C,' which is also made part hereof. That said labor and services so rendered, and which enured to the benefit of said succession, were well worth the price of six hundred and twenty-seven dollars and fifty cents. That petitioner has received from *A. Levi*, for the account of said succession, the sum of one hundred and twenty-five dollars, which leaves a balance due him of five hundred and two dollars and fifty cents, as hereinbefore stated."

On the trial the plaintiff offered witnesses to prove the value of his services in making a balance-sheet of the books of *A. Levi, Adler & Co.*, as contained in the inventory of *Benoit Adler*. This testimony was objected to by the defendants, but the objection was overruled and the evidence admitted. To which ruling of the court a bill of exceptions was reserved.

The District Court erred. A notary public cannot be allowed to increase his legal fees, for those acts which he does in his official capacity, by testimony of a quantum meruit for extra services. This was distinctly decided in *Walton*

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v. *His Creditors*, 3 Rob. 438, and again in the case of the *State v. Atchafalaya Bank*, 7 Rob. 198.

It is very easy to perceive that a relaxation of the rule would make the bill a dead letter. And no stronger instance can well be presented than the present case affords of the bad consequences of a different rule: the extra compensation charged by the plaintiff for making the inventory of *Benoit Adler*, amounting to nearly twenty per cent. of the total appraisement of the estate inventoried. The jury who tried the case in the court below, found a verdict in favor of plaintiff for thirty-six dollars and seventy-five cents, from which plaintiff has appealed. The appellees filed in this court, on the same day the transcript was filed, a paper of the following tenor:

"*Henry Hawford v. M. & S. Adler, Administrators.*

"On appeal in the Supreme Court, come the defendants and appellees, and move the court to amend the judgment of the lower court by dismissing plaintiff's demand entirely, as prayed for in appellees' answer, and for the reason stated in their said answer.

By their attorneys,

MUSE & HARDER."

We view this as an answer to the appeal, and a substantial compliance with the requirements of the Code of Practice, Articles 888 and 890.

As the record shows that the plaintiff has been already paid more than his legal fees for making the inventory of *Adler's* estate, the amendment prayed for must be allowed.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that there be judgment for defendants, with costs in both courts.

MERRICK, C. J., was recused in this case.

#### THOMAS MCGOWAN v. MARY LAUGHLAN.

When the only subscribing witness to an act of sale is dead, and after diligent search and inquiry no one can be found who is acquainted with the signature or place of residence of the vendor, proof of the genuineness of the signature of the subscribing witness will be sufficient proof of the execution of the instrument.

APPEAL from the District Court of Carroll, *Farrar, J.*

*Goodrich & DeFrance*, for plaintiff and appellant. *A. B. Caldwell*, for defendant.

VOORHIES, J. This is a petitory action brought by the plaintiff to recover a slave named *Jerry*. He alleges that he acquired said slave, then known as *Spencer*, by donation from his father, prior to the year 1839. That sometime in that year or the next, 1840, said slave was enticed away from his possession in Tennessee, where he resided, and came into the possession of the late *Wm. Laughlan* about twelve years since, and has ever since been in possession of said *Laughlan* or that of the defendant, but without any legal title.

The defendant in her answer avers that her title is derived from *James Stott*, a resident of Arkansas, who sold said slave to the late *William Laughlan*, at Vicksburg, on the 20th November, 1841, for the price of \$740; that *John Gedge* bought him at the syndic's sale of the estate of said *Laughlan*, on the

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18th of June, 1851, and sold him to her on the 18th of August, 1851, and that she, and those under whom she holds, have been in the quiet, public and uninterrupted possession of said slave as owners in good faith more than ten years prior to the institution of the present suit. She therefore pleads the prescription of five and ten years as a bar to the plaintiff's action. There was judgment in her favor, and the plaintiff appealed.

We conclude from the admission of the plaintiff that *William Laughlan* and the defendant had been in the uninterrupted possession of the slave *Jerry* about twelve years previous to the date of the filing of his petition, on the 20th of December, 1854, a sufficient length of time to acquire said slave by prescription with a just title. C. C. 3432. In the absence of proof to the contrary, *William Laughlan* and those holding under him must be presumed to have been possessors in good faith. C. C. 3447, 3448.

But it is contended by the appellant that the sale from *Stotts* to *Laughlan* was an absolute nullity, insufficient to constitute a just title to form the basis of prescription, because it was in contravention of a constitutional and statutory provision of the State of Mississippi, interdicting the introduction of slaves into that State as merchandize or for sale.

Conceding that such an interdiction did exist, of which we cannot take judicial notice, there is no evidence in the record to show that the slave was brought into Mississippi by *Stotts* as merchandize or for sale. Certainly the recital in the sale, that he resided in the State of Arkansas, could scarcely be viewed as affording any proof of such fact, much less the fact that the slave had, as alleged by the plaintiff, absconded in 1839 or 1840 from his residence in Tennessee. Indeed, for aught that appears to the contrary, *Stotts* may have acquired his title to the slave in Mississippi.

A bill of exceptions to the admission of the sale under private signature from *Stotts* to *Laughlan*, in evidence on the trial of the cause below, has been submitted to our consideration. It is objected that there was not sufficient proof of its execution. *W. Pollock*, the only subscribing witness, then resided and continued to reside at Vicksburg until the time of his death, in the fall of 1843. The genuineness of his signature is satisfactorily proved.

The defendant appears to have made a strict, diligent and honest inquiry and search for the vendor, *James Stotts*, at Vicksburg, and at the place indicated in the deed as his residence, in the State of Arkansas, but in vain. It is shown that he had never resided in the parish of Carroll, nor that any one had known him in the State. None of the witnesses in Vicksburg, whose depositions were taken under commission, appear to have been acquainted with his signature or his place of residence.

We think the evidence in the record is sufficient to establish the impossibility of proving the signature of *James Stotts* in any other manner than that to which the defendant has resorted, and that she has brought herself within the rule for the admission of such secondary evidence. 9 An. 227; Greenleaf on Evidence, §§ 574, 569, 572, 575, 604, 606 and 610.

It is, therefore, ordered and decreed, that the judgment of the court below be affirmed, with costs.

## ELIZABETH WILSON v. MOSES HENDRY et al.

When the wife in opposition to a creditor of the husband, in whose favor she had made a formal renunciation, claimed the property mortgaged by him as her separate property—*Held*: that a conveyance of the property to the wife, by act under private signature, not recorded, in which the consideration of the transfer was stated to be a partial payment of the amount due to the wife from her father's succession, without its being shown where the father's succession was opened, or what amount the wife was entitled to inherit, was insufficient to rebut the legal presumption of title in the community.

**A** PPEAL from the District Court of Tensas, *Farrar, J.*  
*L. V. Reeves*, for plaintiff and appellant. *Thomas P. Farrar*, for defendants.

**VOORHIES, J.** On the 1st of January, 1855, *William C. Wilson*, the husband of the plaintiff, executed a mortgage in favor of the defendant, *Moses Hendry*, on a slave named *Jane*, and other property, to secure the payment of a promissory note for the sum of \$1150; in which act the plaintiff made a formal renunciation of her right of mortgage.

The execution of a writ of seizure and sale, obtained by the defendant on this mortgage, was enjoined by the plaintiff in so far as the same related to the slave *Jane*, whom she claimed as her paraphernal property, alleging that she had acquired said slave by inheritance from her deceased father's succession, on the 6th of February, 1850, as evidenced by a transfer to her of that date.

The injunction was dissolved without damages, and she appealed.

Our examination of the evidence has brought us to the conclusion that there is no error in the judgment of the court below. An act under private signature, dated the 6th of February, 1850, purporting to be a conveyance of the slave *Jane* from *Sarah Moore* and her husband, *David Gay*, to the plaintiff for the price of \$650, in part payment of the amount due to the latter from her father's succession, and which does not appear to have ever been recorded, appears to be the only evidence of title in the plaintiff. Nothing shows when or where her father's succession was opened, nor the amount which she was entitled to inherit. This conveyance to her, standing alone, is clearly insufficient, under the well settled jurisprudence on the subject, to rebut the legal presumption of title in the community to said property. C. C. 2335; 5 An. 368.

In *Wiley v. Hunter and wife*, 2 An. 806, where the property mortgaged by the husband to the plaintiff, was conveyed to the wife by her brothers and sisters, and urged as a *dation en paiement* for her share of her mother's succession, her failure to make proof of what that share was, the court held to be fatal to her pretensions. We do not apprehend this to be in opposition to the doctrine of the cases quoted by the appellant's counsel in 1 La. 522; 17 La. 296; 1 Rob. 367; 4 Rob. 115; 2 An. 930, and 5 An. 741, 116.

Under the peculiar circumstances of this case, we do not think justice requires that the appellant should be mulcted in damages, as claimed by the appellee; neither can we allow him any more than the highest rate of conventional interest to which he is entitled under the judgment.

It is, therefore, ordered and decreed, that the judgment of the court below be affirmed, with costs.

## J. P. WALWORTH v. R. C. BALLARD.

Under the 19th Section of the Act of the Legislature of 18th March, 1820, reenacted in 1855, a prosecution criminally and a conviction is a prerequisite to the civil liability of a party sought to be made liable for the debts of a vacant estate on the ground of having taken possession of it without authority, with the intent of converting the same to his own use.

**A** PPEAL from the District Court of the parish of Madison, *Farrar, J.*  
*A. T. Steele*, for plaintiff and appellant. *Stacy & Sparrow*, for defendant.  
**MERRICK, C. J.** The plaintiff being a creditor of *Silas Lillard*, deceased, for \$13,888 18 with interest from February, 1848, has brought the present action against the defendant to make him responsible for the debt.

He bases his right of recovery upon the Act of 18th March, 1820. The 12th Section of which was reenacted in 1855, and is in these words, viz:

"That in case any person shall take possession of a vacant estate or part thereof, without being duly authorized to that effect, with the intent of converting the same to his own use, he shall be prosecuted by information, and on conviction thereof shall be fined, not exceeding two thousand dollars, to the benefit of the State, and shall be, moreover, liable to pay all the debts of the said estate, exclusive of the damage to be claimed by the person who may have suffered thereby." Acts, 1855, 400, sec. 9; Bullard & Curry's Dig., 810, § 2.

The defendant having excepted to the plaintiff's action, the question is presented whether the prosecution by information and a conviction is not a prerequisite to the civil liability of the party to pay the debts of the vacant estate?

We are not aware of anything in our law analogous to the executor *de son tort* of the common law. Hence the authorities from that source can furnish but little assistance on the present question.

Prior to the passage of the Act of 1820, the liability of the person converting the effects of a vacant succession to his own use, was merely in an action in damages to the succession for the amount of the injury sustained.

Perhaps also where all of the goods of the succession were made way with, the creditors might recover to the extent of the injury done him in a demand similar to the revocatory action.

To these remedies, which result from the general provisions of law, the Act of 1820 has, in the case of the taking possession of all or *any part of the effects* belonging to a vacant estate with the intent to convert them to the use of the taker, added, on conviction, 1st, a fine not to exceed two thousand dollars; 2d, a liability to pay all the debts of the estate.

Inasmuch as this liability "to pay the debts of the estate is *exclusive of the damages* to be claimed by the parties who may have suffered thereby," it is seen that the trespasser is responsible to the vacant succession for all the effects he may have taken, in addition to the two penalties denounced against him by the statute.

As the Act is so highly penal, we think that it was the intention of the Legislature to make both penalties depend upon a conviction under a public prosecution. That is, we think, the more natural interpretation of the language used according to its order.

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Moreover, it is hardly to be supposed that the Legislature intended to invest the private citizen with the power, upon the proof of the conversion of an article or two of small value to the use of another, to charge that other with all the debts with which a succession may be burdened, however large they might be.

The administration of criminal justice is much safer in the hands of public officers charged with the prosecution of crimes and offences, than in the hands of private persons governed by such preponderating interests.

The construction we put upon the statute in question is the same as that intimated in the case of *McMasters v. Place*, 8 An. 431, although the point now made does not appear to have been directly decided in that case.

The plaintiff in his petition having failed to allege that the defendant had been convicted of taking possession of the vacant estate or a part thereof, without being duly authorized to that effect, with the intent of converting the same to his own use, the exception is well taken, and the judgment of the lower court must be affirmed.

Judgment affirmed.

SUCCESSION OF JOHN O'KEEFE—On rule taken by G. McCRYSTAL,  
Executor, v. C. DELACROIX.

The purchaser of property at a succession sale delivered to the notary who was to prepare the act of sale and mortgage the cash instalment of the price, and also left with him the notes that were to be given in compliance with the terms of the adjudication. The executor of the estate afterwards asked the notary to give him \$50 of the money on account to pay a bill, which the notary did. The notary afterwards absconded with the balance of the money. *Held*: that the loss should be borne by the purchaser.

In order to make a valid tender the money must be placed in the power of the adverse party. If paid into court, it must be with the intention on the part of the debtor that the creditor shall be at liberty to take it out of court. If deposited with the notary, as the agent of both parties, it must be with the consent that the creditor shall be at liberty to withdraw it if he sees fit, otherwise the money is at the risk of the debtor.

The money and notes could only have been placed at the risk of the succession or executor by a formal putting in default, or by a deposit for the benefit of the succession with the express or implied consent of the executor.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*A. McCarthy & T. W. Collins*, for the executor and appellant. *A. Robert*, for defendant.

MERRICK, C. J. Two lots of ground in the city of New Orleans were sold at a probate sale of property of the succession of *John O'Keefe*, deceased, on the 30th of December, 1854, to the defendant in the rule, for the sum of \$1450, one third cash and the residue on a credit of six, twelve and eighteen months, for which notes were to be given bearing six per cent. interest until their maturity and eight per cent. thereafter, and to be secured by mortgage upon the property sold.

The purchaser delivered to the notary who was to prepare the act of mortgage and sale the instalment of cash on deposit; and, it seems, also left with him the notes.

After the money had been paid to *Monaghan*, the Notary Public, *McCrystal* asked him (*Monaghan*) to give him \$50 dollars on account, for the purpose of enabling him to pay a bill, and the amount was handed to him by the notary. The latter having absconded, the executor demanded, through a Notary Public, a compliance on the part of *Delacroix* with the terms of sale, and on his refusal to comply further than he had already done, he took a rule upon him to show cause why he should not comply with the terms of the adjudication and accept the sale.

This rule is resisted by the purchaser, on the ground that the payment of the money to the notary and delivery of the notes was done with the consent of the executor, and the same is in itself a compliance with the terms of adjudication.

It is contended on the part of the purchaser, that the case is identical with the case of *Breen v. Schmidt*, 6 An. 13; that here as in that case, the vendor having withdrawn a portion of the funds from the notary, must be presumed to have consented to the payment of the money to the notary by the purchaser. But it must be remarked, that in the case cited the decision is placed expressly on the peculiar facts of the case, and on the conclusions of the District Court upon the facts, which the Supreme Court did not feel authorized to disturb.

In the case of *Brown* against the same defendant, in the 7th An. 349, this court, with a slight variation of the testimony, came to a different decision, and, it seems to us, the doctrine cannot be extended beyond the case in the 6th Annual, without violating the well settled law on the subject of tender and payment.

In order to make a valid tender, the money must be placed in the power of the adverse party. If paid into court, it must be with the intention on the part of the debtor that the creditor shall be at liberty to take it out of court. If deposited with the notary, as the agent of both parties, it must be with the consent that the creditor shall withdraw it if he sees fit. If not so deposited, the property in the money remains in the debtor, the notary is his agent and the money is at his risk. C. P. 404, 407; *DeGoer v. Kellar*, 2 An. 496.

In the present case the money was delivered to the notary on deposit. And it does not appear to have been placed there with the consent of the purchaser that it should be withdrawn by the executor. On the contrary, it may be fairly inferred from the manner in which the deposit was made, that neither the money nor the notes were to be delivered to the executor until the further consent of the depositor should be manifested, and a satisfactory certificate of mortgage produced.

Now, did the borrowing of fifty dollars of the notary by *McCrystal* change the character of the deposit, and place the money and notes at the risk of the Succession of *O'Keefe*?

We think this can hardly be affirmed. The money and notes could only be placed at the risk of the succession or executor by a formal putting in default or by a deposit for the benefit of the succession, with the express or implied consent of the executor.

Here the deposit cannot be considered as so made, for the depositor, it is to be presumed, did not intend to part with the control of the property, the money and notes deposited, until he had obtained from *McCrystal* a satisfactory title.

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The money borrowed by *McCrystal* of the notary appears to have been a matter between them, (*McCrystal* and the notary.) It was borrowed "on account." It does not appear to have been demanded of the notary, as money belonging to *McCrystal*, as executor, but as money belonging to the notary, and which was to be replaced probably when the price was received of the purchaser. The money received from the notary was not shown to have been received on account of the succession, and it must be presumed it was for some private object of *McCrystal*.

The unfaithfulness of the notary in loaning to *McCrystal* a part of the funds of his principal, if the money lent was really a part of the same, has proved less injurious to the purchaser than it would have been had the notary been a faithful depositary up to the day *only* of his departure with the whole. What was loaned to *McCrystal* has been saved, and as the latter has offered to return the same to *Delacroix*, who has refused to receive it, it may be considered as so much of the first instalment already in the hands of the executor.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the District Court be avoided and reversed, and that the said rule taken upon the said *Cyril Delacroix* be made absolute, and that he be ordered to comply with the said terms of the sale made the thirtieth day of December, 1854, fifty dollars of the instalment in cash being considered as already in the hands of the executor, to the credit of the said *Delacroix*, and it is further ordered, that the defendant pay the costs in both courts.

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WIDOW JUNEK, Tutrix, v. L. F. HEZEAU.

An appeal from an order submitting a cause to referees is premature and will be dismissed.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J. L. Eyma* and *J. S. Whitaker*, for plaintiff. *J. L. Tissot* and *E. Fileul*, for defendant and appellant.

**BUCHANAN, J.** The defendant has appealed from a decree of the following tenor:

"It is, therefore, ordered, adjudged and decreed, that the plaintiffs are entitled to have an account of all the receipts and expenditures of the whole of the property known as the cemetery of St. Vincent de Paul, and that the books and papers of said cemetery, in whose hands soever they may be, be referred to auditors, to be selected by the parties, in order that an account may be stated between them."

A motion is made to dismiss the appeal on the ground, among others, that "the judgment appealed from is not final, and does not divest the inferior court of its jurisdiction over the case."

We think this ground is well taken. It was decided in *Davis v. Preat*, 6 Martin 422, that an appeal from an order submitting a cause to referees is premature.

It is, therefore, decreed that this appeal be dismissed, at the costs of appellant.

## JAMES W. BOATNER, Administrator, v. STEPHEN YARBOROUGH.

No action lies for the price of fraud. The law leaves parties who traffic in forbidden things and then break faith with each other, to such mutual redress as their own standard of honor may award.

**A**PPPEAL from the District Court of East Feliciana, *Ratliff, J.*  
*Smith & Pond*, for plaintiff. *Bowman & Delee* and *Muse & Hardee*, for defendant and appellant.

**SPROFFORD, J.** This suit is the sequel, and we trust the final sequel, of the case of *Muse, syndic, v. Yarbrough et al.*, decided as far back as 1838, and reported in 11 La. 521.

By the result of that suit, *Elias Boatner* (in whose right this action was brought) was evicted of property estimated to be worth about \$27,000, of which, by the expenditure of about \$5000, the creditors of the original owner, *John Bostwick*, were sought to be defrauded, by means of a scheme first concocted between the present defendant, *Yarbrough*, and the said *Bostwick*, and afterwards persistently prosecuted by their confederate, *Elias Boatner*, deceased.

*Yarbrough* had become security for *Bostwick* to *Reynolds, Byrne & Co.*, in the amount of five thousand dollars. His object was, first, to save this sum, and then to aid *Bostwick* in defrauding his other creditors. For that purpose, he took a mortgage and pledge of all his valuable property, procured from him a confession of judgment for \$5,500, and made a levy upon the property mortgaged and pledged to secure this sum.

At this juncture, on the 14th January, 1834, the deceased, *Elias Boatner*, (whose administrator brings this suit) appeared with *M. Boatner*, and took from *Yarbrough* a notarial transfer of all his interest in the mortgage, pledge, judgment and seizure, for which they promised to give three promissory notes, amounting to \$5,164, and payable respectively on the 1st April, 1834, the 1st November, 1834, and the 1st November, 1835.

After the passage of this notarial act, *Elias Boatner* took control of the execution already levied upon all the property of *Bostwick*, and on the 3d of February, 1834, it was adjudicated to him and his associate *M. Boatner*, for the price of \$5,605, enough to satisfy the judgment confessed by *Bostwick* in favor of *Yarbrough*, and by the latter transferred to *Boatner*.

Having thus, as he supposed, secured the property, *Boatner*, on the 15th of February, gave *Yarbrough* his three notes, as promised in the notarial act of the 14th January, and secured them by mortgage.

The first of these notes, it will be observed, fell due on the 1st April, 1834; but it was not paid.

On the 11th April of that year *Elias Boatner* was served with citation and the petition in the suit of *Muse, syndic, v. Yarbrough et al.* This petition in the name of the creditors of *Bostwick*, who made a cession immediately after *Boatner* had swept off his available property through the judgment in favor of *Yarbrough*, distinctly charged *Bostwick*, *Yarbrough* and *Boatner* with having conspired to defraud the creditors of *Bostwick*, through the machinery of their mortgage, pledge, judgment, transfer, Sheriff's sale and purchase in the name of the *Boatners*, as the following extract will show:

"Your petitioner represents that the said *Yarbrough* and the said *Boatners*

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well knew that the said *John Bostwick* was insolvent, and intended suing his creditors as soon as he had made the arrangement with them by which, as he thought, all of his valuable property would be screened from the claims of his creditors, and knowing this fact, they assisted and participated in the arrangement."

The petition prayed that the judgment, transfer, seizure and sale be decreed to be null and void, on account of the fraud which infected them to the injury of the creditors of *Bostwick*.

Upon the trial of the suit contradictorily with *Boatner* and *Yarborough*, a verdict was rendered in favor of the plaintiff generally. There was judgment pursuant to the rule, and the defendants appealed to the Supreme Court, where they seem to have made common cause in seeking to get rid of the judgment upon purely technical grounds, and not by a denial of the fraud.

The judgment of the District Court was affirmed.

*Boatner's* representative now sues his confederate *Yarborough* to recover the price he was to pay the latter for the mortgage, pledge, judgment and seizure, which have thus turned to ashes in his hands. He contends that *Yarborough* warranted their existence as valid claims, and that the warranty has been falsified by the the eviction which followed the suit of *Muse, syndic*.

He alleges that he has paid the three notes he gave for the price. *Yarborough* denies this fact, and in support of the denial produces the original notes uncanceled.

But *Boatner* says that the contract was in effect novated, by giving another note of \$8,000 to *Yarborough*, which the latter surrendered in execution under the judgment of *Reynolds, Byrne & Co.* against himself as surety for *Bostwick*, for which he took the mortgage and pledge as an indemnity. This note of \$8000 the plaintiff contends was given in lieu of the first three notes, and was bought in on twelve months' credit by *Boatner*, the maker, when it was sold under the judgment of *Reynolds, Byrne & Co. v. Yarborough*, and that having paid his twelve months' bond to *Reynolds, Byrne & Co.*, on the 27th of June, 1836, he has thus extinguished the obligation he gave as the price of the claims of *Yarborough* against *Bostwick*. In confirmation of this view, he relies upon the fact that *Yarborough*, on the 3d of January, 1837, cancelled the mortgage given him by *Boatner* to secure the payment of the first three notes.

If these assertions be true, as conjectured by the District Judge, they convict *Boatner* as a conspirator with *Yarborough* to carry out a scheme of fraud after full notice.

For it will be observed that the \$8000 note was given by *Boatner* to *Yarborough* on the 25th April, 1834, payable 1st June, 1836, and we have already stated that the petition of *Muse, syndic*, against *Yarborough* and *Boatner*, to annul their transactions, was served upon *Boatner* on the 11th April, 1834. An innocent purchaser in good faith, after service of that petition, could not have renewed and augmented his obligations to a fraudulent vendor who had deceived him.

The District Judge says it is clear that *Boatner* has paid for *Yarborough's* execution that *Reynolds, Byrne & Co.* issued against the latter, that he has been evicted from the claims and mortgages which the latter transferred to him, and that it is but sheer justice that one who has thus paid the debt of another should be reimbursed. That *Yarborough* was under a natural obligation to reimburse *Boatner* may be conceded.

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But judicial tribunals should not be called upon to adjust the balance of profit and loss between joint adventurers in iniquity. No action lies for the price of fraud. The law, whose mission is to right the innocent and to enforce the performance of licit obligations only, leaves parties who traffic in forbidden things and then break faith with other, to such mutual redress as their own standard of honor may award.

It is, therefore, ordered, that the judgment of the District Court be avoided and reversed, and this suit be dismissed, the plaintiff paying costs in both courts.

MEERICK, C. J., recused himself, having been of counsel for defendant.

### L. H. DEARMOND v. ELIZA M. COURTNEY.

Although the entire interest of a co-heir in a succession fallen to him may be seized and sold under execution at the instance of a creditor of the heir, the Sheriff is not dispensed from the necessity of seeing that a description of the property seized be given in as accurate a manner as the nature of the case will allow, so that bidders may know what they are bidding for, and the property of the debtor may not be unnecessarily sacrificed.

When the proportion of the heir's interest in the succession was not given, either in the return of the Sheriff or the advertisement of the sale, and it did not appear how many heirs there were, nor of what property the succession consisted, nor what was the amount of the inventory, the sale was properly declared illegal and void.

As the plaintiff, previous to bringing his action to annul the judgment, made a tender of the amount for which his rights in the succession had been sold, and which had gone to the payment of his judgment debtor, it was not necessary to make him a party to the suit to annul the Sheriff's sale.

**APPEAL** from the District Court of East Feliciana, *Ratliff, J.*  
*J. O. Fuqua*, for plaintiff. *Muse & Hardee*, for defendant and appellant.

**SPOFFORD, J.** The defendant appeals from a judgment annulling a Sheriff's sale at which she was a purchaser.

The plaintiff, before attacking the validity of the sale of his property, made a tender of the amount which the defendant had bid for it, and which had gone to the satisfaction of his judgment debts. As equity and good conscience required, the defendant has been allowed that sum in the judgment from which she appeals.

Three defects are specially relied upon in the plaintiff's petition as reasons for annulling the sale. It is necessary to notice but one.

He alleges that "neither the seizure made by the Sheriff nor the advertisement under which said pretended sale was made, contained any such description of the property pretended to be seized and sold as is required by law, nor any such description as would enable the appraisers properly to estimate the same, or the bidders to know what they were buying."

The description was this: "All the right, title, interest, claim and demand of the defendant, *L. H. Dearmond*, in and to the succession of his mother, *Elizabeth Dearmond*, late of said parish, deceased, and all the right, title, interest and claim of said *Levi H. Dearmond* in and to the movables, immovables and slaves of which said succession is composed."

Under the strict rules which have been applied to forced expropriations of property, we think this description was too vague.

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It is true the eventual interest of an heir in an unliquidated succession is generally very hard to be appraised. Such a sacrifice of property was apprehended from this source in France that the Napoleon Code (Art. 2205) forbade the personal creditors of the heir to expose at sale the undivided portion of a co-heir in the immovables of a succession prior to a partition. And in our former Code this prohibition was perhaps wisely extended still further: "The undivided share belonging to a co-heir in a succession cannot be seized on execution, but the creditors have the right to demand a partition of the estate between the co-heirs." Code of 1808, p. 490, Art. 6.

In the new Code this Article was omitted, and in *Noble v. Nettles*, 3 R. 153, it was held to have been repealed by the great repealing statute of March 25th, 1828. In that case, and the subsequent case of *Mayo v. Stroud*, 12 R. 106, the doctrine was recognized that the *entire interest* of a co-heir in a succession fallen to him may be seized and sold under execution at the instance of a creditor of the heir by pursuing the requisite formalities. The warrant for such a doctrine was held to be found in the Article 647 of the Code of Practice, which declares that "if the debtor has neither movables nor slaves nor immovable property, the Sheriff may seize the *rights and credits* which belong to him, and all sums of money which may be due to him in whatsoever right, unless it be for alimony or salaries of office."

But this doctrine does not dispense the Sheriff from the necessity of seeing that a description of the property seized be given in as accurate a manner as the nature of the case will allow, so that bidders may know what they are bidding for, and the property of the debtor may not be unnecessarily sacrificed, as it appears to have been in this instance. In this case the proportion of the heir's interest in the succession was not given either in the return of the seizure or the advertisement of sale. It did not appear how many heirs there were, nor of what property the succession consisted, nor what was the amount of the inventory.

In *Gales v. Christy*, 4 An. 295, our predecessors held that "the judicial sale to the plaintiff of the rights, interests, claims and demands of the heirs of *Thomas Beale, sr.*, in right of their inheritance of their deceased father, on their mother and tutrix, was void, by reason of the vagueness and insufficiency of the description of the thing sold. The nature of the rights, interests, claims and demands should have been stated in such a manner as to give bidders a clue to their value. Art. 647 of the Code of Practice, authorizing the seizure of the rights and credits of the debtor when he has neither movable nor immovable property nor slaves, does not dispense with a proper description of the rights and credits seized. The seizure and sale in this case were illegal and void."

The present case falls within the reason of the rule thus announced in *Gales v. Christy*.

The appellant contends that the plaintiff is concluded by a judgment homologating the final account of the administrator of the succession of *Elizabeth Dearmond*, whereon the defendant was placed as the transferee of his interest as heir by virtue of the Sheriff's sale. But the plaintiff was not a party to that decree, and is not bound by it.

It was also contended, at a late stage of the proceedings in the court below, that the plaintiffs in execution, under whose judgments the defendants in this suit purchased, should have been made parties to the present action. They

have no interest in it, as the money which they received from the purchaser at the Sheriff's sale has been refunded to her by the judgment, and she can have no claim upon them. She is reinstated where she stood before the purchase, and justice has been done to all parties.

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Judgment affirmed.

MERRICK, C. J., recused himself in this cause, having been of counsel.

# L. N. & S. J. BENNETT v. MARY C. BENNETT, Administratrix, et al.

The adjudication to the husband of property as held in common with the minor children, when such property was in fact the paraphernal property of the deceased wife, does not divest the children of their title.

It is such a title sufficient to form the basis of prescription under Article 8444 of the Civil Code.

**A**PPPEAL from the District Court of the Parish of East Feliciana, *Ratliff, J. Musc & Hardee*, for plaintiffs. *Ellis & Haynes*, for defendants and appellants.

**VOORHIES, J.** This is an action of partition. In 1853 *Bartholomew Bennett* died intestate in the parish of East Feliciana, where his succession was opened. His first wife, *Sarah Bennett*, died in 1828, leaving four children as the issue of her marriage with him, to wit: *Nancy Leonora, Sarah Jane, Virginia* and *Loretta Ann Bennett*. On the 8th of August, 1838, he caused all the property to be inventoried as acquets and gains of the community, and to be adjudicated to him at the price of the appraisement under the advice of a family meeting held on the 28th of the same month. This appears to have been the only step taken by him in relation to the settlement of the estate of his deceased wife. It does not appear that he ever rendered any account as natural tutor to his minor children. His daughter *Virginia*, married to *Matthew Bowman*, died in May, 1841, leaving an infant, who survived her until the 17th of June, 1841. *Loretta Ann* died in 1850, leaving her father and two sisters, *Nancy Leonora* and *Sarah Jane*, the plaintiffs, as her legal heirs. By his marriage with *Mary C. Flynn*, the defendant, the deceased left six minor children, to wit: *Emma, Lucinda, Cynthia, Orra Amanda, Mary* and *Zachariah T. Bennett*, represented by their mother and natural tutrix, and *William W. Chapman*, as under tutor, who is also a party to this suit. *Emma* was born the 3d of December, 1849, and died the 11th of September, 1856. The plaintiffs claim a slave named *Letty* and her increase as the separate or paraphernal property of their mother, *Sarah Bennett*, who acquired the same under the last will of her deceased father, *Jesse Bennett*; which last will was declared to be valid by the then Parish Judge, on the 29th of November, 1819, and duly recorded in his office. The testator required that the slave *Letty* should be appraised, and after deducting the amount of her hereditary share from such appraisement the legatee was required to account to his co-heirs for the surplus.

From the documents annexed to the bills of exceptions in the record, which we think should have been admitted on the trial below, the following facts may be deduced in relation to *Jesse Bennett's Succession*: On the 7th of October, 1820, the movables were sold at auction and produced the sum of \$535 81.

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On the 8th of June, 1822, a partition of the slaves, estimated at \$3858, in which the sum of \$350 was included as the value of the slave *Letty*, was made between the widow and heirs of the deceased, allotting to the former, under the will, the sum of \$2900, and to each of the heirs the sum of \$86 36 4-11, after deducting their respective collations and adjusting their several accounts. The account of *Sarah Bennett* is thus stated:

|                                          |              |
|------------------------------------------|--------------|
| "Her share.....                          | \$86 36 4-11 |
| Balance due her on payment of debts..... | 2 40         |
|                                          | \$88 76      |
| Deduct amount of her collations.....     | 70 00        |
| Amount due her.....                      | \$18 76"     |

From this we think it is clear that the title to the slave *Letty* was vested in *Sarah Bennett* as her paraphernal property. It is equally clear, under the decision of the *Rivas* case, 13 L. 160, that the adjudication to *Bartholomew Bennett* did not divest his children of their title to this property.

But it is contended, that the receipt of the price by the plaintiffs, particularly *Nancy Leonora*, amounted to a ratification of the adjudication. Were we to give full effect to the deposition of *A. Levi*, annexed to the defendant's bill of exceptions, still we do not think the evidence would be sufficient to establish a legal ratification, 13 L. 175.

We think it is clear that the alleged adjudication is not a sufficient title to form the basis of the prescription relied upon under Article 3444 of the Civil Code, as it is not a title translatif of property in the slave *Letty*. From the view which we have taken of the case, it follows that the interest of the respective parties in the slaves in question must be regulated in the following manner, to wit: On the death of *Loretta Ann* one-fourth of her interest descended to her father and the remainder to her sisters, half-sisters and half-brother, in accordance with Article 909 of the Civil Code. On the death of *Emma*, the one-fourth of her interest vested in her mother and the remainder in her sisters and brother, as in the other case. The hire of the slaves must be regulated on the same principle. From the evidence we are not prepared to say that there is any material error in the conclusion of the Judge *a quo* as to the hire of the slaves. All the heirs are entitled to claim the hire or revenues derived from the slaves held as the separate property of their deceased father. The estimate fixed therefor does not appear to us to be unreasonable.

By the admission of the parties in the record it appears that the sum of \$500 was paid as the price of the slave *Peter*; during the existence of the community. As this payment does not appear to have been made with the separate funds of the deceased, we think the Judge *a quo* erred in refusing to allow it as a credit to the community.

The Judge also erred in referring the parties to a notary to make a partition between them without having previously directed the manner in which the same should have been made, either in kind or by licitation. C. P. 1027: C. C. 1267; 1 R. 512.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed, and that the cause be remanded for further proceedings according to law, the plaintiffs and appellees to pay the costs of this appeal.

Mr. C. J. MERRICK recused himself as having been of counsel.

## BENJAMIN ORR v. HOME MUTUAL INSURANCE Co. et al.

Insurance companies cannot be made liable in an action for damages, for having conspired and agreed with each other that they would not insure any boat in which a particular person should be employed, in order to prevent that person from obtaining employment.

The defendants had the right, separately or acting in concert, to decline taking any risk in any boat on which the plaintiff should be employed as master.

Courts can enforce only legal obligations and redress injuries to legal rights.

**A**PPPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Tappan & Holt, Benjamin, Bradford & Finney*, for plaintiff and appellant. *M. M. Cohen, George Eustis and J. B. Eustis*, for defendants.

MERRICK, C. J. This action is brought to recover of the defendants, three insurance companies, damages for a conspiracy. The plaintiff alleged in his petition, in substance, that he was the master of the steamboat *Red River*, that he was receiving one hundred and fifty dollars per month as wages; that by means of his skill and experience and good reputation he was able to obtain employment and earn a competent livelihood for himself and family; that the defendants maliciously, and without any cause except that the plaintiff, under the instructions of the owner of the said steamboat, had charged eight dollars per bale freight on certain cotton, and five dollars per barrel on certain beef and tallow, and two and one-half dollars per barrel for sundries taken from the steamboat *Julia Dean* at Jacksonport, on White River, to New Orleans, which, on account of the difficulties of the navigation, were reasonable charges, combined and confederated together and agreed that they would not insure anything on any steamer on which the plaintiff might be employed, nor adventure any risk on such steamer, by reason whereof the owner of the steamboat *Red River* discharged petitioner from his occupation as master on said boat, and petitioner finds himself excluded from his business of steamboat navigation and from all useful and honorable employment, and deprived of all means of livelihood for himself and family, and that he has been damaged \$30,000.

The defendants excepted on the ground that plaintiff's petition disclosed no cause of action. The exception was sustained, and the plaintiff has appealed.

Undoubtedly, either of the defendants had the right separately to decline taking any risk on any boat on which the plaintiff should be employed as master. Nor could the motives of the company be questioned; whether they were malicious and with the sole design of injuring the plaintiff or not, would be entirely immaterial in a legal point of view so long as there was no contract on their part and no legal obligation to insure such boat. Courts can enforce only legal obligations and redress injuries to legal rights. 4 Rob. 68; 8 Rob. 84.

Does the fact that the three insurance companies conspired and agreed with each other that they would not insure on any boat on which the plaintiff should be employed, in order to prevent him from obtaining employment, change the character of their acts?

It is difficult to perceive in what respect the combination of three insurance offices out of all of the companies of this city should change the character of acts otherwise conceded to be lawful. The companies had the right to say,

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separately, that they would not insure any boat on which the plaintiff should be employed, and we can see no good reason why the three companies, whether they felt themselves aggrieved by plaintiff's charges or not, might not say so in concert.

We have not deemed it necessary to advert to the distinctions of the common law on the subject of the indictment for a conspiracy, and the action on the case in the nature of a conspiracy, nor to consider whether cases may not arise in which combinations to do acts otherwise lawful may not occasion injuries which will sustain a civil action.

It is sufficient for the purposes of the case to decide that the facts alleged in this case are not sufficient to sustain the action. The inconvenience which the plaintiff has suffered is but a *damnum absque injuria*.

Judgment affirmed.

### HENRY E. MOORE v. CORNING & Co. et al.

The plaintiff residing in Missouri sent an endorsed note to *J. J. Anderson & Co.* at St. Louis, with instructions to forward the same for collection to New Orleans, where it was payable. The note was sent to *Corning & Co.* at New Orleans, who caused it to be protested by a notary for non-payment. The notary, under the instruction of his employers, sent the notice of protest for the endorser to *J. J. Anderson & Co.* Held: that the notary was exonerated from the obligation of giving notice to the endorser.

The agents, *Corning & Co.*, were only bound to give notice of the dishonor of the note to their principals, and could not be held liable to the plaintiff whose interest in the note was not disclosed to them by their principals.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Thomas Hunton*, for plaintiff and appellant. *George Eustis*, for defendants.

**VOORHIES, J.** The plaintiff seeks to make the defendants liable, *in solido*, for the payment of a note of which *L. T. Leblanc* was the maker, and *W. Beaty* the endorser, as damages. He alleges that said note, which he held as endorsee, was enclosed by him to *J. J. Anderson & Co.*, at St. Louis, with instructions to forward the same to New Orleans, where it was payable at the banking house of *Benoist, Shaw & Co.*, for collection; that it was accordingly sent to *Corning & Co.*, who caused it to be protested for non-payment, by *Thomas Layton* as notary public; and, that in consequence of the latter's failure to give legal notice of protest, the endorser was discharged, and the maker proved to be insolvent.

The grounds disclosed by the evidence, in our opinion, are insufficient to make the notary liable. The note clerk of *Corning & Co.* testified on the trial below, that he instructed the notary, under the authority of his employers, to inclose the notice of protest for the endorsers to *J. J. Anderson & Co.*, at St. Louis. The clerk of the notary shows that no inquiry was made as to the residence of the endorser; that he enclosed under those instructions the notice of protest for *Beaty* and *Moore* to *J. J. Anderson & Co.* at St. Louis, and also mailed one to *LeBlanc* at *Plaquemine, La.*, where the note appears to have been made and dated. It is, therefore, obvious that the notary was thereby exonerated from the obligation of giving notice to the endorser according to the requirements of the statute of 1827.

Neither can *Corning & Co.* be held liable to the plaintiff, whose interest in the note was not disclosed to them by *J. J. Anderson & Co.*, for whom they acted as agents. Under the well settled rule of the commercial law, which we consider undisturbed by the statute of 1827, providing a new and convenient mode of proof, they were only bound to give notice of the dishonor of the note to their principals, and not to the endorser, even had they known his residence. 12 R. 127; 1 A. 369, ; 9 A. 27.

Judgment affirmed.

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### THOMAS S. MORGAN v. C. C. LATHROP.

The defendant, who was a private banker, being sued for a cash deposit made with him by the plaintiff, pleaded, by way of reconvention, that he had credited the amount on a protested draft of the plaintiff in his favor for a larger amount. *Held*: That plaintiff and defendant being both residents of New Orleans, and the reconventional demand not being connected with plaintiff's original demand, proof of the reconventional demand was properly rejected.

Conceding the answer to be equivalent to a plea in compensation, the defence could not be sustained, because, under our jurisprudence, as now settled by frequent decisions, compensation does not take place in the confidential contracts arising from irregular deposits of this nature.

The depositary is not authorized to apply the funds on deposit in his hands to the payment of the debts of the depositor, except there is a special mandate from the depositor, or a course of dealing which will justify such application of the funds.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*Bejamin, Bradford & Finney*, for plaintiff. *M. M. Cohen*, for defendant and appellant.

MERRICK, C. J. The plaintiff sues the defendant for \$615 39, it being the balance of cash on deposit with the defendant, on the 24th day of May, 1853, as a private banker, conducting business under the style of "Insurance and Banking Agency."

Defendant reconvenes, and, admitting that there was that amount in his hands to the credit of petitioner, alleges that he indorsed (credited) it on a bill of exchange dated 23d day of March, 1853, payable thirty days after date, to the order of defendant, for fourteen hundred dollars, and drawn on *George Nichols*, of Shreveport, La., and protested for non-payment. The defendant claims judgment for the balance due upon the draft, after crediting the balance on deposit in favor of the plaintiff.

On the trial, the defendant offered the testimony of *O. P. Miller* and others to prove the facts set forth in his answer and plea in reconvention, and that, having received the money sued for, as a banker, according to the custom of banks and bankers, he had a right to withhold the same on account of debts held by him against *Morgan*.

We are not prepared to say that the Judge erred in excluding this testimony. There was no allegation in the answer that there was any particular custom in New Orleans more favorable to banks and bankers than other persons holding money on deposit, and the witnesses appear to have been offered to express an opinion on plaintiff's case. Both plaintiff and defendant being residents of New Orleans, the reconventional demand not being connected with plaintiff's original demand, could not be maintained, and proof of the same was properly refused. But if it be conceded that the answer is equivalent to a plea in com-

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pensation, still we think the defendant must fail in his defence. For whatever might be the opinion of the court, were the question presented for the first time under Article 2934 of the Civil Code, we think it must now be considered as settled law, in the confidential contracts arising from irregular deposits of this nature, that compensation does not take place, and that the depositary is not authorized to apply the funds on deposit in his hands to the payment of the debts of the depositor, except there is a special mandate from him, the depositor, or a course of dealing which will justify such application of the funds. See *Breed v. Purvis, Wood & Co.*, 7 An. 35, and *Bludworth v. Jacobs*, 2 An. 25; 10 Rob. 200; and *Bogart, Williams & Co. v. Egerton*, 11 An. 73.

The conclusion arrived at by this court in the cases cited, is in conformity with those of Toulhier and Marcadé on Article No. 1293 of the Napoleon Code, which is identical with Article 2207 of our own code. This Article declares that compensation does not take place against a demand for the restitution of a deposit or a loan for use.

The argument is briefly this: under the Roman law and the former law of France, (and the same may be said of Louisiana,) compensation did not take place in the case of an irregular deposit. *Legis. 24 and 25, Dig. 16, 3; Pothier on Obligations, sec. 625.* The Article ought to be understood as embracing the principle of the Roman law as to irregular deposits, because, as it is not possible that compensation can take place in the case of the regular or special deposit, it is but reasonable to suppose that the law-giver was not formally prohibiting that which was impossible, but, on the contrary, that he was prohibiting something which, without the prohibition, might easily happen. For example, if a suit be brought to recover a specific thing, as a watch, or a packet of notes enclosed, or a sealed box of coins, the action is for the identical thing deposited, and it partakes of the nature of an action in revendication. *C. C. 2932, 3189.*

It is obvious that compensation cannot be pleaded against an action of this kind, because compensation can only take place where a sum of money or a quantity of consumable things is demanded. On the other hand, in the irregular deposit, it is not expected that the identical thing deposited will be returned, but only an equal quantity of other things of the like kind. There is then, in the nature of things, nothing which prevents compensation from taking place in the case of the irregular deposit, where the plaintiff, from other causes, owes the defendant an equal sum of money or quantity of consumable things as those demanded of the depositary, except the confidential relation in which the depositary stands towards the depositor. It is, therefore, but reasonable to conclude that the Legislature intended to prohibit compensation from taking place in the irregular deposit on account of the confidential nature of the contract. See *Pothier on Obligations, No. 625; 7 Toul. No. 385; 4th Marcadé, Art. 1293, No. 830.*

The force of the argument is somewhat weakened from the fact that compensation is also prohibited in the case of the loan to use, the *commodatum*. As compensation cannot take place in this kind of contract any more than in the special deposit, it may be replied that the Legislature might as well be understood to prohibit the one as the other, particularly as Article No. 2934 has declared that the only real deposit is where the depositary receives a thing to be preserved in kind, without the power of using it, and on the condition that he is to restore the identical thing.

If, however, compensation in the case of the irregular deposit is not prohibited by Article 2207 of the Civil Code, then that portion of the Article cited is entirely meaningless and absurd.

Although the case is not free from difficulty, on the whole we conclude that the judgment of the lower court ought to be affirmed.

Judgment affirmed.

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WIDOW BERNY DOUVILLE v. SUN MUTUAL INSURANCE COMPANY OF NEW YORK.

Where, by the terms of the policy of insurance, the party desiring to be insured, upon any particular shipment of merchandise, was bound to present to the Insurance Company an invoice of the goods, and pay or secure the premium to the company—*Held*: That on a policy of insurance in this form, there must necessarily exist as many contracts of insurance as the endorsements upon the policy of separate shipments of goods; that such contracts only became complete when the invoices of the goods were presented and endorsed upon the policy.

The assured under such a policy could not recover from the underwriters for the loss of goods the shipment of which did not appear by any bill of lading, and of which no invoice had been furnished to the company previous to the loss.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*J. Bermudes and E. Filleul, for plaintiff. G. Schmidt and J. A. Maybin, for defendants and appellants.*

MERRICK, C. J. This suit is upon a policy of marine insurance. As we shall decide this case upon a single point, we do not deem it important to recapitulate all the facts, nor to notice the other questions presented by counsel in the elaborate briefs and arguments presented in this case. We shall assume that the plaintiff had an insurable interest in the goods lost; that the suit was brought by proper parties, and that the preliminary proof was made.

The original policy which was delivered on the fourteenth day of December, 1850, and was on goods and merchandize to be laden on board ——— vessels, contained this clause:

"This insurance is declared to be on merchandize, as interest may appear, adding ten per cent. to invoices. The risks to attach from the time of shipment, which are to be reported to the insurers (on receipt of invoices) for indorsement."

On the 13th March, 1854, this modification was indorsed on the policy: "It is agreed that this policy shall cover merchandize to the address of the assured, from European ports to New Orleans, via Boston or New York, subject to additional premium as per tariff."

*Amélie Berny Douville*, a member of the firm in which the plaintiff held the chief interest, having, in the summer of 1854, purchased a quantity of goods in Paris for the house in this city, wrote home, on the seventh of September, that his purchases were made, with the exception of a few articles for which he should wait until the last moment, in order to have the latest fashions; and he announced that he had retained his passage aboard the steamer *Arctic* for the 20th of September, and that he would leave Paris on the 15th or 16th for London, to purchase fashions and "nouveau-tés."

After this letter was received, viz: about the 8th or 10th of October, a clerk of the firm informed the agent of the Insurance Company that *Mr. Douville*

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was about to leave France with goods by the Arctic. The clerk was informed at the insurance office, "that it was all right, but that they would be compelled to wait the receipt of the invoice, in order to indorse this on the policy."

It is apparent, that at this time the members of the plaintiff's firm in New Orleans had no knowledge whether *Amédée Berny Douville* had carried out his intention of purchasing more goods in Paris or not, nor what was the amount of goods he intended to bring with him; hence, at this time, there was nothing definite agreed upon which could be indorsed on the policy, and no premium was offered to be paid the company.

*Amédée Berny Douville* and a *Miss Eliza Revelle* (who was also sent out to Paris to assist in the purchases) sailed in the Arctic and perished in that ill-fated vessel.

Sometime after the loss of the steamship was ascertained, an agent of the house in Paris informed them by letter of the amount of goods which it was supposed *Mr. Douville* and *Miss Revelle* had with them, and furnished a list showing the amount and value and the various houses in Paris from whom the merchandize was purchased. The amount was 16,565 95-100 francs. The goods never reached New Orleans.

The testimony renders it probable that this amount of merchandize was packed in the trunks of these two persons and lost with them on the 27th of September. No bill of lading appears to have been taken of the steamer, nor any other evidence that the merchandize was shipped as a part of the cargo of the vessel. How these goods were carried in the trunks of the parties through England, is not explained.

After the list of articles was received from the agent in Paris, and the loss ascertained, the list was presented to the insurance office. The company refused to indorse it upon the policy or pay the loss.

It appears that goods to the amount of about 180,000 or 190,000 francs were purchased in Paris that season, after the departure of *Douville* from New Orleans, and only invoices to the amount of say \$8166 were indorsed upon the policy previous to the information of the loss of the Arctic, viz: were indorsed on the 28th day of September, 1854.

This suit was instituted against the Insurance Company on the 25th day of October, 1855. Judgment was rendered against the defendants, on the verdict of a jury, for \$3229, and the defendants appealed.

The question is presented by this state of facts, whether there was any contract of insurance relative to the goods lost upon the Arctic?

We think it must be answered in the negative. By the terms of the policy, the party desiring to be insured upon any particular shipment of merchandize, was bound to present to the Insurance Company an invoice of the goods and pay or secure the premium to the company. When this was done and the amount of the invoice was indorsed upon the policy, the contract for insurance was complete. The plaintiff was not bound by her contract to report to the Insurance Company the 180,000 francs in value of purchases made by her firm in Paris, on the one hand, nor could the company demand of her the premium on this large amount, on the other. On a policy of insurance in this form, there must necessarily exist as many contracts of insurance as there are indorsements upon the policy of separate shipments of goods. The delivery of the policy four years previously did not constitute a contract of insurance upon goods which might be shipped by the Arctic. Something more was required,

viz: consent on the part of the plaintiff, a production of her invoices and the payment of the premium on her behalf, and a communication of the unusual manner in which these goods were intended to be brought over, viz, in the trunks of a partner and an employée of the house, as baggage; and on behalf of the company, an agreement to take the risk in this form. Nothing of this kind occurred. The company were informed that some goods were to be sent out by the Arctic, the unusual manner in which they were to be sent was not communicated. No amount was stated to the company, for the agents of the plaintiff did not then know what quantity of goods would be sent. No premium was offered, and if the Arctic had arrived in safety, the company would have been without power to collect the premium: the plaintiff would have been under no legal obligation to have paid it. The reply of some officer at the insurance office, that it was "all right," when informed that it was expected that goods would be brought out by the Arctic, was coupled with a reference to the terms of the policy which shows that the company did not intend to bind themselves beyond it. They informed the clerk "that they would be compelled to wait the receipt of the invoice, in order to indorse this on the policy." That reply, therefore, of some officer of the company, even if he had power to bind the company beyond the terms of the policy, created no obligation. Nothing was agreed upon beyond the policy. How then can it be construed to cover the loss of goods packed in the trunks of travellers, not subject to the payment of freight, nor covered by bills of lading, nor stowed with the cargo, nor contained in covers or boxes commonly subject to entry at the custom-house?

The company has a right to stand upon its written policy, and say to the plaintiff: *Non in hac federa veni*. The goods were not, in a legal sense, *laden* on board the Arctic, nor were the invoices presented or premium offered, until the loss was ascertained.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment against the demand of the plaintiff and in favor of the defendants, and that the plaintiff pay the costs of both courts.

#### HENRY BOYLE v. SUCCESSION OF ANDREW LEITCH.

The ownership of real estate can only be established by a written title.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*Elmore & King*, for plaintiff and appellant. *Durant & Hornor*, for defendant.

BUCHANAN, J. *John J. E. Massicot* sold to *Andrew Leitch*, on the 7th of June, 1851, by notarial act, a lot of ground in Conti street, between *Villeré* and *Robertson*, for a price payable partly in cash and partly in notes of *Leitch* endorsed by *Andrew Huey*.

It appears that *Leitch* was in partnership in the draying business with *Huey*. A building was put upon the lot in question, which was paid for by *Leitch & Huey*. *Leitch* died in September, 1853.

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The plaintiff, assignee of *Huey*, brings this suit against *Leitch's* widow and administratrix for one-half of the lot and building.

The building contract and receipts for payments on the same, in the name of *Leitch & Huey*, were offered in evidence by plaintiff, for the purpose of proving the ownership of the lot. They were properly rejected by the court. The transfer of real estate can only be shown by a written title. C. C. 2255; *Heiss v. Cronan*, 12 An. 213.

Judgment affirmed, with costs.

ANN MARIA BARCLAY, f. w. c. v. E. W. SEWELL, Curator.

The plaintiff was the slave of a citizen of Louisiana, by whose formal act and consent she was emancipated, in the year 1839, in the State of Ohio, where she was carried for that purpose. She subsequently returned to Louisiana and has been residing here since as a free person of color, her former master also residing here. *Held*: That she did not forfeit her freedom thus acquired abroad, by returning to the State. Such penalty is not imposed upon free persons of color for returning to the State in contravention of law. The Act of the Legislature in 1845 does not prohibit an express emancipation of a slave in a foreign State by a master resident in Louisiana. It only guards against manumission being implied from the mere fact that the slave, whether with or without the consent of the master, has been upon the soil of a territory where slavery is prohibited.

**A**PPEAL from the Second District Court of New Orleans, *Morgan, J. C. Roselius*, for plaintiff. *J. S. Whitaker*, for defendant and appellant. *SPOFFORD, J.* The case comes up on the following state of facts:

"It is admitted that the plaintiff acquired by purchase and paid for the property claimed in this suit, and all further testimony on that subject is dispensed with; the only question submitted and to be decided by the court is, whether the plaintiff has the legal capacity of holding property.

"It is admitted that plaintiff was absent for two months in the State of Ohio, where she was emancipated, and that ever since that time she has been residing here as a free person of color, and that *G. A. Bötts* (her former master) has been residing in this city as a citizen of Louisiana."

The emancipation of the plaintiff in Ohio took place in the year 1839, and shortly afterwards, in the same year, she returned to Louisiana.

The question is, did the plaintiff, in 1839, come from Ohio into Louisiana clothed with the *status* of a free person of color? If she did, no subsequent legislation in Louisiana has changed that *status*.

The power of the master to manumit his slave within the limit of Louisiana, has always been qualified by her laws; but no law of Louisiana in existence in 1839, placed any restraint upon the power of the master domiciled here, to manumit a slave in a foreign State who had been carried thither for that purpose.

There is no question but that it was lawful in Ohio for a master resident in Louisiana, to disfranchise his slave who had been carried thither.

There is no question but that the emancipation in this instance was complete and formal under the laws of Ohio.

There the slave became free by the formal act and consent of her master. Her *status* was changed.

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Upon her subsequent return hither, did she relapse into her original condition? Not unless some law of Louisiana in force at the time entailed such a penalty upon her for her return.

We have been referred to no such law; we think there was none.

Something has been said about the general policy of the Louisiana Legislature; it was undoubtedly always adverse to the indiscriminate manumission of slaves, and now it has become altogether prohibitive of emancipations in the State, probably in consequence of injudicious and impertinent assaults from without upon an institution thoroughly interwoven with our interior lives.

But we find that in 1830, the Legislature recognized the validity of such emancipations as the one under consideration. In an Act embodying certain police regulations as to free persons of color it was declared, that "these provisions shall not be construed to extend to any free negro, mulatto, or other free person of color, who may have been a slave in this State and who shall have, *with the consent of his owner*, been emancipated in any other State of the Union, and shall have, after such emancipation, returned to this State." (Acts 1830, p. 94, sec. 16.) Nothing in this statute prohibited thereafter, even by implication, a mode of emancipation thus expressly recognized as lawful up to that time. And we have been able to find no legislative act previous to the plaintiff's manumission, which would involve such a marked change in the law.

The dangers supposed to flow from an increase in the free colored population out of the rank of slaves, were thought to be sufficiently guarded against by the stringent provisions against free people of color coming into the State. The plaintiff went away a slave; in Ohio she became free by a lawful act of manumission from her master; upon her return hither she subjected herself to all the penalties imposed upon free persons of color for entering the State in contravention of law. But we do not find one of those penalties to have been a forfeiture of her freedom acquired abroad. She could be ejected from the State; but she could not be reduced to slavery by the master who had emancipated her—nor did he ever resume his dominion over her.

The Act of March 16th, 1842, confirms this view of the law as it stood in 1839. That Act prohibited, for the first time, the carrying of slaves out of this State into free States; but so far from implying that their condition could not be changed by such a removal it implies the reverse, by providing that slaves so removed shall be subject to all the penalties and regulations provided for in this Act or in preëxisting Acts, against *free persons of color* coming into the State. Acts 1842, sec. 9, p. 314. And the next section goes on to declare that nothing in the Act shall be construed to deprive an inhabitant of the State of his right of property in a slave who, *contrary to the consent and will of his master*, shall have gone out of the limits of the State into any other State or territory of the Union, or in any foreign country where slavery does not exist; and that said owner, in case he shall recover the possession of his slave, shall be entitled to his full property, and such slave shall not be admitted to claim his freedom, because he has set his foot upon a soil where slavery is not acknowledged.

The Act of May 30th, 1846, (Acts p. 163,) went one step further, and declared that from the passage thereof, no slave should be entitled to his or her freedom, under the pretence that he or she had been, *with or without the consent of his or her owner*, in a country where slavery does not exist, or in any of the States where slavery is prohibited.

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It will be observed that this Act does not prohibit an *express* emancipation of a slave in a foreign State by a master resident in Louisiana. It only guards against manumission being implied from the mere fact that the slave, whether with or without the consent of the master, has been upon the soil of a territory where slavery is prohibited.

We may also remark that this enactment was probably called out by a series of decisions in the Supreme Court of this State, which were incorrect in principle, because they held that the *status* of a slave whose master resided in Louisiana, could be changed by even a transient presence upon free territory; a doctrine which was overruled in *Lisa v. Paissant*, 5 An. 80, where the whole subject is treated and the true doctrine announced as flowing from general principles of law and supported by the highest English and American authorities.

We conclude, that the plaintiff is a free woman of color, and that the judgment must be affirmed.

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Any additional instructions desired by the prisoner to be given to the jury, should be prepared and submitted to the court by his counsel.

The object of polling a jury is to ascertain whether the verdict, as announced by the foreman, was concurred in by all the jurors, and the inquiry should be restricted to the question "is this your verdict"?

**A**PPEAL from the District Court of St. James, *Duffel, J.*  
*E. Legendre*, District Attorney, for the State. *G. Schmidt*, for defendant and appellant.

**SPOFFORD, J.** There was nothing in the Judge's charge prejudicial to the prisoner, as it involved no expression of opinion upon the facts, and so far as it went, correctly expounded the law.

If the prisoner wished any additional instructions to be given to the jury, his counsel should have prepared them and submitted them to the court.

When the jury was polled, the Judge correctly refused to allow the prisoner's counsel to interrogate the jurors as to the grounds of their verdict. The object of polling the jury is to ascertain whether the verdict, as announced by the foreman, was concurred in by all the jurors, and the inquiry should be restricted to the question, "is this your verdict"? Even this practice is not universal, although it is generally allowed in our sister States. *State v. Harden*, 1 Baily, 3; *State v. Allen*, 1 McCord, 525; *Jackson v. Hawks*, 2 Wend, 619. *Contra Commonwealth v. Roley*, 12 Pick., 496; *Fellow's case*, 5 Green, 333.

Judgment affirmed.

## STATE v. PETER GAFFERY.

The prisoner was charged with having committed larceny of the property of *Mary Buckley*. Proof having been adduced that she was a married woman and that the goods stolen were bought by her while residing with her husband, it was held, that the Judge should have charged the jury, that all property bought during the existence of the marriage is presumed to belong to the community.

For any larceny committed against the property of the community, the chattels stolen should be alleged to be the property of the community.

Proof that the chattels belonged to the community, will not sustain the charge that the same belonged to the wife.

The presumption of ownership by the husband might be rebutted by the State by showing that the wife was separate in property from her husband, or that the property was bought in her own name by the wife with her paraphernal funds, or that the husband had himself transferred the goods to the wife for the purpose of replacing her paraphernal effects.

APPEAL from the First District Court of New Orleans, *Robertson, J.*  
*E. W. Moise*, Attorney General, for the State. *A. P. Field*, for defendant and appellant.

MERRICK, C. J. This is a prosecution upon an information for larceny.

Proof having been adduced that *Mary Buckley*, the person from whom the goods were alleged to have been stolen, was a married woman, and that the goods were bought by the wife whilst residing in the house with her husband, the counsel for the accused requested the court to charge the jury, that if they believed from the evidence that *Mary Buckley* was at the time of the alleged larceny a married woman living with her husband and not separated in property, in contemplation of law, the property stolen was the property of the husband and not of the wife, and should have been alleged as the property of the husband. But the court, as it appears by the bill of exceptions, considering that the common law of England was without application as to a question of property in Louisiana, refused to charge as requested and, on the contrary, charged the jury if they believed that the wife bought the property, although she was living with the husband at the time that the charge was properly laid as the property of the wife.

The court erred. It is true that the common law of England has no application to a question of ownership of property acquired in this State, and the court was justified in refusing to look to that system in order to ascertain whether the husband or the wife was the owner of the chattels alleged to have been stolen. But testing the question by our own law, the charge requested ought not to have been entirely refused, nor should the Judge have given the charge in the form in which it was done.

As the Judge did not see fit during the trial to direct an amendment to be made as now authorized by the Statute of 1855, p. 171, sec. 1, the jury ought to have been informed that all property bought during the existence of the marriage, by either the husband or the wife, is presumed to belong to the community; that the husband is the head and master of the community, and for any larceny committed against the property of the community, the chattels stolen should be alleged to be the property of the husband, and that the proof that they belonged to the community, will not sustain a charge that the same belonged to the wife. And the jury should have been further charged that the

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presumption that the property bought by the wife, during the existence of the marriage, belonged to the community, might be rebutted by the State, by showing that the wife was separate in property from her husband, or that the property was bought in her own name by the wife with her paraphernal funds, or that the husband had himself transferred the goods to the wife for the purpose of replacing her paraphernal effects alienated by him; and that the burden of proof is upon the State to rebut the presumption of ownership by the husband, by showing the above or similar exceptional facts or circumstances, making the property stolen the separate property of the wife.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that the verdict of the jury be set aside, and that the cause be remanded to the lower court for a new trial, with directions to that court to be governed by the views herein expressed, and otherwise proceed according to law.

### J. C. WALKER v. B. M. G. BROWN, Sheriff, et al.

A tender of payment by the creditor in order to exonerate him, must be followed by a consignment or deposit of the money or notes. C. C. 2103, 2105; C. P. 405, 407, 412.

**A**PPEAL from the District Court of East Feliciana, *Ratliff, J.* Tried by a jury. *John McVea*, for plaintiff. *W. F. Kernan*, District Attorney, for defendants and appellants.

**VOORHIES, J.** The plaintiff, as sheriff of the parish of East Feliciana, was collector of the State taxes for the years 1839 and 1840. His account for the year 1840 was audited by the State Treasurer on the 14th of March, 1841, and resulted in a balance against him of \$7,367 64. Previously, the following letter was received by him:

"TREASURY DEPARTMENT, NEW ORLEANS,  
December 4th, 1839."

"*John C. Walker, Esq.*, Sheriff of East Feliciana.

"Dear Sir:—Your letter of the 17th inst. came to hand this morning, and in reply, allow me to say that you can take in payment of the State taxes all notes of the several banks located in this city.

"I remain, very respectfully,

"Your obd't. servant,

"**F. GARDERE**, State Treasurer."

In his reply to the Legislature, dated the 20th of February, 1843, the State Treasurer noticed this claim in the following terms:

"The case of the former Sheriff of East Feliciana for the year 1840, requires particular mention. A very few days after the sudden depreciation of the notes of the banks of Atchafalaya, Improvement and others, that officer tendered in settlement of the balance now remaining due, notes of said banks, which the Treasurer declined receiving. The Legislature being then in session, a resolution was brought forward authorizing a settlement in cases similar to the above, and was rejected. Since when, no legislative action has been had on the subject."

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On the 20th of September, 1843, a writ of execution was issued by the State Treasurer for the balance thus audited against the plaintiff and his sureties, directed to the Sheriff of the parish of East Feliciana. Upon the seizure of his property under this writ, the plaintiff obtained an injunction. After the lapse of many years, the cause was finally submitted to a jury, who returned the following verdict: "We, the jurors, dissolve the injunction, and that *John C. Walker* and his securities pay to the State of Louisiana the value of the money tendered by *John C. Walker* or his deputy." The Judge *a quo*, after having refused to grant a new trial, rendered a judgment pursuant to that verdict. The defendant thereupon appealed from said judgment.

The principal, indeed the only ground urged by the plaintiff and appellee in support of the injunction, is that he acted under the instructions of the State Treasurer as to what kind of funds should be received by him in payment of taxes due the State; that the Treasurer possessed the power to give such instructions; that under the instructions thus given, he collected nearly the whole amount of the taxes for the year 1840 in notes of the Atchafalaya Bank, which was one of the "several banks located in New Orleans" at that time; and that after deducting the "insolvent list" and the Collector's commission, the balance was tendered by him to the State Treasurer, who declined receiving the same, on the ground that the bank had stopped payment. Hence it is insisted, that the plaintiff should be exonerated on the principle, that when a loss is to be borne by one of two parties, that he who had the means of preventing it, and did not, should bear it.

The evidence leaves no doubt on our minds but that the plaintiff received three bank notes in payment of the State Taxes in good faith, pursuant to the instructions which he had thus received.

But waiving the consideration of the question, whether the Treasurer possessed any such power or not, there is nothing to show that the alleged tender was followed by a consignment or deposit of the notes; both of which were essential to exonerate the plaintiff. C. C. 2163, 2165; C. P. 405, 407, 412 *et seq.*; 2 An. 243; 6 An. 17.

It may be proper to remark that we consider it immaterial to notice the objection in relation to the sureties. If they were not parties to the suit, it is clear that the judgment cannot affect them.

We are of opinion that the Judge *a quo* erred in decreeing the dissolution of the injunction as qualified by the verdict of the jury.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed, that the injunction in the case be dissolved, so as to allow the defendant to proceed in the execution of said writ in accordance with law, and that the plaintiff pay the costs of both courts.

MERRICK, C. J., took no part in this case.

## REBECCA HICKMAN v. G. W. FLENNIKEN, Administrator, et al.

A paper filed by an administrator purporting to be his account, but which merely gives a statement of the creditors of the estate and the debts which he has paid, but does not show that he had any money in his hands to be distributed, or that he collected or distributed any money of the succession, is not such an account or tableau as could be homologated and made binding upon either the creditors or the heirs, unless they had been personally cited.

Any one heir may compel the administrator to render his account without the concurrence of his co-heirs and without making his co-heirs parties to the suit.

**A** PPEAL from the District Court of East Feliciana, *Ratliff, J.*

*A. M. Dunn and Bowman & Delee*, for plaintiff. *Muse & Hardee*, for defendants and appellants.

MERRICK, C. J. This suit is brought to annul an administrator's account, which shows a balance to his credit, and to enjoin him from selling property of the succession to pay the same.

At the time the account was homologated the minor brother and sister of the plaintiff, if not the plaintiff herself, were represented by *Samuel Flenniken*, as tutor, but the tutor was not cited, although it is proven that he was present in court when the judgment homologating the account was rendered. Neither has the tutor been made a party to the present suit, and the plaintiff alleges that she sues on behalf of herself and minor co-heirs.

The account was homologated in open court, after ten days publication, on the 10th day of November, 1854, and this suit was brought on the 8th of December, 1855, more than one year afterwards.

The defendant has excepted to the action on the ground, that the tutor ought to have been made party to it, and he has also pleaded the prescription of one year in bar of the same.

It occurs to us that the judgment attacked cannot have the force of the thing adjudged under any circumstances, and therefore the tutor can have no interest in maintaining it, and it can furnish no basis for the plea of prescription.

The administrator in the paper which purports to be his account, has merely given a statement of the creditors of the estate and the debts which he has paid, but he does not show that he had any money in his hands to distribute or that he had collected and disbursed any money of the succession. It was, therefore, neither an account nor a tableau of distribution. It is true that on one side of the account, the administrator charged himself with the amount of the inventory, but on looking into the inventory we find it consists entirely of property, viz, slaves, there being on it no items of cash or active debts. It was not in the power of the administrator to treat the slaves as cash in his hands and thus change the ownership of the property. The paper, therefore, which he presented to the court, was not such an account or tableau as could be homologated and made binding upon either the creditors or the heirs, unless they had been personally cited. *Succession of Hart*, 8 Rob. 121; *Succession of Day*, 2 An. 895; C. C. 1168, 1170.

In a recent case, we held that where the administrator had funds to distribute among the creditors, and his tableau of distribution was regularly published and homologated, it had the force of the thing adjudged against the

heirs as to the funds so distributed, although the administrator himself figured as a creditor upon the tableau. It is apparent that the two cases are dissimilar.

It is further urged by the defendant, that one of several heirs cannot call upon the administrator to render an account without making the co-heirs parties to the suit, and the case of *Douglas v. Edwards*, 9 La. 234, decided in 1836, is relied upon to sustain this position.

We think since the changes introduced by the Act of 1837, and the subsequent legislation, that any person interested may compel the administrator to render his annual account. For it is provided by the third section of the Act of 1855, p. 78, that the creditors "or any person interested," may file in the Clerk's office a motion to know whether the executor, administrator, curator or syndic, has any funds, and that such executor, administrator, curator or syndic, shall be bound within ten days to file a true statement of his accounts and bank book, (if he has one,) showing the amount of funds collected by him, and on his failure so to do he is to be dismissed from office and pay ten per cent. per annum interest on any sum for which he may be responsible. By the fourth section of the same Act, it is made the duty of executors, administrators, curators and syndics, at least once in every twelve months, to render to the court from which they received their appointment, a full, fair and perfect account of their administration, and on failure to do so they shall be dismissed from office and pay ten per cent. interest, &c.

The sixth section of the Act of 1855, p. 54, relative to Clerks of the District Courts, confers on them the power to order all executors, tutors, curators, administrators and syndics, within ten days after such order may have been served, &c., to file their accounts. See the French text of the Article.

Under these provisions of law no good reason can be urged why an heir who desires the rendition of an account as preliminary to a partition, or in order to obtain the sums to which he is entitled as heir, may not compel the administrator to render his account without the concurrence of his co-heirs and without encountering the delay and expense of making such co-heirs parties defendant.

As the affidavit was clearly insufficient to entitle the party to a writ of sequestration, there is no cause for amending the judgment in favor of the plaintiff. *Raynaldson v. Hamilton*, 5 An. 203.

Judgment affirmed.

#### DENIS CRONAN v. THE SUCCESSION OF McDONOGH et al.

A title to real estate does not pass by the adjudication of an auctioneer, unless he was authorized in writing to make the sale.

**A**PPPEAL from the Second District Court of New Orleans, *Lea, J.*  
*G. B. Duncan*, for plaintiff. *J. Livingston*, for the Cities of New Orleans and Baltimore, appellants.

MERRICK, C. J. We consider the objections to the form of the action virtually determined by the decree of this court remanding the cause in order to make parties. See case, 9 An. 302.

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McDONOUGH.

The plaintiff *Cronan* and the appellants, the Cities of Baltimore and New Orleans, the universal legatees under the will of *McDonogh*, claim title through *A. Hodge, Jr.*

The act of sale from *Hodge* to *Conrey* was duly recorded, and although junior to the auction sale under which the legatees of *McDonogh* claim, must nevertheless prevail over it, because among other reasons it does not appear that the auctioneers were authorized in writing to make the sale. C. C. 2584; 9 An. 363.

The universal legatees of the will of *McDonogh* being without interest in the property, cannot question the sale to *Cronan* for irregularities, if any such exist.

Judgment affirmed.

VANWICKLE & CO. v. STEAMER BELLE GATES AND OWNERS.

A privilege on a steamboat for damages, caused by non-delivery of freight, is lost at the expiration of sixty days from the date of the default and consequent liability. After that time elapses, a sequestration will not lie.

**A**PPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*Collins & Wooldridge*, for plaintiffs and appellants. *Mott & Fraser*, for defendants.

BUCHANAN, J. This was a suit for damages caused by non-delivery of freight, and was commenced by sequestration. A rule was taken to set aside the sequestration, on the grounds, first, that the plaintiffs, on the face of the papers, had no right to a sequestration, and, secondly, that the affidavit was insufficient.

It is only necessary to consider the first of these grounds.

The petition sets forth that the shipment of cotton, which forms the basis of the plaintiffs' demand, took place on the 11th of April, 1856, at Red River. The destination of the boat was New Orleans, and the cotton was consigned to *Payne & Harrison*, merchants in that city.

The time of the boat's arrival at her port of destination is not mentioned, but the bill for damages for non-delivery of the cotton is made out under date of the 25th April, 1856, and that date is assumed in the argument of plaintiffs as that of the default and consequent liability of the defendants, under Article 3204 of the Civil Code, paragraph 1. This suit was commenced on the 2d of July, 1856, more than sixty days afterwards. Under the settled jurisprudence of this court, as reviewed and confirmed in *Blanchin v. Steamer Fashion*, 10 An. 49, the privilege is lost.

The plaintiffs' counsel have made an extended argument against the doctrine here spoken of, but we regard the question as no longer an open one. We may observe that the Legislature have indirectly sanctioned the limitation of privileges on ships and vessels created by our construction of the Articles of the Code, by establishing, in the Act of March 15th, 1842, (p. 282) a longer limitation, for the privilege of a vendor of firewood to steamboats. See also Acts of 1853, p. 159.

Judgment affirmed, with costs.

M. & B. MULLEN & Co. v. T. J. HARDING AND J. M. BASS.—R. M. SCOTT et al., Interveners.

A judgment debtor is at liberty to waive the formalities of the law, so far as they exclusively affect his personal interests.

A bona fide purchaser at a Sheriff's sale will be protected against any attack upon his title upon the ground of informalities, unless the plaintiff show injury to himself in consequence of such informalities.

**A** PPEAL from the District Court of Madison, *Farrar, J.*  
A. T. Steele, for plaintiffs. Stacy & Sparrow, for defendants and appellants.

LEA, J. There is no dispute about the material facts of this case. In December, 1846, the plaintiff obtained a judgment against *William Amos* and *Thomas P. Roe*, commercial partners, for the sum of \$5,298 65, with interest thereon at the rate of ten per cent. per annum from the 5th April, 1842. This judgment was duly recorded in the parish of Madison, and was reinscribed before the lapse of ten years from its first rendition. As thus inscribed, it operated as a mortgage upon any immovable property of either of the defendants situated in that parish.

In the year 1845 *Thomas P. Roe*, one of the defendants, purchased from *H. Pargoud* the south half of section 20, township 17, range 13 east, for which he gave \$638 50 in cash and two notes, each for a like amount, payable respectively in one and two years after date, secured by a special mortgage on the property sold.

The two notes above described not having been paid at maturity, *Pargoud* obtained an order of seizure and sale of the tract of land sold by him to *Roe*. The writ of seizure and sale was issued on the 30th May, 1848, and the defendant, *Roe*, having made a waiver of notice, appraisalment and advertisement, the property was offered for sale on the 3d day of June, 1848, and sold to *G. L. Douglas* for \$2,900.

*Douglas* subsequently sold to *A. R. Hynes*, who afterwards reconveyed the property to *Douglas*. The property by successive transfers passed from *Douglas* to the Union Bank of Tennessee, and from the Bank to *John M. Bass*, who sold an undivided half to *Thomas J. Harding*. The property is now owned in undivided halves by *Thomas J. Harding* and *John M. Bass*, the present defendants, against whom the plaintiffs have brought this suit in the form of an hypothecary action to enforce the mortgage resulting from their judgment against *Roe*.

It is clear that if the sale made at the suit of *Pargoud* had been regular in every respect, the property would have passed to the present purchasers unincumbered with the judicial mortgage in favor of the plaintiff.

It is contended that the irregularities attending the sale were such as to deprive it of the force and effect of a judicial sale, and that the judicial mortgage remains in full force and effect. A judgment debtor is certainly at liberty to waive the formalities of the law, so far as they exclusively affect his personal interests, and the court has frequently held that a bona fide purchaser at a Sheriff's sale will be protected against any attack upon his title upon the ground of informalities, unless the plaintiff show injury to himself in consequence of

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such informalities. See *Copeland v. Labatut*, 6 An. 61; *Stockton v. Downey*, 6 An. 581. In this case no attack is made upon the sale, and the only question is whether the plaintiff's mortgage has ever been legally cancelled.

The defendants in this case are bona fide purchasers for a real and sufficient consideration. They are also without notice, unless they are to be held to a constructive notice of the details of the proceedings in the case of *Pargoud v. Roe*. They hold under a sale made by the Sheriff in virtue of an order of court. Unless the plaintiffs can show that they have suffered injury by the informalities complained of, they ought not to be permitted to attack the validity of the proceedings.

It is not shown that the property did not sell for its full value, and moreover it appears that had it sold for twice the amount it actually brought, the whole sum would have been absorbed by the claims of creditors holding judicial mortgages prior in the date of their registry to that of the plaintiffs.

The plaintiffs could not, therefore, by any possibility, have been injured by the alleged informalities in the sale, and have, therefore, no interest in invoking them.

The sureties of the Sheriff have no right to intervene in this suit. The payment made by them, as sureties of the Sheriff on his official bond, could only subrogate them to the rights of their principal, the Sheriff, and they have no more right to intervene in this suit than he would have.

It is ordered, that the judgment appealed from be reversed, so far as it relates to the defendants, and that there be judgment in favor of the defendants. It is further ordered, that as respects the intervenors the judgment appealed from be affirmed, and that the costs of this appeal be paid by the appellees.

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GATY, McCUNE & Co. v. THE FRANKLIN MARINE AND FIRE INSURANCE COMPANY.—C. C. LATHROP, Garnishee.

When the answer of the garnishee admits in effect, the possession of funds belonging to the defendant, and he refuse to state their amount, a point upon which he was specially interrogated, he is presumed to have had a sufficient amount to satisfy the demand of the plaintiff.

Debtors cannot be permitted to tie up their funds indefinitely by putting them in the hands of an agent.

Until notice to third persons interested in the dedication of the fund, creditors may attach.

APPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*C. B. Singleton*, for plaintiff. *M. M. Cohen*, for the garnishee and appellant.

SPOFFORD, J. The Franklin Marine and Fire Insurance Company, domiciled in the State of New York, had an agency in New Orleans, under the management of *C. C. Lathrop*.

The plaintiffs held adjusted claims for losses upon the company, which claims accrued in St. Louis, Missouri.

They brought suit upon these claims here, and prosecuted them to a judgment, contradictorily with the company, from which no appeal has been taken.

*C. C. Lathrop* was made a garnishee in the cause, and appeals from a judgment condemning him to pay the debt.

GATT

FRANKLIN INS.CO

The cause turns wholly upon the sufficiency of his answers to interrogatories.

Being asked: "Had you, at the date of the attachment in this case, or have you now, in your possession or under your control, any rights, credits, money or property, of any description whatsoever, belonging to the said Franklin Marine and Fire Insurance Company, or in which the said company is interested? If yea, state the value thereof. Are the rights, credits, effects, money and property of sufficient value to pay the plaintiff's claim, say \$8,900, interest and costs?"

He answers: "No, but that, prior to the service of the writ and attachment on him in this case, he had some funds in hand under an arrangement with said company to hold them exclusively to pay any losses occurring at this agency; that with a view of closing said agency before the 1st day of January, 1854, he has applied, and is applying said funds to the re-insuring the outstanding debts and adjusting losses as far as said funds may go, and therefore will have nothing left in hand belonging to said company."

To the interrogatory: "Are you not the agent of said company? If yea, have you not bills receivable and other assets in your possession, or under your control, belonging to the said company? If yea, annex to your answers a full and detailed schedule of said bills receivable or other assets belonging to said company." He replied: "No, except for liquidating; that he had been agent, but closed the business with the end of the past year, as was determined on some time before. He had funds and bills receivable, as stated in his answer to interrogatory number one, but they were used, and are being used, for the purposes set forth in his answer to said interrogatory number one. Of those funds the said company had no control; they had endeavored to direct them to other uses than those above stated, but this respondent had resisted all such efforts, as said company had no right except to any balance that might have chanced to be due to them after closing up all the risks insured by this agency, and after payment of expenses, commissions, &c., &c."

The interrogatories were served on the garnishee on the 31st December, 1853, and answered on the 9th January, 1854.

The answers are far from being clear and categorical. They, however, in effect admit the possession of funds belonging to the company, and as the garnishee refused to state their amount, a point upon which he was specially interrogated, he is presumed to have had an amount sufficient to satisfy the demand of the plaintiffs. When the interrogatories were served, he was, by his own admission, the agent of the company; when he answered, he was still the agent, "for the purpose of liquidating."

He pretends to no claim to the funds in his own right; he discloses no third persons who had liens or any other vested rights upon the funds; he does not declare that any creditors of the company had been notified that the funds were held for their benefit; his only pretence is, that by his understanding of his agreement with his principals (an understanding to which it also seems the principals did not assent) he was, as liquidator, to keep the funds until he should finally pay up all losses occurring at the agency here, and re-insure at his leisure all outstanding risks, and pay expenses, commissions, &c. Then he admitted the company would be entitled to such balance as should chance to remain.

This statement is sufficient to vindicate the judgment appealed from. Debtors cannot be permitted to tie up their funds indefinitely, by putting them in the

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hands of an agent, even by instructing him to do what this agent assumes to do against the wishes of his principal. At least, until notice to third persons interested in the dedication of the fund, creditors may attach.  
Judgment affirmed.

### STATE v. RICHARD SCOTT.

Declarations are called "dying declarations" when made under a consciousness of impending death.

It is not necessary that the declarant should express in direct terms a sense of approaching dissolution; his bodily condition, his appearance, conduct and language, as well as the statements made to him by physicians and other attendants, may be considered and a conclusion deduced therefrom, as to the state of his consciousness at the time.

In a charge of murder, before the jury can convict the defendant, they must believe from the evidence that the deceased died of the wounds inflicted by the accused and from no other cause. If he did, the facts that he had no surgeon, or an unskillful one, or a nurse whose ill appliances may have aggravated the original wound, cannot mitigate the crime of the person whose malice caused the death.

To do that, it must plainly appear that the death was caused, not by the wound, but only by the misconduct, malpractice or ill treatment on the part of other persons than the accused.

**A**PPEAL from the First District Court of New Orleans, *Robertson, J.*  
*E. W. Moise*, Attorney General, for the State. *A. P. Field*, for defendant and appellant.

**SPOFFORD, J.** The defendant has appealed from a judgment sentencing him to hard labor in the penitentiary for life, he having been again convicted of the crime of murder. See the former case reported in 11 An., p. 429.

Two bills of exceptions only are to be considered:

**I.** The witness *Mary O'Rourke* was admitted, against the objection of counsel, to prove the dying declarations of the victim of the homicide charged in the indictment. Declarations are called "dying declarations" when made under a consciousness of impending death. In this case the Judge might well have inferred that the declarations of the deceased were made at a time when she knew death was imminent, from the state of facts conceded by the bill of exception. It is not necessary that the declarant should express in direct terms a sense of approaching dissolution; his bodily condition, his appearance, conduct and language, as well as the statements made to him by physicians and other attendants, may be considered and a conclusion deduced therefrom, as to the state of his consciousness at the time. We do not find that the Judge committed an error in inferring from the admitted facts, that the declarations in question were dying declarations, and admissible as such. See 1 Greenleaf Ev. § 158.

**II.** The other bill was taken both to the refusal of the Judge to give a certain instruction to the jury, and to some of the instructions actually given. The prisoner's counsel desired the court to charge the jury, that "if the wound inflicted was not necessarily mortal, but by ill treatment became so, they will find the defendant not guilty." The refusal of the Judge to give this charge was not an error. He had just charged "that before the jury can convict the defendant, they must believe from the evidence that the deceased died of the

wounds inflicted by the defendant, *and from no other cause.*" It is sometimes impossible to procure skillful surgical aid. If a person dies from a wound inflicted with a murderous intent, whose life might have been saved by the skill of a surgeon whom it was impossible to procure, the crime is none the less murder. The true point is, did the party die of the wounds inflicted by the accused? If he did, the facts that he had no surgeon, or an unskillful one, or a nurse whose ill appliances may have aggravated the original hurt, cannot mitigate the crime of the person whose malice caused the death. To do that, it must plainly appear that the death was caused, not by the wound, but only by misconduct, mal-practice or ill treatment on the part of other persons than the accused.

We do not think the instructions given to the jury, all taken together, are inconsistent with this exposition of the law, which we regard as correct and supported by the best authorities. 1 Hall's P. C.\* 428; Wharton's Law of Homicide, 241; 1 Russel, 505. The doctrine upon this subjected is thus digested by Greenleaf, (Evidence, vol. 3, § 189,) with his usual accuracy and clearness: "If death ensues from a wound given in malice, *but not in its nature mortal*, but which being neglected or mismanaged, the party died; this will not excuse the prisoner who gave it, but he will be held guilty of the murder, *unless he can make it clearly and certainly appear* that the mal-treatment of the wound, or the medicines administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death: for if the wound had not been given, the party had not died. So, if the deceased were ill of a disease apparently mortal, and his death were hastened by injuries maliciously inflicted by the prisoner, this proof will support an indictment against him for murder; for an offender shall not apportion his own wrong."

Judgment affirmed.

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### JOHN MONTICON v. W. G. MULLEN, Executor, &c.

The proper mode of seizing a debt existing in the form of a judgment, is a notification of seizure by the Sheriff to the judgment debtor.

**A** PPEAL from the District Court of Jefferson, *Burthe, J.*

*M. Grivot* and *Z. Latour*, for plaintiff and appellant. *McCay* and *Edwards* and *W. S. Scott*, for defendants.

**VOORHIES, J.** The property of *Antonia Renturia* was seized and advertised to be sold by the Sheriff of the parish of Jefferson, under a writ of  *fieri facias* on a judgment in favor of *Isaac Collins* against the plaintiff, *John Monticon*. The sale was enjoined by *Renturia*, and the execution made perpetual at the costs of *Collins*. On the judgment thus rendered in favor of *Renturia*, an execution was issued for the costs, amounting to the sum of \$17 70. The Sheriff's return states: "Received July 28th, 1854, and same day seized all the right, title and interest of *Isaac Collins* in and to a certain judgment rendered in the case of *Isaac Collins v. Jean Monticon*, No. 4263 of the docket of the Third Judicial District Court, and same day issued notice of seizure to said *Isaac Collins*, notifying him of said seizure, and which was duly served on him

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by said defendant, and on the 19th day of August, same year, I advertised said judgment for sale at public auction for cash, in the English language, in the *Carrollton Star*, a newspaper published in the parish of Jefferson, announcing said sale to take place on Monday the 30th August, 1854, &c." It also appears from the return, that *Collins* was notified to name an appraiser, but did not do so, nor was he present at the sale, when the judgment thus seized was adjudicated to *José Antonio De la Rondo* for the price of \$55.

By an act under private signature, dated 27th September, 1856, *De La Rondo* declares that, shortly after the adjudication he transferred to *Monticon*, for a valuable consideration, his title to the judgment thus acquired by him. *William G. Mullen*, as executor of the last will of *Isaac Collins*, having caused an execution to issue on the judgment against *Monticon*, the latter enjoined the same, on the ground that said judgment was extinguished by confusion, as he had become the transferee thereof as above stated.

The defendant pleaded a general denial and specially, that the whole of the proceedings under which the pretended sale to *De La Rondo* was made were null and void; and prayed for the dissolution of the injunction with damages.

The plaintiff is appellant from a judgment dissolving the injunction and awarding damages against him in favor of the defendant.

The only question which we consider necessary to be examined, is whether the judgment in question was legally seized or not. Without a legal seizure, it is clear that the adjudication under it conferred no title on *De La Rondo*. We take it to be the rule as laid down in the case of *Hanna v. Bry*, 5 A. 656, that "the proper mode of seizing a debt existing in the form of a judgment, is a notification of seizure by the the Sheriff to the judgment debtor." In the case at bar, it does not appear that such notice was given. See 9 A. 525.

Judgment affirmed.

BULLITT, MILLER & Co. v. WILLIAM WALKER.—ROBERTSON & McDougall  
and OGLESBY & McCauley, Garnishees.

The true owner of goods in a factor's hands on consignment may require an account of the factor, although unknown to him. When the true owner has not presented himself to make any claim, and the factor, without having received any communication from him, and being under advances to the agent upon his drafts, passes the proceeds to the credit of the agent, by whom the goods were shipped, with instructions to that effect at the time of the shipment, he will be protected from liability to pay a second time.

When the goods, under such circumstances, were undisposed of at the time of the service of the interrogatories on the garnishees, held: that they are liable to seizure for the debts of the owner. Held, also, that in this case the owner of the goods, and defendant in the suit, was not a competent witness for the plaintiffs, but that the agent was a competent witness for the garnishees.

APPEAL from the Fourth District Court of New Orleans, *Reynolds, J.* Henry C. Miller, for plaintiffs and appellants. W. W. King, for defendant Benjamin, Bradford & Finney, for Robertson & McDougall. Mott & Frazer, for Oglesby & McCauley.

BUCHANAN, J. This suit was commenced by attachment, the defendant being an absentee. Two commercial firms of this city, *Robertson & McDougall*

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and *Ogleby & McCauley*, were made garnishees, by service of interrogatories, on the 27th April, 1854. The answer of a curator *ad hoc*, appointed to represent the defendant, filed, under instructions from him, contained in a letter, which is in evidence, admits fully the plaintiffs' claim, the correctness of which is also proved by other evidence. The judgment of the District Court was in favor of the defendant and the garnishees, upon the ground that no property of the defendant had been attached. From this judgment the plaintiffs have appealed.

The garnishees, commission merchants in New Orleans, were consignees of corn in sacks, shipped on board steamboats at Evansville, Indiana, by *John S. Mitchell*, for account of *William Walker*. Plaintiffs contend that the consignments of corn, or their proceeds, in the hands of the garnishees, belong to the defendant, and are liable to their attachment.

The garnishees, *Robertson & McDougall*, in their answers, which are uncontested, aver that they received two shipments, per steamers *Empress* and *James Robb*, with directions from the shipper, *Mitchell*, to place the proceeds to the credit of *Mitchell* in account; that they sold both shipments of corn, and placed the net proceeds to the credit of *Mitchell*, as directed, on the 2d and 22d April, 1854, respectively.

They say: "Before the collection of the money for sales of this corn, we were under advance upon the drafts of *John S. Mitchell* for more than it yielded by about \$100, which he still owes. We were under advance for the whole amount of these sales before the service of attachment."

An account current with *Mitchell*, annexed to the answers of these garnishees, corresponds with their statements, showing a balance in favor of *Robertson & McDougall*, on the 24th April, (after crediting *Mitchell* with the net proceeds of both shipments of corn) of \$98 12.

A letter of advice accompanied the first shipment, in these words:

"I ship to you to-day, per *Empress*, a lot of corn, 700 sacks, marked A. & B., which please sell for the best price you can, and credit my account with proceeds. Make account of sales for account of *William Walker*.

"Yours, very respectfully,

"JOHN S. MITCHELL."

The counsel for plaintiffs contend that these instructions gave no authority to the consignee to apply the proceeds of the corn in the manner directed. That the corn was defendant's property, and that the bills of lading (in evidence), and the letter of advice itself, gave *Robertson & McDougall* notice of this fact. That an agent, as *Mitchell* was, has no right to pay his own debts with the property of his principal. Consequently, that the payment of the proceeds to any one but *Walker* was a payment in consignee's own wrong.

The evidence certainly shows that the corn belonged to *Walker*, having been purchased for him by *Mitchell*, and partially paid for by funds of *Walker* in *Mitchell's* hands. But it is also proved that *Mitchell* was in advance to *Walker* on account of the price of the corn.

The mention of *Walker's* name in the bills of lading, and in the letter of advice, must also be taken to have conveyed to *Robertson & McDougall* intelligence that *William Walker* had an interest in the corn. But *Robertson & McDougall* had no mission to protect *Walker* from a misappropriation of his funds by his agent, *Mitchell*. The true owner of goods in a factor's hands on consignment may require an account of the factor, although unknown to him.

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See Story on Agency, section 420, and the case of *Hays v. Wright*, lately decided in this court.

But *Walker* did not present himself to make any claim. The garnishees state, under oath, and are uncontradicted in the statement, that they received no communication from *Walker* in regard to those shipments. There is, to be sure, evidence of an order of *Walker* upon them, in favor of the plaintiffs, for the proceeds of the 1830 sacks of corn, per *Empress* and *James Robb*, but this order was only presented after the institution of this suit and service of the attachment.

We perceive no sufficient legal reason for requiring *Robertson & McDougall* to pay the proceeds of this corn a second time.

The other garnishees, *Oglesby & McCauley*, are in a somewhat different position. They had in their hands, undisposed of, 1352 sacks of corn, which had been shipped to them under the same circumstances, at the time of the service of the interrogatories, on the 27th April. This corn they sold, as they state, on the 29th April, and applied the proceeds to the credit of *Mitchell's* account, as directed by him. After giving this credit, *Mitchell* appears to be still indebted to them. The net proceeds of the 1352 sacks of corn was \$1,235 18, for which amount *Oglesby & McCauley* are liable to plaintiffs under the garnishment, unless they have established a lien on the corn in favor of *Mitchell*, which entitled him to its proceeds in preference to the owner of the corn, *Walker*.

In entering upon this enquiry, we are met by two bills of exceptions: one taken by the garnishees to the admission of *Walker*, the defendant, as a witness for plaintiffs, the other by plaintiffs, to the admission of *John S. Mitchell*, as a witness for garnishees. The objection to both witnesses is the same, namely, interest.

The interest of *Walker* is that of party to the suit, against whom judgment is asked, and it does not seem to admit of doubt that a judgment against the garnishees is contingent upon a judgment against defendant. When the defendant is put upon the stand as a witness by the plaintiff, at first blush it would seem that he is called to testify against his own interest; but when we consider that the answer in the cause, filed with the written authorization of defendant, is an acknowledgment of plaintiffs' right to recover, it is apparent that defendant's testimony is only required for the purpose of making the garnishees liable for the payment of defendant's debt to plaintiffs, which purpose he is clearly interested to see accomplished. Neither does the so called release, which has been tendered, cure the objection, for it does not discharge defendant from the suit. It merely stipulates that plaintiffs will not seek to enforce any judgment they may obtain out of any other property of defendant than what may be decreed to be in the hands of the garnishee.

We consider *Walker's* testimony should have been rejected.

As to *Mitchell*, we cannot see any incompetency. He is not directly interested in the result of the suit, neither does the rule of indirect interest, contained in the cases collected in *Hennen's Digest*, verbo Evidence, page 546, at bottom, apply to him. The judgment in this case would not be evidence in a suit to be brought by *Walker* against *Mitchell* for settlement of accounts. *Res judicata* only holds where the thing demanded is the same.

Proceeding next to examine the state of the account between *Mitchell* and *Walker*, on the 27th April, 1854, the date of the service of attachment on the

garnishees, we find *Walker* charged in *Mitchell's* account current, for advances and commissions to that date (not disputed)..... \$6,969 15  
 Against which are credits to amount of..... 4,562 00

Balance due *Mitchell*, April 27th, per his account..... \$2,407 15

This balance must be diminished, however, in the first place by the amount of two items which figure in *Mitchell's* account to *Walker's* credit, under date of the 29th April, but which the other evidence shows were passed to *Mitchell's* credit by the garnishees, on the 30th and the 22d of April—\$982 33 + \$1,004 49 —..... 1,986 82

Reducing it to..... \$420 33

And, in the second place, the credit of \$3,000 in *Mitchell's* account, under date of May 16th, should bear date April 26th, when the ninety day draft of *Walker* on plaintiffs matured and was paid, say..... 3,000 00

Real balance, April 27th, in *Walker's* favor..... \$2,580 67

Further credits are, however, claimed for *Mitchell*, for items in his account current, on file, of a date posterior to the levying of plaintiff's attachment. They are as follows:

April 29th—To paid Evansville Insurance Company insurance on corn shipped by *Preston & Brothers*..... \$214 34

May 8th—To five cents per bushel on 9,637 bushels of *D. H. Moore*, as per agreement..... 481 85

" " To five cents per bushel on 33,000 bushels bought of *W. W. Gray*..... 1,650 00

" 31st—To five cents per bushel on 39,391 bushels corn, bought of *Preston & Brothers*..... 1,969 55

" " To paid for telegraph dispatches..... 2 50

" " To five cents per bushel on 7,000 bushels, bought of *Kenner & Brothers*..... 350 00

Total..... \$4,668 24

A great deal of the argument has turned upon the correctness of these charges, as between *Mitchell* and *Walker*, particularly the charges of commissions on corn bought. It appears to us, however, impertinent to the issues between the attaching creditors and the garnishees to pass upon the correctness of those items, which, indeed, would involve several questions not free from difficulty.

But the rights of plaintiffs under their attachment were fixed by the levy of the attachment and process of garnishment. It was out of the power of *Mitchell* to alter the condition of things to the prejudice of plaintiffs, by charges, correct or incorrect, of a date subsequent to the attachment. Even taking for granted that *Walker* has approved all those charges, which he now so strenuously contests, (although the approval testified by *Mitchell* and *Hill* would rather seem to have a date fixed by *Walker's* letter of the 6th of May, a date anterior to all the contested charges, except that for insurance) yet it was equally out of *Walker's* power as out of *Mitchell's* to divert the fund attached by changing the balance of his account with *Mitchell*, after this attachment. Besides, such a proceeding on the part of *Walker* would have been in fraud of

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the assignment made by him, on the 24th of April, 1854, to plaintiffs, of his rights upon the shipments of corn in the hands of those garnishees, which assignment was notified to the garnishees on the 1st of May, 1854, anterior to the date of the contested charges of *Mitchell*.

It is, therefore, adjudged and decreed, that the judgment of the District Court as to the garnishee, *Robertson & McDougall*, be affirmed; that the judgment as regards the defendant and the garnishees, *Oglesby & McCauley*, be reversed; that plaintiffs recover of the defendant, *William Walker*, sixteen hundred and seventy-three dollars, with interest from March 26th, 1854, until paid, and costs of the District Court; that plaintiffs recover of *Oglesby & McCauley*, garnishees, twelve hundred and thirty-five dollars and eighty-one cents, and that the costs of appeal be borne one-half by plaintiffs and one-half by defendant and *Oglesby & McCauley*.

LEA, J., dissenting. I think that the judgment appealed from should be affirmed as it stands.

SPOFFORD, J., dissenting. I concur in the judgment relative to the claim of *Robertson & McDougall*, but I incline to the opinion that the claim of *Oglesby & McCauley* should also prevail against the attaching creditors.

The testimony of *Walker* being rejected, in the propriety of which ruling I also concur, I do not think the answers of the garnishees are contradicted; and the circumstances of the shipment to these garnishees were such, in my judgment, as to create a contract between themselves and *Mitchell*, which *Walker*, and of consequence *Walker's* creditors, are not in a position to defeat.

#### WHANN v. HUFTY, Sheriff, et al.

The right of a plaintiff in attachment to follow the property attached into the hands of third persons who have acquired rights from the owner after the attachment, depends on the reality of the Sheriff's possession under the attachment.

The possession of the keeper appointed by the plaintiff is the possession of the Sheriff, but if the plaintiff in the attachment is himself the keeper and suffers the property attached to be taken out of his possession and carried to a distant parish from his own residence, where it is sold without any steps having been taken to regain the possession, he cannot disturb the title of the purchaser.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*M. M. Cohen*, for plaintiff and appellant. *George L. Bright*, for defendants.

BUCHANAN, J. *Randall McGavock*, one of the defendants, brought suit against *James R. Christian*, in the District Court of Iberville parish, by attachment, for money paid to and for the use of *Christian's* wife, who was the daughter of *McGavock*.

This suit was brought and the attachment levied on the 15th November, 1854, on a slave named *Mary*, as the property of the defendant *Christian*. The Sheriff's return of the writ of attachment is "Executed by seizing and attaching," &c. It does not say, in so many words, that he had taken possession of this slave; but we may infer that he did so, because it is proved by a witness, introduced by *McGavock*, that the latter was in possession of the slave in November, 1854, as keeper appointed by the Sheriff. On the 27th of April, 1855, judgment was entered up in the District Court of Iberville, (which was

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however, only signed on the 14th February 1856,) in favor of *McGavock* against *Christian*, for the sum of two hundred and seventy-five dollars and sixteen cents; "and that the slave attached be seized and sold to satisfy judgment and costs." Some time in the interval between the rendition of the judgment and its signature, *Mrs. Christian*, daughter of defendant, *McGavock*, who was living at her father's house, when the suit was instituted by him against her husband, came from thence to New Orleans to the house of *Philo H. Goodwyn*, accompanied by the slave *Mary* as a nurse. *Philo H. Goodwyn* was married to another daughter of defendant *McGavock*. After staying some time with her sister, *Mrs. Goodwyn*, *Mrs. Christian* left to go to her husband, in the parish of Iberville, a reconciliation having taken place between herself and her husband, who, it should have been mentioned, was living in Tennessee when his father-in-law brought suit against him, but had returned to Louisiana pending that suit, in which he made a personal appearance and defence. The night before *Mrs. Christian* left *Mr. Goodwyn's* house, the slave *Mary* ran away, and told *Goodwyn*, when found, that she was willing to stay with any one who would purchase her in the city, but would not return to the country. Whereupon, at the instance of *Goodwyn*, negotiations were set on foot for the sale of the slave *Mary*, between *Christian* and the plaintiff, a resident of New Orleans, through *James M. Putnam*, a merchant of New Orleans, and the holder of a mortgage upon the slave.

The slave *Mary* was left in plaintiff's possession, on trial, for a month previous to the day of sale. The proposed sale of the slave by *Christian* to plaintiff was a matter of notoriety in the family; and defendant *McGavock* was informed of it in a letter by *Goodwyn*. *McGavock* replied to this information, that he did not care what *Christian* did with the girl, but that, if he got judgment, he would seize her.

A power of attorney to sell the girl was sent at first by *Christian* to *Goodwyn*, but *Goodwyn* declined to act, knowing the difficulty that existed. *Christian* then made his special power of attorney to *Putnam*, of date the 26th July, 1855, under which the latter sold the slave *Mary* to plaintiff on the 30th July, 1855, for nine hundred dollars cash.

*Putnam* testifies that he was on the 30th July, the agent of defendant, *McGavock*, in this city; that up to the date of the sale, *McGavock* did not inform him that he had a claim against this slave *Mary*, which, as agent for *Christian*, the witness sold to *Whann*. Had witness known that there was a claim on the part of *McGavock* against *Christian* on the slave *Mary*, he would not have passed the act. And *Goodwyn* states that *Whann* consulted him about the title before making the purchase; and admits that, although he knew of the attachment, he concealed it from *Whann*. After this sale *Whann* remained in possession of the slave *Mary* until the 7th March, 1856, when the Sheriff of the parish of Orleans seized her in his hands, under a *fi. fa.* directed to him from the District Court of Iberville, in the suit of *McGavock v. Christian*, by the express written instructions of *McGavock*. The plaintiff has enjoined the sale.

Under the above state of facts, respecting which there is no contrariety of evidence whatever, the claim of *McGavock* to make the slave *Mary* liable in execution of his judgment, has as little foundation in law as in equity. There is no doubt that property claimed in a lawsuit cannot be alienated or incumbered pending the proceedings, to the prejudice of the plaintiff or claimant.

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See C. C. 2428, and the case of *Gillespie v. Cammack*, 3d Annual. But the right of plaintiff in attachment to follow the property attached into the hands of third persons, who have acquired rights from the owner after the attachment, depends upon the reality of the Sheriff's possession under the attachment, see *Goodrich v. Pattengill*, 7 An. 664. And we take it also to be correct doctrine that the possession of the keeper appointed by the Sheriff is the possession of the Sheriff. But when, as in the present case, that keeper is the plaintiff in attachment himself, who suffers the property attached to be taken out of his possession by the wife of the defendant into a parish distant from his own residence, and there to remain for months, while the defendant is openly, and to his perfect knowledge, offering it for sale, and finally sells it without the plaintiff in attachment interposing any obstruction or taking any steps to regain possession, as keeper, for the Sheriff, although he had ample opportunity to do so; the case is clearly within the rule of the Roman law quoted by Judge Story in paragraph 394 of his Commentaries on Equity Jurisprudence—"creditor, qui permittit rem venire, pignus dimittit." See also paragraph 386 of the same work, and *Marsh v. Smith*, 5 Rob. 523.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; and that the injunction herein be perpetuated, the defendant and appellee, *Randall McGavock*, to pay the costs of both courts.

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EDWARD CONERY v. WEBB, RAWLINGS & Co.—RAWLINGS, DUNCAN & Co.,  
Garnishees—W. H. WEBB, Intervenor.

When appeal is taken by motion in open court, one who is a party to the suit and who signed the appeal bond, although only as surety, will not be permitted to allege that he was not a party to the appeal.

Under the terms "*et alii*," parties to the suit not expressly named, may be considered as included among the obligees in the bond.

The garnishees had received from the defendants certain promissory notes, with instructions to place the proceeds to the credit of the intervenor, to whom the defendants were indebted. *Held*: That the property in the notes could only enure to the benefit of the intervenor when he had been informed of what was done, and had assented thereto; until then the defendants might have changed the destination of the property. The rule is that, when the proprietor may sell and deliver, the creditor can seize.

**A**PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*C. B. Singleton*, for plaintiff. *H. C. Miller*, for intervenor and appellant.  
*MERRICK, C. J.* The plaintiff obtained judgment against *Webb, Rawlings & Co.* for \$1700 77, and interest.

In aid of an execution issued upon this judgment, the plaintiff propounded to *Messrs. Rawlings, Duncan & Co.*, of this city, interrogatories requiring them to answer under oath, as garnishees, whether they had not cotton, promissory notes and other effects belonging to the defendants. The garnishees answered that they had nothing belonging to the defendants, but had received from *Webb & Rawlings*, of Memphis, certain promissory notes, with instructions to place the proceeds to the credit of *W. H. Webb*, to whom said *Webb & Rawlings* were largely indebted; and that the garnishees had, previous to the seizure in this case, informed *Webb & Rawlings* that they would place the proceeds to

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the credit of *W. H. Webb*. The firm of *Webb & Rawlings* was composed of the same members as the branch of the same house in New Orleans, styled *Webb, Rawlings & Co.*, and being the defendants in the original suit. The firm of *Rawlings, Duncan & Co.* (the garnishees) is a distinct firm and not composed of the same partners as the other firms mentioned. The plaintiff traversed (successfully as was deemed by the District Court) the answers of the garnishees, and judgment was rendered against them and also against the right of *W. H. Webb*, who had intervened in the suit. *Webb* appealed by motion in open court, and *Duncan & Rawlings*, of the firm of *Rawlings, Duncan & Co.*, with *G. W. Logan, Jr.*, signed the appeal bond as sureties, which was made payable to "*Edward Conery et al.*"

A motion has been made to dismiss the appeal, on the ground that proper parties to the appeal have not been made, and that the bond ought also to have been in favor of *Webb, Rawlings & Co.*, *Webb & Rawlings* and *Rawlings, Duncan & Co.*

The latter firm having signed the appeal bond as sureties, which is payable to "*Edward Conery et al.*," could not be permitted to allege that they were not parties to the appeal. *Webb & Rawlings* are no parties to the proceedings, except so far as the firm of *Webb, Rawlings & Co.* is identical with it. *Webb, Rawlings & Co.* are parties to the suit and may be considered as included among the obligees in the bond under the term "*et alii.*" See *Bachus v. Moreau*, 4 An. 314. The motion to dismiss the appeal is therefore overruled.

On the trial of the cause as to the garnishees and the intervenor *Webb*, the latter offered to read in evidence the deposition of *J. J. Rawlings*, one of the defendants in the original suit, and consequently a member of the firm of *Webb & Rawlings*, of Memphis. This testimony was objected to and excluded on the ground that *J. J. Rawlings* was a party to the suit and interested in the result of the present controversy. The intervenor excepted.

Without deciding the question raised by the bill of exception, we remark that if the intervenor be allowed the full benefit of this deposition, it will not make out his case. The testimony of this witness explains the transactions of the parties more in detail than do the answers of the garnishees *Rawlings, Duncan & Co.*, but it adds nothing of force to those answers, and on the answers and deposition together, we think the judgment of the lower court must be affirmed.

It appears that the firm of *Webb & Rawlings* was indebted to *W. H. Webb*, a planter of Tennessee, in the spring of 1855, in a balance of between nine and ten thousand dollars, for advances of cash and proceeds of cotton during the year 1854, previous to the dissolution of the two firms of *Webb & Rawlings* and *Webb, Rawlings & Co.*, which took place in July and September of that year, each partner having power to use the partnership name of either firm in liquidation. In the spring of 1855, in a conversation with *W. H. Webb*, the witness *J. J. Rawlings* promised him that on the return of his partner *S. M. Webb*, who was then on a tour of collection, that if they (*Webb & Rawlings*) could not pay the money, they would give him such paper as the witness thought most available to him, it being understood, as the witness says, that it should be discretionary with him what paper to transfer. *S. M. Webb* having returned with two notes on *Jos. J. Scales*, one dated May 31, 1855, for \$3843 50 cents, and the other dated November 1st, 1855, for \$394 50, and another note on *W. A. Thomas*, for \$170 02, dated May 26, 1855, all payable to *Webb*,

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*Rawlings & Co.*, the New Orleans branch of the house, on the 22d of December, 1855; the name of *Webb, Rawlings & Co.* was indorsed upon the notes, and they were transmitted by *Webb & Rawlings* to *Rawlings, Duncan & Co.*, of New Orleans, to collect and place to the credit of *W. H. Webb*. *Rawlings, Duncan & Co.* notified *Webb & Rawlings* that they would obey the instructions.

It is fair to presume that the notes were assets of the New Orleans house, because they were payable to it, and because they were sent to this city for collection. *W. H. Webb* does not appear to have had any correspondence with *Rawlings, Duncan & Co.*, and his account with *Webb & Rawlings* was not once debited with the notes so sent. The witness states that it (viz, the indorsement and sending of the notes to *Rawlings, Duncan & Co.*) was intended as a payment to *W. H. Webb*, and that the notes would have been given to him (*W. H. Webb*) in person, had it been known where he was. But before information had been communicated to him of what had been intended and done on his behalf by his debtors, viz, on the 29th December, 1855, the plaintiff had levied his execution and served his proceeding in garnishment on *Rawlings, Duncan & Co.*, the holders of the notes of *Scales* and *Thomas*.

*W. H. Webb* was not apprised of what had been done until the 26th day of January, 1856, and for the first time he testified his acquiescence on the 3d day of February, 1856, (more than a month after the garnishment,) by letters addressed to *Webb & Rawlings* and to *Scales*, the maker of the principal notes.

It is clear that at the time the execution was levied and the proceeding against the garnishees was served, that the paper in the hands of *Rawlings, Duncan & Co.* was under the entire control of *Webb, Rawlings & Co.*, or *Webb & Rawlings*, and that they might have countermanded the order to hold the proceeds for the benefit of *W. H. Webb*, and could have directed the proceeds to be paid to the plaintiff or any one else. The property in the notes could only enure to the benefit of *Webb*, when he had been informed of what was done and had assented thereto. Had the makers of the notes become insolvent, he would not have been bound to receive them, nor was he bound to recognize *Rawlings, Duncan & Co.* as his agents.

Before the information had been given him and he had assented to the arrangement, the notes were attached and the power given to *Rawlings, Duncan & Co.* to appropriate the proceeds to the payment of *W. H. Webb* was revoked by the effect of the attachment.

The case falls within the rule laid down in the case of *Armour v. Cockburn*, which has been affirmed by repeated decisions, "That where the owner of the property has lost all power over it and cannot change its destination, the creditors cannot attach; the converse of the rule being that whenever the proprietor may sell and deliver, the creditor can seize." 4 N. S. 669; 3 An. 62. If it be considered that the delivery of the notes to *Rawlings, Duncan & Co.* was accompanied with the stipulation *pour autrui*, (C. C. 1884, 1896,) the same was subject to revocation until accepted. *Gravier v. Gravier*, 3 N. S. 206. See cases of *Wilson v. Lizardi*, 15 L. R. 255, and *Goodhue v. McClarty*, 3 An. 56.

Judgment affirmed.

## STATE OF LOUISIANA v. BYTHELL HAYNES.

Under the Act of the Legislature of March 15th, 1855, the Governor has authority to appoint a liquidator to take charge of and liquidate the affairs of any corporation, when its charter has been decreed to be forfeited and there is no law existing at the time which provides for its liquidation.

**A**PPPEAL from the District Court of East Feliciana, *Ratliff, J.*  
*J. O. Fugua, and Muse & Hardee*, for plaintiff. *Moise & Randolph*, for defendant and appellant.

**VOORHIES, J.** This is an appeal taken by the defendant from a judgment rendered by the court below, vacating his commission as liquidator of the "Clinton and Port Hudson Railroad and Banking Company," incorporated in 1853.

Having forfeited its charter, an Act was passed by the Legislature on the 4th of May, 1847, for the liquidation of the affairs of said company, under which the Governor was authorized to appoint a liquidator for the term of one year. By the Act of the 16th of March, 1848, the Governor was authorized to appoint the same or such other liquidator as to him might seem proper, for a term not exceeding two years. On the 21st of March, 1850, and 30th of April, 1853, the Legislature passed two Acts on the same subject, the former of which limited the term of the liquidator's office to three years from the date of his appointment by the Governor, and the latter to two years from the same period. At the expiration of the term of the liquidator's office, under the last mentioned Act, the affairs of the company being still unsettled, the defendant was re-appointed by the Governor on the 18th of April, 1856.

In regard to the duties and powers of the liquidator, it suffices to refer to the Acts to which we have adverted in connection with the cases of *The Gas Light Company v. Haynes*, 7 An. 114, and *Haynes v. Castor*, 9 An. 266.

The record contains an admission of the insolvency of the company, and that its affairs are still unsettled.

It is contended by the relators, that the Governor had no right to make the appointment after the term of office had expired; and that the defendant was disqualified from holding the office, on the ground of his being a debtor of the company.

The purchase of property encumbered with mortgages in favor of the company, could not have the effect of making the purchaser a debtor of the company. Such we understand from the evidence to be the relation in which the defendants stands to the company.

It is evident that the defendant's appointment as liquidator was not and could not have been made under the Act of 1853. That and the other Acts in relation to the liquidation of the affairs of this company, to which we have adverted, had expired by limitation prior to the appointment of the defendant in this case. But we think the authority for the appointment thus made is to be found in the 7th section of the Act entitled, "An Act to regulate Corporations generally," approved March 15th, 1855, which declares: "That whenever the charter of any corporation in this State shall be decreed forfeited by any competent court, the District Attorney of the district shall forthwith inform the

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Governor of the fact, who shall thereupon appoint a liquidator to take charge of and liquidate the affairs of the corporation, as in case of insolvency of individuals. \* \* \* This section shall not apply to banking or other corporations whose liquidation is otherwise provided for by law." (Session Acts of 1855, p. 486.) It appears to us clear that the company, whose charter had been decreed to be forfeited by a competent court, must be considered as falling within the operation of this enactment, unless excluded by the exception. As there was no law existing at the time which provided for its liquidation, we think it follows as a natural consequence that such an appointment became necessary, and that the Governor was fully authorized to make it under the provisions of this Act.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed, and that the application of the relators be rejected, at their costs in both courts.

MERRICK, C. J., recuses himself in this case.

#### SUCCESSION OF WHITING VALENTINE—On rule taken by the Widow and Heirs of W. G. VINCENT.

The deceased by his will, which was executed in 1848, after a legacy to his wife of certain specified property, declared as follows:

"All the balance of my property, I will to my six brothers and two sisters, to be equally divided between them, after all claims against me are paid. And, I hereby appoint, *John Valentine*, my brother, to execute this will; and, in case of his death or absence, *Paltzen Belcher*, my wife's brother. I would recommend that this property be sold, for one-fourth cash, and the balance on six, twelve, eighteen and twenty-four months' time; and the notes secured by mortgage to secure payment."

"I would recommend that the money be paid to them, so as to be of the greatest advantage to them possible. There will be somewhere from two to three thousand dollars for each of them, if it were so divided at the present time. What my property is, and where situated, you will find by the copy of the titles in my bank-box. Although I have made several errors, yet I think the above will be easily understood. I have one house on Circus Street; two on Gravier; two on Adele; one corner of Camp and St. Mary; and one vacant lot, corner of Plaquemines and Seventh streets."

*Held*: that this was a disposition of the property which the testator then had, and was not intended to cover his future acquisitions; and that, consequently, property purchased by the testator in 1853, after the will was made, did not pass under it.

"A disposition, the terms of which express no time, neither past nor future, refers to the time of making the will." C. C. 1715.

**A**PPEAL from the Second District Court of New Orleans, *Morgan J. Clarke & Bayne*, for plaintiffs and appellants. *P. E. Bonford*, for defendant.

MERRICK, C. J. The defendant in the rule in this case is the purchaser of property at a sale made in order to effect a partition among the universal legatees under the will of the deceased. He refuses to comply with the terms of the sale, because, as he alleges, all the parties interested in the property were not made parties to the proceedings in partition.

The question which he presents arise under the will. If the will conveyed conjointly to the legatees the present and future property of the testator, the purchaser has acquired a good title and must be compelled to comply with the

terms of the sale. If, on the other hand, the legacy was not conjoint, or if it was only of the present property of the testator, in either case the purchaser has not acquired a good title, and ought to be discharged from the rule taken against him.

The will which was dated in 1848 is as follows :

"NEW ORLEANS, December 12th, 1848.

As my health is not good, and as I travel often, I think it my duty to write a will, in order that there may be as little trouble about my estate as possible.

I, therefore, give to my wife, *Lucy Belcher*, the two pieces of property, which are now in her name—one on St. Charles street, the other on Phillippa street—and, likewise, all the property where we now live, on Camp street, consisting of a frame house and three lots of ground, and all the furniture belonging thereto; and, likewise, the first month's rent that may fall due, after my death. This property, in all, is worth, I think, ten thousand dollars; and is just about half of what we have gained since we were married.

All the balance of my property, I will to my six brothers and two sisters, to be equally divided between them, after all claims against me are paid. And I hereby appoint *John Valentine*, my brother, to execute this will; and, in case of his death or absence, *Palitzen Belcher*, my wife's brother. I would recommend that this property be sold, for one-fourth cash, and the balance on six, twelve, eighteen and twenty-four months' time; and the notes secured by mortgage to secure payment.

I would recommend that the money be paid to them, so as to be of the greatest advantage to them possible. There will be somewhere from two to three thousand dollars for each of them, if it were so divided at the present time. What my property is, and where situated, you will find by the copy of the titles in my bank-box. Although I have made several errors, yet I think the above will be easily understood. I have one house on Circus street; two on Gravier; two on Adele; one, corner of Camp and St. Mary; and one vacant lot, corner of Plaquemines and Seventh streets.

I have done this in my right mind, on the date above.

[Signed]

WHITNEY VALENTINE."

The property which was sold was acquired by the testator after the making of his will, viz: in February, 1853, it being one half of the lot sold, the other half being held by *John Valentine* and sold at the same time.

*Richard Valentine*, one of the six brothers of the testator and one of the legatees in the will, died after the execution of the will, but before the testator, leaving three minor children, who were not represented in the partition. Thus, two questions arise under the will and these facts: Did the will convey the future property? Was the disposition conjoint, and did the other brothers and sisters take the share of *Richard Valentine*, by accretion? If either of these questions, as already said, are decided in the negative, the rule must be discharged.

Under the peculiar phraseology of this will, we think it was a disposition of the property which he then had. It was not intended to cover his future acquisitions, and is, therefore, controlled by Article 1715 of the Code, which is in these words:

"A disposition, the terms of which express no time, neither past nor future, refers to the time of making the will."

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Valentine.

"Thus, when the testator expresses simply that he bequeathes his plate to such a one, the plate he possessed at the date of the will is only included."

The minor heirs of *Richard Valentine*, therefore, appear *prima facie* to be interested in the property sold, and the purchaser cannot be compelled to complete the sale.

It is thus unnecessary to consider the second question with its surrounding difficulties.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and that the rule be discharged at the cost of the plaintiff in the rule, the appellee paying the costs of the appeal.

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STATE v. JAMES PATTON.

As the jury in trying an indictment for murder have the power to find the prisoner guilty of manslaughter, it was pertinent and right for the Judge to instruct the jury in the law both of murder and manslaughter, notwithstanding his counsel chose to assert that the only issue for the jury to try was the sanity of the accused.

The judge did not err in refusing to allow the tardy motion for an inquisition of lunacy, there being no pretence that the prisoner had become insane since the trial, and the question of his sanity at that time having been fully considered and passed upon by the jury as a question of fact.

APPEAL from the First District Court of New Orleans, *Reynolds*, Judge of the Fourth District Court, presiding. *E. W. Moise*, Attorney General, for the State, *A. P. Field* and *J. S. Whitaker*, for the accused.

SPOFFORD, J. The opinion we have formed upon the only questions presented by the record and cognizable by this court, render it unnecessary to consider the motion to dismiss the appeal.

Since the cause was remanded for the admission of evidence touching the asserted insanity of the accused, (10 An. 299,) there has been a new trial which resulted in a verdict of "guilty without capital punishment." The prisoner was sentenced to hard labor in the penitentiary for life.

There are but two bills of exceptions, neither of them appears to have been well taken.

The prisoner pleaded not guilty to an indictment for murder. Upon the issue thus joined, the jury had power to find the prisoner guilty of manslaughter. (Rev. Stat. 136, sec. 2.) It was, therefore, pertinent and right for the Judge to instruct the jury in the law both of murder and manslaughter, notwithstanding his counsel chose to assert that the only issue for the jury to try was the sanity of the accused.

Nor was there error in refusing to allow the tardy motion for an inquisition of lunacy, it appearing that there was no pretence that the prisoner had become insane since the trial, and the question of his sanity at that time having been fully considered and passed upon by the jury as a question of fact. The verdict of the jury is conclusive upon us as to all matters of fact embraced by it, and as there are no errors of law assigned, and the bills of exceptions were not well taken, the judgment of the District Court is affirmed, with costs.

**McGREGOR, ALLOWAY & Co. v. BARKER & DIFFENDERFFER.—PLANTERS'  
BANK OF TENNESSEE, Intervenor—FELLOWES & Co. and YEATMAN  
& Co., Attaching Creditors, Defendants in Rule.**

An appeal will not be dismissed on the ground that the judgment was not signed when the order of appeal was made, if it appears to have been signed at the time the appeal was made out.

It is not necessary there should be as many copies of a record of appeal made out and filed as there may happen to be appellants with interests in any way conflicting. When the necessary parties are before the court, a transcript filed by any one of them, will authorize the court to adjudicate upon the merits of the whole cause.

The right of priority of a creditor making the first attachment, will not be defeated in consequence of another creditor having discovered that there was a dormant partner interested in the property attached, and having attached his interest.

When property is attached within the jurisdiction of our State courts, questions of privilege and priority among the attaching creditors, must be determined by the laws of Louisiana.

A bill was drawn in Tennessee on a merchant in London, under an authorization to draw against shipments of tobacco to an agent of the London merchant at New Orleans. On the faith of such an authorization, the intervenors discounted the bill, which the drawer afterwards refused either to accept or pay. *Held*: That the intervenors acquired no privilege upon the tobacco, which they attached in New Orleans, in the hands of the agent of the drawee, because they had no actual possession or control of the tobacco by themselves or by their agents.

Under such circumstances, in order to give the bill-holder such an interest in the tobacco as would defeat attaching creditors of the consignors, there should have been an agreement between the consignors and the consignee, that the tobacco should be held by the consignee for the benefit of the bill-holder, so that the latter would look to the fund for payment, and not to the consignee's personal credit.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*L. E. Simond*, for plaintiffs and appellants. *Mott & Fraser and Hunt & Denegre*, for *Fellowes & Co.* and *Yeatman & Co.*, appellants. *C. R. Singleton*, for the intervenor, appellee.

The opinion of the court on the motion to dismiss the appeal was delivered by

MERRICK, C. J. A motion has been made in this case to dismiss the appeal. The grounds stated in the motion are:

1st. The order allowing the appeal was granted and citation of appeal served before the judgment appealed from was signed.

2d. The appeal bond filed purports to be given in a different cause.

3d. The condition of the bond is insufficient for a suspensive appeal.

We shall only notice the first point, the others being unsupported by the facts. The judgment was rendered on the 30th day of June, 1856, and the order of appeal was granted by the Judge and the appeal bond filed on the tenth of July, the judgment not having been signed until the 12th day of July, two days after the order allowing of the appeal.

It is contended that the appeal was prematurely taken and ought to be dismissed.

We have carefully examined the cases of *Wright v. McNair*, 7 L. R. 518; *Cooley v. Seymour*, 9 L. R. 275; *Tissot v. Bowles*, 18 L. R. 30; *Whittemore v. Watts*, 4 R. R. 47; *Mechanics' Bank v. Walton*, 7 R. 451, and 9 An. 42. These all appear to be cases in which the judgment appealed from had not been signed at the time the transcript of appeal was made out. The older cases were decided before the Act of 1839, curing certain defects, and the Act of 1849, allowing an appeal by motion in open court, were passed.

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The question now presented is, whether, where an appeal is taken at the same term at which the judgment is signed, but before the judgment is actually perfected by the signature of the judge, it is such a fault on the part of the appellant as to occasion the dismissal of the appeal.

The 19th section of the Act of the Legislature approved March 20th, 1839, provides that thereafter "no appeal to the Supreme Court shall be dismissed on account of *any defect, error or irregularity in the petition or order of appeal*, or in the certificate of the Clerk or Judge, or in the citation of appeal, or service thereof, or because the appeal was not made returnable at the next term of the Supreme Court, whenever it shall not appear that such defect, error or irregularity is imputed to the appellant; but in all such cases, the court shall grant a reasonable time to correct such errors or irregularities, (in case they are not waived by the appellee,) and may impose on the appellant such terms and conditions as in their discretion they may deem necessary for the attainment of justice, and may also impose such fines on the officer who shall have caused such irregularities, as they may deem proportioned to the offence."

Now, the judgment is pronounced in court publicly and usually in the presence of the parties. But the judgment is not often signed in their presence, but usually in the Clerk's office, or in the court room, at the pleasure of the Judge and when he has leisure at the close of the term, for that purpose.

By the 20th section of the Act just referred to, it is made the duty of the Judge in the country parishes to sign all final judgments before the adjournment of the court, whether the three judicial days have or have not elapsed since they were rendered. Acts 1839, p. 164.

Under this statute, in some of the parishes, the custom has been to make the signing of the judgments the last thing to be done by the Judge before adjourning for the term, and in such cases, under the Act of 1843, p. 40, the motion to appeal has usually been made immediately after the motion for the new trial has been overruled, without waiting until the Judge has affixed his signature to the judgment, which would then be too late. It would be difficult to say that the suitor is in fault for waiting the pleasure of the Judge to sign in such case.

So too in the city courts, the signing of the judgment is more particularly within the knowledge of the Judge than the counsel, and we do not think the error in the present case is to be imputed to the appellant. It is true that he might have assured himself that the judgment was signed, by an inspection of the record upon the first opportunity; but as three judicial days had elapsed, and the term was closed at which the judgment was rendered, he had a right to suppose that the Judge had done his duty and affixed his signature to the judgment, and that the Judge would not order the appeal without so doing.

The record containing the judgment properly signed is before us, and we see no reason to dismiss the appeal in this case on the objection made.

The motion to dismiss is, therefore, overruled.

On the merits:

SPOFFORD, J. The defendants, *Barker & Diffenderffer*, were merchants engaged in the tobacco trade in the State of Tennessee. Contemplating a shipment of tobacco to England, and wishing to raise funds by means thereof, they procured the following authority from the agent of a London and Liverpool house:

"CADIZ, Tenn., 28th April, 1854.

McGREGOR  
&  
BARKER.*Messrs. Barker & Diffenderffer, Clarksville, Tenn.*

"DEAR SIRS: I hereby authorize you to draw on my father, *Mr. John K. Gilliot*, of London and Liverpool, the sum of £21, say twenty-one pounds sterling on all good and fine strips forwarded to *Mr. Walter G. Robinson*, New Orleans, to be consigned to my father in Liverpool, and £16, say sixteen pounds sterling on all seconds or lugs; the draft to be made on receipt of *Mr. Robinson's* acknowledgment of the arrival of the tobacco in New Orleans.

(Signed)

"JOHN S. GILLIOT."

Shipments were made to *W. G. Robinson*, of New Orleans, as agent of *Gilliot*, by *Barker & Diffenderffer*, and on being informed by *Robinson* that he had received the tobacco, the Planters' Bank of Clarksville discounted, at successive dates, four several bills of exchange drawn by the shippers on *J. K. Gilliot*, of London, pursuant to the foregoing authorization, which was exhibited to the bank. But no assignment of the bills of lading was made to the bank.

One hundred and twenty-four hogsheads of this tobacco were attached in the hands of *W. G. Robinson*, in New Orleans, by the plaintiffs *McGregor, Alloway & Co.*, on the 30th of June, 1854, under a claim of theirs against *Barker & Diffenderffer*, who, it would seem, had become insolvent. Afterwards, the same property was attached by *Fellowes & Co.* and then by *R. Yeatman & Co.*, defendants in the rule, from the judgment whereon these appeals were taken.

*J. K. Gilliot* accepted and paid two of the four bills discounted by the Planters' Bank of Clarksville, as above described. Having heard of the attachment in New Orleans, he refused to accept or pay the other two bills, and they were protested both for non-acceptance and non-payment; it does not appear that notice of protest was given to the drawers *Barker & Diffenderffer*.

The tobacco having been attached by three creditors of the shippers in different suits, *McGregor, Alloway & Co.*, whose attachment was first in date, took a rule on *Fellowes & Co.* and *R. Yeatman & Co.*, to show cause why the proceeds of the tobacco should not be paid to them by preference.

The Planters' Bank of Clarksville afterwards intervened and claimed, by way of third opposition, the first privilege upon the tobacco or its proceeds, as holders of the two protested bills of exchange which they had discounted on the faith of the shipment and of the letter of credit or authority to draw given by *Gilliot's* agent to *Barker & Diffenderffer*, said bills amounting to the sum of \$5098 62.

There was judgment awarding this sum to the bank by privilege and preference, and ordering the balance of the proceeds of the tobacco to be paid first to *McGregor, Alloway & Co.*, and then (if any should remain) to *Fellowes & Co.*

*McGregor, Alloway & Co.* have appealed from the judgment in favor of the bank, and *Fellowes & Co.* and *Yeatman & Co.* have appealed both from that judgment and the judgment in favor of *McGregor, Alloway & Co.*

The first controversy is between all the attaching creditors and the Planters' Bank of Clarksville, Tennessee. The property having been attached within the jurisdiction of our State courts, the question of privilege and priority must be determined by the laws of Louisiana. The Tennessee bank has no other lien upon the movable property attached than a citizen of Louisiana would have had, who had discounted bills drawn in this State under precisely similar circumstances. See *Lee v. His Creditors*, 2 An. 599. The bills under which

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the bank claims a privilege upon the tobacco attached, are of the following tenor:

"CLARKSVILLE, TENN., June 22d, 1854.

"Sixty days after sight of this first of exchange (second and third, &c., unpaid,) pay to the order of ourselves, in London, three hundred and seventy-eight pounds sterling, value received, and place the same to account, as advised by your friends.

"(Signed) BARKER & DIFFENDERFFER.

"To J. K. Gilliot, Liverpool."

[Endorsed by the drawers.]

"CLARKSVILLE, TENN., June 24th, 1854.

"Sixty days after sight of this first of exchange, (second and third, &c., unpaid,) pay to the order of ourselves, in London, five hundred and sixty-seven pounds sterling, value received, and place the same to account of shipment of strips, as advised by your friends.

"(Signed) BARKER & DIFFENDERFFER.

"To J. K. Gilliot, Esq., Liverpool."

[Endorsed by drawers.]

The question is not whether *Gilliot* acquired a privilege upon the tobacco to the amount of his actual acceptances, upon its reaching the hands of his agent, *Robinson*, in New Orleans. That he did so, is conceded by all parties. For, by consent of the attaching creditors (before the intervention of the bank), the 124 hogsheads of tobacco were forwarded to *Gilliot* for sale, and he has retained without opposition, out of the proceeds, the amount of the two bills of *Barker & Diffenderffer* on himself, which he actually accepted and paid, and has remitted the balance (deducting also charges) to *W. G. Robinson*, without making any claim for the other two bills which he refused to pay, and which went to protest and are now in the hands of the bank, the intervenor in this cause. Indeed *Gilliot* claims no interest in the fund now in court which, therefore, belongs to *Barker & Diffenderffer*, subject to such privileges as are established by law.

We think that, under the law as understood and administered in the courts of Louisiana, the bank acquired no privilege upon this tobacco, because it has never had any actual or constructive possession thereof by itself or by its agents. See *Goodhue v. McClarty*, 3 An. 56. And it seems doubtful whether, under the extremely liberal views entertained by courts of equity with regard to the law of lien, the bank in this case could succeed in defeating the attaching creditors. See the case of *The Marine and Fire Insurance Bank of the State of Georgia v. Jamcey and others*, 3 Sandford's Sup. Court Rep. 257.

As already observed, the bank acquired no control whatever of the tobacco. It took no transfer of the bills of lading and was a stranger to them. These protested drafts do not on their face purport to assign the tobacco to the bank. One of them, indeed, makes no allusion to the shipment. It is plain that the authority from *Gilliot* to *Barker & Diffenderffer* to draw upon him, after the receipt of certain shipments by *Robinson*, was what the bank in the first instance looked to; in other words, to the credit of the drawee, and to the anticipation that he would accept the bills in strict pursuance of the engagement of his son and agent towards the drawers. He has broken that engagement; whether he had a legal excuse for doing so, is a question not relevant here, for *Gilliot* is no party to these proceedings. But because he has so broken

the engagement entered into on his behalf, it does not follow that a privilege rises into being, in favor of the bank over merchandise which it never had, even constructively under its control and to which it laid no claim until long after the merchandise had been attached by creditors of those to whom it confessedly belong. The mere belief of the President of the bank that the bank had a lien, cannot affect the case unless he had legal grounds for the belief. And no such grounds are disclosed in the record.

There is no subrogation to a privilege inferrible from the evidence.

The case also differs from those where a consignee has received a consignment with special instructions from the consignor to pay out of the proceeds a particular creditor of his, and the consignee has notified such creditor of the fact. Under such circumstances, it has been held that a contract springs up between the consignee and the named creditor of the consignor, which a subsequent attachment by other creditors of the consignor will not defeat. *Cutlers v. Baker*, 2 An. 572; *Williams v. Pierce & Co.*, 10 An. 277; *Armor v. Cockburn*, 4 N. S. 687.

But here there was no contract between *Barker & Diffenderfer*, consignors, and *J. K. Gilliot*, consignee, that any particular creditor of the former should be paid by the latter out of the proceeds of this tobacco. The contract was personal between the consignors and the consignees. The bank was in no sense privy to it. There was even no stipulation *pour autrui*, so that the case differs widely from that of *Oliver v. Lake*, 3 An. 78. *Gilliot* agreed to accept drafts to a certain limit so soon as his agent should receive certain tobacco. He knew he would become personally bound as soon as the drafts were accepted although the tobacco should perish, or never reach Liverpool. It was his acceptance, or the belief that he would accept, *payable at all events*, that induced the bank to buy the bills. In order to give the bill-holder such an interest in the tobacco as would defeat attaching creditors of the consignors, there should at least have been an agreement between the consignors and the consignees, that the tobacco should be held by the consignee for the benefit of the bill-holder, so that the latter would look to the fund for payment, and not to the consignee's personal credit.

Here the President of the bank declares that he looked to *Gilliot* for payment on the strength of the letter of authority, that he still holds him liable, and that he had no confidence in the solvency of the drawers, but all confidence in the drawees.

We conclude that the judgment awarding the Planters' Bank of Clarksville, Tenn., a privilege upon the fund under attachment, must be reversed.

There is quite a different controversy between *McGregor, Alloway & Co.*, the first attaching creditors, and *Fellowes & Co.* and *R. Yeatman & Co.*, whose attachments were subsequent.

*McGregor, Alloway & Co.* appealed only from the judgment in favor of the Bank of Clarksville.

*Fellowes & Co.* and *R. Yeatman & Co.*, as already stated, appealed both from the judgment in favor of the bank and the judgment giving *McGregor, Alloway & Co.* priority over themselves. All these appeals were made returnable on the first Monday of November last. *McGregor, Alloway & Co.* procured from this court an extension of time to bring up the record, but on the same day one of the other appellants, it would seem, filed the present transcript. As *McGregor, Alloway & Co.* have never filed a transcript of the record, the other

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appellants contend that they must be considered as having abandoned their appeal against the Planters' Bank of Clarksville, and that they will not, therefore, be entitled to benefit from a reversal of their judgment in favor of the bank.

We think such a rule of practice would be too rigorous and that it is not warranted by the precedents.

The record in this case is very voluminous; but one transcript was necessary, and we see no reason for adopting a construction of the law which would require as many copies of a record to be made out and filed, as there may happen to be appellants with interests in any way conflicting.

So far as the bank is concerned, *McGregor, Alloway & Co.* are appellants, and by the filing of this transcript we consider their appeal before us; as all the necessary parties are represented here, we can adjudicate upon the merits of the whole cause as fully as the District Court might have done.

The first attachments by these three sets of creditors were levied in suits against the commercial firm of *Barker & Diffenderffer*, the plaintiffs, *McGregor, Alloway & Co.*, alleging that the full names of the partners were unknown to them.

Some time afterwards *Yeatman & Co.* and *Fellowes & Co.* filed supplemental petitions, alleging that *L. G. Williams* was indebted to them *in solido* with *Barker & Diffenderffer*, and attached his interest in the tobacco or its proceeds.

These parties now contend that the interest of *Williams* is one-third of the entire shipment, and that they, as creditors of the partnership of *Barker & Diffenderffer* and *Williams*, are entitled to a payment out of the property belonging to that firm over *McGregor, Alloway & Co.*, who are creditors only of *Barker & Diffenderffer*. The accounts first sued upon by *Yeatman & Co.* and *Fellowes & Co.* make no allusion to *Williams*.

The evidence shows that *Williams* was insolvent, but that he became a dormant partner with *Barker & Diffenderffer* in the tobacco transactions out of which the claims of all the attaching creditors have sprung; that *Williams* furnished no means to the partnership, but agreed to superintend the stemmery, which he never did; that all the money was raised by *Barker & Diffenderffer* by bills on *McGregor, Alloway & Co.* and others, and that the shipments were all made in the names of *Barker & Diffenderffer*, who raised the funds. Under these circumstances *McGregor, Alloway & Co.* are as much entitled to be paid out of the property attached as those who discovered that *Williams* was a silent partner in the firm of *Barker & Diffenderffer* in their tobacco business, and attached his interest.

Finally the junior attaching creditors complain that *McGregor, Alloway & Co.* do not allow sufficient credits on their original judgment against *Barker & Diffenderffer*, for payment received through certain shipments made to them from Tennessee since the suit was instituted, and that their judgment should be still further reduced. Their judgment (4th May, 1855,) was for \$20,905 91 and interest. They are willing to credit it with the sum of \$9,346 78, paid July 2d, 1855, under the following circumstances:

"On the 27th June, 1854, *Barker & Diffenderffer* made an assignment of all their tobacco, in the stemmery at Cadiz, and at some other places in Tennessee, amounting to 160 hogsheads, (none of which was attached in these suits,) to *McGregor, Alloway & Co.* and to one *Wesley Gunn*, to secure the sum of about thirty thousand dollars due the former on account of advances, and about

\$8,330 57, due the latter for services in purchasing, stemming and putting up tobacco, besides the sum of about \$4,260, advanced by him to farmers from whom tobacco had been purchased for *Barker & Diffenderffer*. This assignment was made in Tennessee, and is not shown to have been in contravention of her laws. *McGregor, Alloway & Co.* and *Gunn* accepted the assignment there, it being stipulated that if there was not enough to secure them both, *Gunn* should have the first lien. *Gunn* had at least a constructive possession of the tobacco, it having been shipped to *McGregor, Alloway & Co.*, in New Orleans, to be sold to pay, first, the amount stipulated as due himself, and the balance to be applied to the discharge of *McGregor, Alloway & Co.*'s claim on *Barker & Diffenderffer*.

*McGregor, Alloway & Co.* received the shipment, and faithfully carried out the contract, paying over to *Gunn* the sum of \$10,590 57, and after deducting costs and charges, they consent to credit the balance of the proceeds of this tobacco (\$9,346 78) on their judgment of the 4th May, 1855, against *Barker & Diffenderffer*, thus reducing it to the sum of about \$11,559 13 besides interest.

The other attaching creditors contend that the sums paid over to *Gunn* by *McGregor, Alloway & Co.* should also be credited on the judgment of the latter, as having been paid to *Gunn* wrongfully and in fraud of their rights.

Under the evidence we find that *McGregor, Alloway & Co.* would have been guilty of a breach of faith if they had failed to pay the stipulated sum over to *Gunn*. It is proved that the sum was justly due him by *Barker & Diffenderffer*, pursuant to a contract made at an unsuspecting time, and that *McGregor, Alloway & Co.* were only able to procure this tobacco, which has so largely reduced their original claim against *Barker & Diffenderffer*, by pledging themselves, first, to pay *Gunn*. *Gunn* had a constructive possession of the tobacco, and could have enforced his contract against *McGregor, Alloway & Co.*, who were his agents, for the purpose of paying his claim out of the proceeds of this shipment.

We see no ground for suspecting any fraud on the part of *McGregor, Alloway & Co.* in entering into and carrying out this agreement.

As to the charges for interest, &c., in their original account against *Barker & Diffenderffer*, we are of opinion that, under the pleadings and evidence, *R. Yeatman & Co.* and *Fellowes & Co.* are not in a position to question them.

It is, therefore, ordered, that the judgment appealed from be reversed; it is further ordered, adjudged and decreed, that the intervention and third opposition of the Planters' Bank of Clarksville, Tennessee, be dismissed, and that *McGregor, Alloway & Co.* be recognized as having the right to be paid by preference and priority out of the property or funds attached in the hands of *W. G. Robinson*, garnishee, the sum of \$11,559 13, besides interest, or such balance as is due on their judgment against *Barker & Diffenderffer*, and costs; and if, after satisfying this judgment, there be any balance, that the right of *Fellowes & Co.* to be paid next in order be recognized, and lastly the right of *R. Yeatman & Co.*; and it is further ordered, that the costs of this appeal be paid one-half by the Planters' Bank of Clarksville, Tennessee, and the other half by the appellants, *Fellowes & Co.* and *R. Yeatman & Co.*

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&  
BARKER.

## CHARLES RICHARDSON v. J. M. BELL, Syndic of Estate of J. M. BELL.

It is the duty of the syndic in selling a slave at auction to declare the existence of any disease in the slave known to him, and which could not be discovered on simple inspection.

Where he has failed to do so, the sale will be rescinded on the ground of such redhibitory vice.

Where the existence of the disease before the sale to the knowledge of the vendor is clearly shown, a *post mortem* examination is not necessary.

**A**PPEAL from the District Court of West Feliciana, *Ratliff, J.* Tried by a Jury. *Brewer & Collins*, for plaintiff. *U. B. & E. Phillips*, for defendant and appellant.

MERRICK, C. J. The plaintiff sues the defendant to rescind the sale of a slave sold to the plaintiff at the sale of the property belonging to the insolvent estate. The case was tried by a jury who found in favor of the plaintiff, and after an unsuccessful attempt to obtain a new trial, the syndic has appealed.

It will be necessary to notice but a few of the questions raised in this case. The testimony abundantly established the fact, that the slave died of a redhibitory disease, which existed prior to the sale, to the knowledge of the defendant. Where the testimony clearly shows that the disease existed prior to the sale to the knowledge of the vendor as in this case, no *post mortem* examination is necessary. The plaintiff has done what was incumbent upon him, viz., he has made his case legally certain. If a physician was not called to treat the negro, it was because when examined by *Dr. James Perkins*, he discovered that the disease was one in which medicine could produce no favorable effect. This objection, moreover, has less effect, as the negro, after having been tendered, had been hired to the defendant himself, who had been a physician, and he was in the defendant's possession when he died.

It is further urged that the action of redhibition does not lie against a syndic on account of property sold at the syndic sale. The jury were instructed by the Judge trying the case, that such was the law in a case of simple restitution and that they must find for the defendant, unless they were of the opinion that there had been fraud in the conduct of the defendant. C. C. 2597. The jury, therefore, if they regarded the instructions of the court must have concluded that the conduct of the defendant was such as to give rise to the action. The testimony of the syndic was taken, from which it appeared that he was aware of the disease of the negro and had caused him to be treated for it.

It was certainly a grave oversight in the syndic, who was present at the sale, in not declaring the existence of the disease, it being one which could not be discovered on simple inspection. Although he may not have thought it his duty as agent of the creditors to inform the auctioneer who was making the sale, or announce the fact to the bidders, yet the consequence of placing a diseased negro upon the stand as sound and suffering him to be adjudicated to all appearances as such, when he knew the contrary, was as injurious to the plaintiff as would have been the case of fraudulent misrepresentations.

If, therefore, it be conceded that the law was correctly stated to the jury by the District Judge, a point not necessary to decide, we are not prepared to say that the jury had not sufficient evidence before them to justify their inference and support their verdict. C. C. 1841, No. 6; *Ibid*, 1842.

Judgment affirmed.

## NAPOLEON B. RIDDLE, Curator, v. CATHARINE KREINBIEHL, &amp;c.

When there has been no fraud on the part of the vendor, and no proof that he had any knowledge of the existence of a redhibitory vice in the slave sold, the redhibitory action is prescribed in one year from the sale.

In an action to recover a part of the price unpaid, the vendor may set up the redhibitory vice as matter of defence, although more than a year has elapsed since the sale. He cannot, however, by a reconventional demand, after the lapse of one year, recover back the part of the price which has been paid.

**A** PPEAL from the District Court of West Feliciana, *Waterston*, Judge of the Eighth District, presiding. Tried by a Jury. *Brewer & Collins and Powell*, for plaintiff and appellant. *H. C. Hudson*, for defendant.

**LEA, J.** The plaintiff, in the capacity of curator of the estate of *Richard N. Cadle*, sues for the unpaid balance due upon the price of a slave adjudicated to the defendant, *Catharine Krienbiehl*, at a public sale of the property belonging to the succession of *Richard N. Cadle*. The defendant resists payment on the ground that at the time of the sale the slave "was afflicted with a redhibitory malady of many years standing," one not easily detected by a person not accustomed to deal in slaves and unskilled in medical science.

The defendant claims in reconvention the cancellation of the sale, the restitution of the money already paid as part of the price of the slave, and the reimbursement of expenses and losses incident to her sickness, such as loss of time, nursing, board, physicians' bills, medicines, &c.

Against the reconventional demand the plaintiff has entered the plea of the prescription of one year. The sale of the slave was made on the 8th of February, 1854, and the suit was not instituted until the 15th March, 1855. Nothing in the evidence establishes fraud in the vendor, or that the vendor had any knowledge of the existence of the alleged redhibitory vice, and neglected to apprise the purchaser of the fact.

The claim upon the reconventional demand, therefore, comes clearly within the application of Article 2512 of the Civil Code, so far as the defendant seeks to recover any part of the price already paid or damages incident to the sickness of the slave. The Article expressly provides that the redhibitory action must be instituted within a year at the farthest, commencing from the date of the sale. So far, however, as the defendant seeks to resist the payment of the unpaid balance due upon the price, she may invoke the doctrine "*qua temporalia*," &c. Though the redhibitory action is barred by the lapse of time, yet she may invoke as matter of defence any facts which would sustain a redhibitory action.

Upon the question of fact, as put at issue, in the pleadings, although the testimony is not as conclusive as could be desired in a case of this kind, yet we are reluctant to disturb the verdict of a jury upon a question of fact sanctioned, as it apparently has been, by the concurring opinion of the District Judge.

It is ordered, that the judgment appealed from be reversed, and proceeding to render such judgment as in our opinion should have been rendered, it is ordered, that upon the plaintiff's claim there be judgment for the defendant, and that upon the claim in reconvention, for the restitution of the money paid by the defendant as part of the price of the slave and for damages, as set forth

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in the answer and supplemental answer, it is ordered that there be judgment in favor of the plaintiff, *N. B. Riddle*, curator; it is further ordered, that the plaintiff pay the costs in the District Court, and that the defendant pay the costs of this appeal.

G. W. HELME, Receiver, v. JOSEPH LITTLEJOHN.

What the parties might do by a power of attorney, the court may, when their interests require and the parties are properly before the court, order to be done.

A receiver may be appointed by the court, notwithstanding the death of one partner and the appointment of an executor to administer his estate.

The decree of the court appointing the receiver to collect the partnership assets is itself sufficient authority to him to institute a suit against a debtor of the partnership. The transcript of the proceedings in the suit in which he received his appointment need not be produced.

**A**PPEAL from the Sixth District Court of New Orleans, *Cotton, J. Clarke & Bayne*, for plaintiff and appellant. *Benjamin, Bradford & Finney*, for defendant.

MERRICK, C. J. This suit is brought by the plaintiff in his capacity of receiver of the late firm of *Joseph H. Palmer & Co.* against the defendant. The defendant excepted to the capacity of the plaintiff to stand in judgment, on the ground that *Joseph H. Palmer*, one of the firm, is dead and represented by an executor, and that, under such circumstances, the court was without power to appoint a receiver. On the trial of the case to prove his capacity, the only evidence offered by the plaintiff was a certificate entitled, "Second District Court of New Orleans, No. 8283," wherein it was certified that, "On the 24th day of May, 1856, judgment was entered in the court in the matter of the *Succession of J. H. Palmer & Co.*, in the words and figures following," viz: "In this case submitted to the court for adjudication, the evidence, the pleadings, and the law considered, it is ordered, adjudged and decreed, that *George W. Helme* be appointed receiver to collect the partnership assets of *J. H. Palmer & Co.*, to settle and liquidate the partnership affairs, upon giving bond in the sum of twenty thousand dollars, until the debts are paid." 29th May, 1856.

[Signed]

"P. H. MORGAN, Judge."

It is objected that this certificate does not show that the Judge had proper parties before him in order to appoint a receiver; that the plaintiff should have produced the whole of the record to show, not only that the *Succession of J. H. Palmer* was represented, but that the surviving partner was also a party to the proceeding."

There is force in the objection under the ordinary rules of evidence. But we think that to require the receiver to produce in every suit he may be required to bring a transcript of all of the proceedings in the suit in which he has received his appointment would, in a great measure, deprive the parties of the benefit of his appointment, and unnecessarily increase the cost of every suit brought by the receiver. We think that the certified copy of the entry alone making the appointment ought to be deemed *prima facie* proof that the court had the proper parties before it when the appointment was made, leaving the opposite party to rebut the presumption.

The receiver is but the agent of the parties, having the legal right to sue. The executor of *Joseph H. Palmer*, deceased, and *James H. Massey* might have united in a power of attorney and appointed *Helme* their agent to institute the suit on their behalf in his own name. *Eggleston v. Colfax*, 4 N. S., 481; 5 N. S., 40; 4 Rob., 521; 5 Rob., 478.

What the parties might do by a power of attorney, the court may, when their interests require and the parties are properly before the court, order to be done. Such decree unappealed from acting upon the parties before the court, cannot have less binding force than the voluntary act of the parties themselves. The court exerts a similar power in the appointment of a curator of an absentee. C. C. 50. The court then had power to appoint a receiver notwithstanding the death of *J. H. Palmer*, and the appointment of an executor, and such decree was a sufficient authority to the receiver to institute this action, and the judgment in favor of the receiver will be a sufficient protection to the defendant. 4 Rob. 521; 2 An. 90.

On the merits, no argument has been urged why judgment should not be rendered in favor of the plaintiff, who appears to have made out his case.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that the said *George W. Helme*, in his said capacity of receiver, do have and recover judgment against the defendant, *Joseph Littlejohn*, for the sum of five hundred and ninety-three dollars and forty cents, with five per cent. interest thereon per annum from the 25th day of February, 1856, until paid, and that the defendant pay the costs in both courts.

#### JAMES B. SMITH v. A. R. BROWN, Tutor.

Novation will not be presumed. "It can only be established by an express declaration to that effect by the creditor or by acts which are tantamount to such a declaration." C. C. 2188.

When the tutor gave his individual notes for the amount of an account rendered by an attorney-at-law for professional services in suits in which the interests of the minor were involved, *held*: that it was not a novation of the debt.

APPEAL from the District Court of East Feliciana, *Ratliff, J.*

*Fuqua & Kilbourn*, for plaintiff. *Bowman & Delee*, for defendant and appellant.

LEA, J. The defendant is appellant from a judgment rendered against him as tutor of his minor child, *William R. Brown*, upon a claim for professional services rendered by the plaintiff as an attorney-at-law in two suits in which the interests of the minor were involved. The basis of the suit is an open account in which the claim for services is set forth. The defence rests upon the pleas of novation and prescription.

We consider the plea of prescription untenable, as it is shown that the correctness of the demand has been acknowledged by the tutor within the last two years, and the only proof of the alleged novation of the debt consists in the fact that the tutor gave his individual notes for the amount.

This would not amount in law to a novation. Novation will not be presumed. "It can only be established by express declaration to that effect by the creditor,

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or by acts which are tantamount to such a declaration." C. C. 2188. In the case at bar, had the note of a third party been given to the plaintiff we should not, under the circumstances of the case, have been justified in drawing the conclusion that a novation was intended.

We have considered this case as it has been presented in the pleadings and arguments of counsel, and do not wish to be considered as expressing any opinion with reference to the regularity of the proceedings in other respects.

Judgment affirmed.

E. H. ROQUEST & Co. v. STEAMER B. E. CLARKE et al.

The writ of provisional seizure cannot be sued out without a bond being given by the plaintiff except in the cases expressly enumerated in the Code of Practice.

The furnishers of provisions to the boat's crew are not furnishers of "materials" in the sense of Art. 285, No. 3, of the Code of Practice.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J. Durant & Hornor*, for plaintiffs and appellants. *Charles B. Singleton*, for defendants.

**SPOFFORD, J.** The writ of provisional seizure which issues without a bond by the plaintiff who resorts to it is restricted to the cases enumerated in the Code of Practice under that head. *Smith v. Smith*, 2 An. 447.

The plaintiffs, who have furnished provisions to the boat's crew, are not furnishers of "materials" in the sense of the Article 285, No. 3, of the Code of Practice.

The District Judge, therefore, did not err in setting aside the provisional seizure.

Nor do we think he erred, as contested by the appellants, in limiting the privilege claimed by the plaintiffs to the term of sixty days next preceding the seizure. It is true the term was established for the protection of third persons dealing with the owners of vessels, but if the privilege runs out in that time, as has been repeatedly held, the courts cannot extend the time. We see no practical benefit to result from holding that the privilege lasts and must be enforced until some third person pleads its peremption; if the owners are solvent the creditor can secure payment without a privilege; if not, some third person must be prejudiced by a prolongation of the term for which the privilege subsists.

The money demand of the plaintiffs is not prescribed, as urged by the defendants and appellees. The Judge properly inferred an interruption of prescription from the facts in evidence.

Judgment affirmed.

## FERDINAND H. FINK et al. v. EXECUTOR OF J. D. FINK.

The will of the testator *John D. Fink*, of New Orleans, contained the following clause:

"That after the payment of my just debts and the legacies mentioned herein above mentioned, that the proceeds of the whole of my estate, property, rights, effects and credits be applied to the erection and maintenance and support of a suitable asylum in this city, to be used solely as an asylum for protestant widows and orphans, to be called *Fink's Asylum*: and I do hereby authorize my friend *Diederich Bullerdieck*, after my decease, to name and appoint three worthy and responsible persons as trustees to carry out my said intentions respecting the aforesaid asylum."

It was held that the widows and orphans for whom it was intended the building to be erected should be a refuge and a home; were the objects of the testator's bounty.

The clause in the will in reference to the appointment of trustees, is to be construed as a delegation by the testator to a third person of the choice of administrators of a portion of the estate, and this clause is a mere nullity, and is to be considered as not written. C. C. 1506, 1506.

The words "Protestant widows and orphans" used in the will, taken in connection with other words, indicate with certainty the meaning to have been "Protestant widows and orphans in the city of New Orleans."

The general form of expression used by the testator, as to the objects of his benevolence, is sanctioned by the Article 1506 of the Civil Code, which sanctions a donation to the *poor of a community*, and the word community in this Article means a municipal corporation.

The qualification "Protestant" of the nouns-substantive widows and orphans, is not so vague as to vitiate the bequest. It will be for the administrators of this charity to determine what widows and what orphans come under the denomination of "Protestant."

The Article 1506 of the Code, which provides that donations made for the benefit of the poor of a community shall be accepted by the administrators of such community, although found under the head of donations *inter vivos* is applicable to donations *mortis causa*.

The corporation formed by the title of the *Fink Asylum* since the death of the testator is without interest.

The charity created by the testator's will is legally to be administered only by the city corporation of New Orleans.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*

*Preaux & Derbès*, for plaintiff:

The will itself shows that the heir was not in existence at the time of the death of the testator. The testator says "It is my wish and desire, and I do hereby declare the same to be my will, that after the payment of my just debts, and the several legacies herein above mentioned, that the proceeds of the whole of my estate, property, rights, effects and credits, be applied to the erection and maintenance and support of a suitable asylum in this city, to be used solely as an asylum for Protestant widows and orphans, to be called *Fink's Asylum*:" and I do hereby request and authorize my friend, *Diederich Bullerdieck*, after my decease, to name and appoint three worthy and responsible persons as trustees, to carry out my said intentions respecting the aforesaid asylum."

We have copied here the entire dispositions of the will in order to render its discussion more sensible.

The words "to be applied to the erection" show clearly that the instituted heir was not yet in existence at the time of the drawing of the instrument, and that the institution was made in favor of a body, whose creation was contemplated by the testator to take effect only after his death. Therefore upon the first proposition there can be no difficulty, so far as the question of the existence of the heir at the time of the death of the testator is concerned.

Then, in order to inherit, one of the essential conditions is, to be in existence at the time of the death of the testator, and this essential condition of the law is missing in the institution.

The Art. 1469 C. C. saith: "In order to be capable of receiving by last will, it suffices to be conceived at the time of the decease."

Toullier, vol. 5, p. 100, No. 92, says:

"Pour recevoir, même sous condition, il faut exister; on ne saurait donner

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à celui qui n'est pas *in rerum natura*, si ce n'est dans le cas des substitutions autorisées par les Art. 1048 et 1049, qui permettent de donner à l'un de ses enfants, ou bien à l'un de ses frères ou sœurs, à la charge au donataire de rendre à ses enfants nés ou à naître. HORS, CES DEUX CAS EST CELUI DE L'ART. 1082, dont nous parlerons au chap. 8. IL FAUT EXISTER POUR RECEVOIR, HERE SOUS CONDITION."

The 8th chap. of the work of Toullier, treats of donations by marriage contract. The above authority is surely conclusive on the subject, and we can say without fear of being contradicted, that the author may have equals among some few of the commentators of the Napoleon Code, but surely he has no superior.

Our laws have shown all kinds of liberality in requiring only that the heir be conceived at the time of the death of the testator, in order to enable him to inherit. It seems that the courts ought to take care not to give more extension to the laws than the liberality of the legislator has given to it.

The requisites of the Roman law were more severe. See L. 49, § 1, *de hereditibus*. L. 1, *D. de regulâ Catonid.*

See Merlin Rep. verbo Institution d'Héritier, Sec. VI, No. V.

There is one fact upon which we desire to call your honor's attention. In *Fink's* will, the asylum is not instituted, for the reason that its creation must take place by an act which will happen after the death of the testator, therefore, at the moment of the decease of the testator, we find no conceived heir, (or no heir in existence so far as it relates to corporation.)

The language of the Art. 418, C. C., is clear: "Corporations, for certain purposes, are considered as natural persons, and, therefore, in the transaction of their business, subject to the same rules as those which govern natural persons."

The authors of the C. C., in Art. 424, in specifying the capacity of corporations, say: That they "are substituted to persons;" they may possess property, receive by way of donations and legacy, also by way of testament. But the Art. 424 C. C., leaves no room for a doubt, that in order to be capable of receiving, they must be first created before the liberality, or the institution is made in their favor.

In Art. 1536, C. C., in which the legislator speaks of donations made for the benefit of an hospital, his language is not ambiguous; he speaks of a body in existence at the time of the act of donation. Again, in Art. 1474, in speaking of the dispositions which the law authorizes a father to make in favor of his natural children, the Legislature contemplates institutions made in favor of an heir conceived. In all its dispositions in relation to corporations, the Code says no where, that the dispositions of Art. 1469 C. C., are not applicable to corporations; on the contrary, the language of the legislator places them on an equal footing with natural persons. Therefore, the inflexible rule of Art. 1469 C. C., is as well applicable to them as to natural persons; they must be conceived at the time of the decease of the testator.

Therefore, the pretended *Fink's* Asylum, being not in such a situation cannot inherit.

The Art. 1469, C. C., requires that in order to be able to inherit, the heir must be conceived at the time of the death of the testator, which means that he must have at any rate, a gestative existence in the womb of his mother. If he is not in such a condition, the institution cannot inure to him.

Then, in supposing that instead of instituting the pretended asylum as his universal legatee, *Fink* had said that the executor would have to appoint three trustees, for the purpose of selecting an infant born at the time of the appointment of said trustees, and to give to him as christian name that of *Fink*, and that the infant thus selected and named, would be the universal legatee of the testator. Could such a disposition be maintained by any tribunal?

Then, is it not the same disposition, so far as the pretended asylum is concerned? It suffices to read the institution contained in the will, in order to say yes.

Then, as we have demonstrated in treating the second proposition so far as the right of heirship is concerned, corporations, in the limits of their attributes, are placed on an equal footing with natural persons; it follows from this, that such a disposition elapsing to a natural person, ought to elapse to the pretended asylum.

It is too often forgotten, that the legislator, in his acts, intends only to give help to laudable disinterested charitable purposes, but that his intention has never been to furnish relief for vanity and unreasonable self respect.

If a citizen is animated by the pure desire of endowing charitable institutions, the laws of Louisiana afford to him ample means for carrying into effect his good will, but if he only intends to satisfy his vanity, and so sacrifice his legitimate relations, the legislator has refused to him such an authority, because in all civilized society, family ties are as much necessary and holy for the support of the government, as charity. 17 L. R. 46; 18 L. R. 246.

The testator says, that it is his wish and desire, that after his death the remainder of his property be applied to the erection of an asylum to be called *Fink's Asylum*, and he charges his executor to appoint and name three worthy and responsible persons as trustees, to carry out his intentions.

Let us suppose that the testator is still alive, in making such a disposition by way of a donation *inter vivos* without the grant of the sovereign, would he have been divested of his title of property? And could it make this corporation pretend to any legal existence as a corporation? Surely no. Because no corporation can be established, except by a positive grant on the part of the sovereign.

But *Fink* is dead. Does that change the position? Surely no, because in his power of disposing by testament, he was bound to act agreeably to the laws of the country. See C. C., Art. 1505.

The Art. 423 C. C., requires the authority of the Legislature to establish a corporation, and if *Fink* had been alive he could not have established said pretended corporation. He could not even have established it alone in recurring to the general laws in matters of corporations. (See Acts of 1855, 185.)

But it may be said, that the title is vested in an intellectual body, because the testator, in his will, had the idea of the creation of the body. But the answer to that objection is very simple. The instituted heir, in the language of Art. 1469 C. C., must be conceived or in existence, so far as it applies to corporations, that is to say, to have a gestative existence, and that pretended asylum had not even, at the time of the death of the testator, that existence. It is only the trustees who took upon themselves to create it.

Therefore, no intellectual body was vested, at the time of the death of *Fink*, with the right to inherit his property.

The executor and the trustees are not instituted heirs by the terms of the will, and no natural persons or corporations remain vested, by the will, of the right of heirship.

Consequently, there is no person vested with the right of heirship, and the testator must be considered as having died *ab intestat* so far as the disposition of his will is concerned.

Beyond a doubt, *Fink*, in his will, has made no legal disposition, so far as the pretended asylum is concerned. C. C. 1566.

But if any disposition can be found in said instrument by meticulous minds, it is null and void, because it cannot be ranked under any shape, except under that of a *fidei commissum*.

*Bullerdieck* is appointed by virtue of the will, not the heir, but only the testamentary executor of the deceased.

The Art. 1651 C. C., says: "That the execution of the dispositions contained in testaments, is usually confided by the testator to one or more testamentary executors."

Then your honors perceive that the duty of a testamentary executor is confined by law to a mere power of execution, and that the testator has no authority by virtue of the law to entrust said executor with the power of creating the heir. The will and the institution, the heir and the capacity of the heir to inherit at the time of the death of the testator, must be accomplished facts at the time of the death of the testator; and the executor has no other power than to execute the legal dispositions contained in the will.

Are these requisites to be found in the will of *Fink*? No, the executor has to appoint and name three worthy and responsible persons as trustees, to carry out the intentions of the testator respecting the asylum. Is that a mere act of execution on the part of the executor. Is it not, on the contrary, a right of constitution? And can the executor constitute any portion of the will which he is charged to execute?

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These are questions for your honors to decide, and they are so simple that it seems to us they offer no difficulty and that the court will pronounce that such a disposition is not warranted by the law of Louisiana.

But by the will, the testamentary executor is vested with the seizin of the succession of the testator and also with the right of appointing the trustees, and to return to them the liberality for the purpose of *carrying into effect the intentions* of the testator, as long as the trustees are not appointed, the assets of the succession remain in the hands of the executor. The appointment of the trustees is entirely left to his own discretion, no specific time is pointed out in the will for their appointment, it must only take place "*after the death*" of the testator. It is only when they are appointed that they receive from the executor the liberality. Is not such a testamentary disposition, coming exactly under the prohibition contained in Art. 1507 C. C. ? We think so.

The language of the Art. 1507 C. C. is clear, "*Substitution and fidei commissus are and remain prohibited.*"

Is not an act committed to the faith of the executor by the testator, to take possession of his succession by virtue of the seizin, to appoint the trustees and to return the assets of the succession to said trustees, a *fidei commissum* ?

Under the old system, in order to establish a corporation, the action of the Legislature was required. (C. C., Arts. 418 and 423). But since the adoption of the Constitution of 1812, the Constitutions of 1845 and 1852 have been adopted. New laws have been established, and a general law has been adopted agreeably to the provisions of these two last instruments. These laws are two in number, and may be found on pages 182 and 185 of the Acts of 1855.

The corporation, of the kind of those similar to that concerned in this controversy, is one of those for which "An Act entitled an Act for the organization of corporations for literary, scientific, religious and charitable purposes," (see page 185 of the Acts of 1855,) has provided.

The first section of the Act requires seven persons in number, in order to be able to create said corporation. Without that number such a corporation cannot be created.

The will of *Fink* requires only the appointment of three trustees, which fact shows clearly that his intention was not to authorize his executor to seek for a remedy in that law, or that he has ever contemplated the creation of a corporation to carry out his intentions.

The language of that first section shows clearly that the intention of the legislator is, that these seven persons will form the corporation with a fund of their own, and not with the fund of a succession, after the death of a testator, and without the intervention of the Legislature, and against its will, for your honors ought not to forget that an application was made to the Legislature of this State by the executor for the incorporation of the pretended asylum, and that that body has disregarded the application.

#### *Durant & Horner, for Executor:*

The testator's intentions are so abundantly clear, that one lays himself open to the charge of affectation in seeming not to see them. The language of the will is, "that the proceeds of his whole estate, &c., should be applied to the erection, maintenance and support of a suitable asylum in New Orleans, to be used solely as an asylum for Protestant widows and orphans;" and it would be difficult to conceive, as far as the intention goes, what language he could have adopted to express his wish more intelligibly, to provide, to the extent of his means, for the wants of a certain class of widows and orphans.

But however plainly his desire may be expressed as to its essence, the legacy is still null, say the heirs, from the omission of the testator to provide for the manner in which his intention shall be carried into effect.

This objection presents two distinct questions for solution:

Firstly—Is it necessary to the validity of a bequest for charitable purposes, that the testator should specify the means by which his design is to be carried out? And does the omission to do so, moreover, taint the bequest with nullity?

The authorities already quoted will suffice to show that the question must be answered negatively.

Under the jurisprudence of Rome, after the introduction of Christianity, provision was made by law for carrying out the bequests of pious persons in

favor of God, the Saviour, the saints, the poor and the fatherless. See Novell. Just. cxxxi, chap. ix, "si quis in nomine magni Dei, et salvatori nostri," &c.; and chap. x, quoted above. And under this legislation it was, of course, unnecessary for the testator to point out the mode in which his beneficence should be carried out, which, from ignorance, he might be unable to do; for the law stepped in, by these general provisions, to supply those means which, in the absence of general arrangements, might always have been afforded by special legislation.

See Domat, liv. iv, tit. ii, sec. vi, §4, "si un legs pieux n'avait pas de destination," &c.

The case is the same in France, and the same general provision is made in Art. 910 of the Code Napoleon.

The legislation and jurisprudence of England was placed upon the same footing by the statute of 43 Elizabeth, chap. 4: "That the commissioners appointed by the Lord Chancellor shall inquire, &c., as to the lands, &c., given by well disposed people, &c."

And under this statute, a bequest to *charity in general* whether to be executed by trustees selected by the testator himself or by the king as *parens patriæ*, will be sustained for the purposes mentioned in the statute or embraced by its equity. See the remarks of Lord Eldon, in *Morrice v. The Bishop of Durham*, 10 Vesey, 541.

In Massachusetts, a legacy to *T. S. P. and R.*, in trust for the cause of Christ, for the benefit and promotion of true evangelical piety and religion, was maintained. See *Going v. Emery*, 16 Pickering, 107.

Our own Code, Art. 1536, says: "Donations made for the benefit of an hospital, of the poor of a community, or of establishments of public utility, shall be accepted by the administrator of such communities or establishments."

Under this, should one make a donation to the poor of New Orleans, would the donation be void because he had not specified the mode and manner in which the poor are to receive the benefit of his bounty? It would not, unless we entirely disregard the Article.

So when, formerly, *Joseph Claude Mary*, once a resident of this city, died in France, leaving \$5,000 to the orphans of the First Municipality, the sum was ordered by this court to be paid to the First Municipality council, the court saying: "It appears to us that the city council of the First Municipality will be competent to claim and receive the legacy, and regulate its distribution among the intended objects of the testator's munificence to be found within the limits of the First Municipality."

Here was the strongest possible case against the petitioners' objection now urged. The testator said not one word, nor made the most distant allusion to the mode and manner in which he desired his intention with regard to the orphans should be carried into effect. He simply said, I give five thousand dollars "*aux orphelins de la Première Municipalité*"—nothing more. The bequest was held valid, and every principle of the law of charitable uses will sustain the decision of the court.

And so, it now stands proved, from authority and reason, that the validity of a charitable bequest does not depend upon an indication by the benefactor of the manner and mode in which his bounty is to reach the beneficiaries. See *Succession of May*, 2 Rob. 438.

Under the system of the Pandects, so little was it necessary for the testator to specify the mode and manner in which he desired his benevolent intentions to be carried out, that even when he had specified them, and they were found to be unlawful or otherwise impossible, some other mode was devised for their fulfilment, that the charity might not entirely fail. See Digest lib. xxxiii, tit. ii, p. 16—"Legatum civitati relictum est, *ut ex*," &c.

And we say, secondly, in the will now before the court, has the testator really made the omission which is here insisted upon by the petitioners as a ground of nullity?

Two principles of great simplicity govern the construction of written instruments of this character. They have been handed down to us from the earliest records of human reason.

That the words employed shall be interpreted according to the meaning of the testator: "*conditionem verba, quæ testamento prescribuntur*," &c. Digest, lib. xxxv, tit. 1, p. 101, sec. 2. See *Succession of Franklin*, 7 An. 416; 4 Kent. 585. And that the interpretation should be more large and liberal than

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in contracts. "In testamentis plenius voluntates testatum interpretantur." Digest, lib. 1, tit. 17, sec. 2.

Looking at the clause under consideration, with these principles to guide us, we find that the intention of the testator was to devote the proceeds of the residue of his estate to the establishment of an asylum; and when he said that it was to be an asylum suitable for protestant widows and orphans, what must he clearly be understood to have had in his mind? Those who seek the nullity of the will, say he must be understood as meaning nothing more than that an edifice should be built, to be called Fink's Asylum, and that his desires went no further than this. He only wanted, says the heirs, that the building should stand as a monument of his name and fame, but had no idea that the arrangements should be effected that would make it useful to the beneficiaries.

Such a construction shocks all plausibility and common sense, neither of which will tolerate the idea that a man entertains the design of making an asylum suitable for widows and orphans, without any one to manage the fund that was to support them.

The testator wishes an asylum to be "erected, maintained and supported" in New Orleans; the word "erected" is sufficient for the building, but it is also to be maintained and supported; and as this could only be done by the expenditure of the proceeds of the property he left for the purpose, and by the aid of persons to direct and manage its affairs, in general and detail, we are bound by the well-known rules of interpretation, to declare that the testator desired and meant that to be done which was necessary to carry his intentions into effect, which is, therefore, just as much a part of his will then as if written in it.

Desiring to erect, support and maintain an asylum in New Orleans, and he a resident of that city, we are not stretching a point when we say, there being already in existence there a number of asylums, all provided with presidents, boards of managers, matrons, nurses, watchmen, cooks, attendants, and all the staff of employees necessary to carry them on, he must be presumed to have desired an asylum under the same management as these, or he would have expressly pointed out in what respects he wished his to differ from the others.

As he says he wishes a "suitable asylum," *i. e.* an asylum suitable for widows and orphans, it may well be asked, in what way an asylum could be suitable for widows and orphans, without the corps of managers and officers by which all asylums are managed.

But, it will be said, that to attain the end of the testator, an incorporated company must be established, and that he has given no direction in his will to that effect. It may be the testator did not know that an incorporation was necessary. He may or he may not have known it. If he knew it was necessary, he certainly desired it, for he is legally presumed to have desired everything necessary to carry out his intent; and if he did not know it, and it is still necessary, then he is presumed just as much, in a legal point of view, to have desired it. In either case the same result is attained. Every man is presumed to know the law. And his having had in view at the time the various laws of this State in regard to the organization of bodies politic for any literary, religious, scientific or charitable purposes (see Acts 1847, p. 151; Acts 1853, p. 296; Acts 1855, p. 185) becomes, then, a matter of legal presumption. Such a corporation Fink evidently conceived; for he uses a term which is a *species* of corporation—corporation being the *genus*. *Asylum* means "an institution for the protection or relief of the unfortunate; as an *asylum* for the poor," &c. Webster's Dictionary. And an institution "is an organized society, established either by law or by the authority of individuals, for promoting any object, public or social." Webster's Dictionary.

We hence conclude that the will employs an expression equivalent precisely to a *corporation*; and there is no necessity of supplying any words to say he meant a corporation. Indeed, the words corporation and asylum are convertible terms: and either may be used in the will without impairing the intention of the testator.

In *Milne's* case, 17 L. R. 46, the testator, in so many words, directed an act of incorporation to be procured. In the matter before the court, that direction is a matter left to inference. Was the will in the former case pronounced good because the testator directed an act of incorporation to be procured? Certainly not, for his direction had no influence in the matter; the will was pronounced good because the incorporation was necessary, and had been granted by the Legislature. And in the present case the act of incorporation is

equally necessary, and may be granted by the same authority, as has actually been done.

Had *Milne* made a bequest to the poor of New Orleans, without saying they should be incorporated, a case which the Supreme Court considered in their opinion, (see 17 L. R. p. 46,) this omission would not have avoided the will, but either the public authorities of the parish would have been competent to receive the bequest, or the General Assembly, as *parens patriæ*, would have devised means for carrying the beneficent intention of the testator into effect. 17 La. 55.

Applying, now, the true principles of interpretation to this residuary clause, it will be found that the mode and manner in which the testator designed his intentions to be carried into effect, clearly result from the law which the testator is presumed to have had in his mind, and whose existence rendered more complete expressions on his part entirely unnecessary.

The petitioner's further object, that dispositions such as are contained in the clause of the will, are in opposition to the policy of the law; but without a more specific statement of the objection, it is scarcely possible to give it an answer. Bequests for charitable uses are favored by every known system of law, and have been cherished by the legislation of successive ages; our Code sanctions them by numerous texts, and our books of reports are filled with their approval; and were a lawyer called upon to signalize the act of man most highly favored by law, he would almost involuntarily turn to bequests for charitable purposes.

And the petitioners contend, that in a case like the present the dispositions of the will could not be carried into effect without making an entire new will for the testator. It remains to be seen what force lies in this objection.

The testator has expressed his desire, in terms the most explicit, that the proceeds of the bulk of his estate should be expended in erecting, supporting and maintaining an asylum suitable for Protestant widows and orphans. How does this disposition require an entire new will? And what more frequent is there than the foundation by will of public charities? See Dalloz Dict., verbo *Etablissements Publics*; Merlin's Rep., verbo *Fondation*; Merlin's Rep., verbo *Institution d'Héritier*, sec. v, § 1, Art. 17.

In such cases the testator, as in the present, indicates the object of his bounty, and it is a function of the government of the country to carry it out, whether by the operation of general statutes provided for the purpose, as in France, or by the supervising control of an equity court, as in Great Britain and many of our sister States, or by the aid of general or special laws, as in Louisiana.

In *Bartlett v. Nye*, 4 Metcalf, 378, a devise of real estate to an unincorporated society for a charitable use was held valid. The estate in such case, it was said, descends to the heirs of the testator, subject to the trust created by him, which they are bound to execute, and if they do not execute it voluntarily, the court will regulate and enforce the execution.

In the will of *Julien Poydras* a legacy of twenty thousand dollars was left, the interest of which was directed to be appropriated to the maintenance of an academy in the parish of *Pointe Coupée*. In the theory of the petitioners' case this bequest should have been held void, for *Poydras* did not say that the academy was to be incorporated, nor did he give the legacy to a corporation, nor did he specify who should administer the fund, nor did he furnish the details for the organization of the school; and to supply all these is what the petitioners would probably call making a new will for him. The bequest was not a nullity, for the Legislature authorized the Police Jury of the parish of *Pointe Coupée* to accept the donation. See 2 Moreau's Dig., 208, 209; also Act of March 18, 1856, p. 111.

It would seem, therefore, that it is by no means essential to the validity of the clause of a will making a bequest for a charitable purpose, that the testator should express his desire that a corporation should be created to administer the fund, for the mode of administration is not the essence of the bequest. The Legislature, as *parens patriæ*, may use its own wisdom in this regard. It may create a corporation, or it may place the fund in charge of a corporation already established, but that the mass of the citizens should be deprived of the benefits the testator designed for them, is not to be thought of. The testator may not have known and may not have cared about the shape in which the channel was to be wrought through which his bounty was to flow; he has left this, in the

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first instance, to the discretion of his executor, who, in the discharge of his trust, has thought proper to procure, in conjunction with certain persons of high trust and respectability, a charter of incorporation under the laws of the State, as the best mode of carrying out the testator's munificence.

That corporation is represented before the court, and its interests fortunately placed in abler hands than ours. But whether the executor has done well or ill is not so much the question with us now as whether the desires of the testator are in some way to be carried out.

And further, the petitioners declare that the clause of the will in question does not dispose of or transfer the property therein designated to any person or persons.

In cases of dedication of property to public use and of charitable uses, it is not necessary that any grantee should be named, or that any should be in existence, and in the meantime the fee would be in abeyance. See *Town of Paulet v. Clark*, 9 Cranch. 292.

In the case of *Shotwell v. Mott*, 2 Sandford, 46, the testator bequeathed four thousand dollars to be invested by the executors in trustees, to be by them selected, to be distributed forever, under the direction of the New York Yearly Meeting of Friends called Orthodox, unto and among such orthodox ministers of said society as the meeting might designate. The objection was there fully discussed, that trustees were not appointed in the will to hold the fund, and the objection was declared invalid. We beg the court's attention to this case, as strongly resembling the present, and as containing a copious review of all the authorities.

The clause of the will now before the court vests the possession of the property in the first place in *Bullerdieck*, the executor—that is the first transfer. It is made his duty to "name and appoint three worthy and responsible persons as trustees, to carry out the instructions of the will respecting the asylum," to whom he is to give the proceeds of the residuary bequest.

If this is a lawful direction, then we say *Bullerdieck* has complied with it, by procuring, with others, an act of incorporation, and will complete the execution of his trust by handing the proceeds to this corporation. If, however, it is an unlawful direction, it is considered as not written, and the will stands, according to law, as if no such direction were contained in it. And say, for the sake of argument, if you please, that the act of incorporation is null and void, what is the case then presented to the court? A mass of property bequeathed for charitable purposes, in the possession of an executor who administers it, waiting for the action of the Legislature as *parens patrie* to bring into existence the machinery which will render the charity effective. The title to the property in the meanwhile is in abeyance, but cannot be claimed by the heirs, for the court cannot presume that the Legislature, by refusing to intervene, will deprive the people of New Orleans of the good the deceased intended to confer on them, and until that refusal is declared in absolute terms, the clause of the will, we submit, must stand.

We are at a loss to know what objections can be found to this clause which have not been dealt with already.

The case now before the court comes completely within the principles recognised as law in the *Philadelphia Baptist Association v. Hart*, 4 Wheaton, 1; *Inglis v. The Sailors' Snug Harbor*, 3 Peters, 148; *Milne v. Milne*, 17 L. R. 46; and *Succession of Franklin*, 7 An. 415.

In the case in 4th Wheaton, and that in 7th Annual, above quoted, it was held by the courts that "the devise was *in presenti* to persons who should be officers at the death of the testator, and to their successors in the trust; the vesting of the devise was not to be postponed to a future time, until a corporation could be created. It was to take immediate effect." And the devise was held to be void in law.

In the case in 3d Peters and in 17 L. R., above quoted, the devise was *per verba de futuro* to corporations not then in existence, which was to take effect when the corporations should be created. And the bequests in these cases were held valid.

So in the case before the court, the proceeds of the residue of the estate are to be held in trust by the executor until the trustees he is to name are brought into existence to manage the fund, or until, in some other way, the Legislature provides for its administration.

*C. Roselius, for the Fink Asylum :*

I. The clause in the will, which has given rise to this controversy, constitutes the foundation of an asylum for the widows and orphans; it is one of those institutions denominated by civilians *via causa* or *via corpora*, of which the testator is the founder.

Merlin, in his *Répertoire de Jurisprudence*, verbo *Fondation*, vol. 12, p. 279, says:

"Ce mot se dit des donations ou legs qui ont pour objet l'établissement, soit d'une église, soit d'un hôpital, soit d'une communauté, soit d'un séminaire, etc., ou qui sont faits sous la charge de quelque œuvre pie, à des églises ou des communautés déjà établies."

It was contended that this authority is inapplicable, because the author speaks of the former jurisprudence of France; but this is a mistake, for he says, at p. 280:

"Quant aux fondations d'hospices et d'autres établissements d'utilité publique, elles ne peuvent pareillement avoir lieu qu'avec l'autorisation du gouvernement. V. l'art. 910 du Code Civil."

Again the same author says, vol. 15, p. 366, verbo *Institution d'héritier*, sec. 5, p. 1:

"Aujourd'hui, les gens de main-morte ne peuvent recueillir l'effet d'aucune disposition, soit testamentaire, soit entre-vifs, s'ils n'y sont autorisés par le gouvernement. (V. l'art. donations, sec. 3, p. 2, No. 1.)

"Mais il est à remarquer, qu'une fois l'autorisation accordée par le gouvernement, les tribunaux ne peuvent plus, comme je l'établirai aux mots: *Réduction de legs*, réduire les institutions ni les legs au profit des parens pauvres des testateurs, que le gouvernement a seul ce pouvoir, et qu'il en use quelquefois, et que d'ailleurs il peut accorder, comme de fait il accorde assez fréquemment, son autorisation à des institutions ou legs qui ont pour objet de former de nouveaux établissements d'utilité publique."

Ricard, vol. 1, p. 137, says:

"Ce dernier arrêt et celui du 11 mai 1654, sont encore considérables pour une autre décision, en ce qu'ils ont jugé que lorsque les donations et les legs sont faits pour l'établissement d'un monastère, on ne pouvait pas opposer le défaut d'autorisation et de lettres patentes; ce qui est juste, parce que ces sortes de dispositions sont présumées faites sous condition, et pour avoir lieu, en cas qu'il plaise au Roi d'agréer l'établissement; et en effet, il serait impossible autrement d'ériger de nouveaux monastères, parce que l'on ne souffre pas qu'il s'en fasse, s'ils ne sont précédés d'une fondation, et il s'observe même que le contrat ou l'acte de fondation s'attache sous le contre-scel des lettres patentes pour en faciliter l'obtention."

Furgole, vol. 1, p. 391, is equally explicit:

"Les dispositions testamentaires sont valables, non-seulement lorsqu'elles sont faites en faveur des hôpitaux fondés et établis, mais encore lorsqu'elles sont faites pour en construire et fonder de nouveaux, auquel cas, la volonté du testateur doit être exécutée dans l'an."

The modern jurisprudence of France by no means conflicts with these principles. Troplong, who is undoubtedly the first living jurist, expounds the doctrine, with his usual vigor and lucidity, in his commentary on the 906th article of the Napoleon Code. V. *Donations et Testaments*, vol. 2, p. 196, No. 610 et seq.

It was asserted in the oral argument, by one of the learned counsel for the plaintiffs, that the Court of Cassation held a different doctrine, and this assertion seemed to rest on the following observations of the author, *loco citato*, p. 201:

"Quant à l'autre question, que la cour a entendu laisser intacte parce qu'il n'était pas nécessaire de la décider, celle de savoir si l'autorisation postérieure à l'ouverture de la succession était suffisante pour valider le legs, il n'est pas douteux, d'après les principes que nous avons établis plus haut, que l'arrêt de la Cour de Douai n'aurait pu d'avantage se soutenir."

How it can be concluded from this language that the opinion of the Court of Cassation is opposed to that of its first President, it is difficult to understand.

It was also said that Toullier laid down a different doctrine on this subject. On referring to that author, vol. 5, p. 86, the court will find, that so far from conflicting, there is a perfect concurrence between his views and those of Troplong.

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The foundation of that doctrine is found in the Roman Law. In the 29th book, t. 5, §62 of the Dig., we read:

"In tempus capiendae hereditatis institui heredem posse, benevolentiae causa; veluti, Lucius Titius, cum capere potuerit, heres esto. Idem et in legato."

Mackeldey, in his compendium of the modern Civil Law, vol. 1, p. —, sec. 145, says:

"The term *pia causa* denotes an institution for pious and charitable purposes, or for the public benefit, and is the general name given to every establishment which has for its object the promotion of piety, the relief of necessitous persons, the spread of education and knowledge, or the advancement of science and the arts. Institutions of this kind are to be regarded as moral persons, only in case they have been recognized as such by the State, by way of approval and confirmation. Otherwise they lack the capacity for rights, and cannot acquire anything. Still the confirmation of them on the part of the State may be subsequent to their foundation; and then it has a retrospective effect back to the time of such foundation. If such *pia causa* be confirmed by the State, and therewith recognized as a moral person, it can not only have rights of all kinds, and make acquisitions *inter vivos* as well as *mortis causa*, but it likewise enjoys many privileges."

In a note to this number, the author says:

"If, therefore, a *pia causa* is founded and instituted by a testament, it is considered as having the capacity to inherit, although the confirmation by the State is only given after the death of the testator." Mackeldey, p. 178-9; 13th edition by Dr. Johnson Adam Fritz. Vienna, 1851.

The whole subject is carefully examined and developed in the 40th vol. of Glück's Commentary on the Pandects, sec. 1438, C. *De hereditibus Instituentibus*, from p. 1 to 108. At the conclusion of this masterly exposition of the legal principles applicable to the matter, he refers to a case precisely similar to that now before the court. It is the foundation of an orphan asylum for Catholic children by a Mr. Blum in Hildesheim. All the arguments used by the author in support of the validity of Blum's foundation are equally applicable to the foundation of the Fink Asylum for Protestant widows and orphans. See p. 108 *et seq.*

By reference to the concordance entre le Code Napoléon et les Codes Civils Etrangers, vol. 1, p. 81, the court will perceive that the Article 345 of the Droit Commun Allemand is substantially the same as Article 910 of the Napoleon Code.

Savigny, in his system of the modern Roman Law, likewise examines the subject and recognizes the same doctrine as that laid down by Mackeldey and the other authors already cited. 2 Savigny, p. 274, sec. 85.

From all these authorities, it is clear that the testamentary disposition of Fink founding the asylum, is perfectly valid, according to the principles of the Civil Law. The only inquiry, therefore, which can possibly arise is, whether our law is different in this respect?

So far from this being so, the Supreme Court has decided in the most express terms, that the law of Louisiana is in perfect harmony with the principles of the Civil Law as understood and applied in other countries.

In the case of *Milne's Heirs v. Milne's Executors*, 17 L. R., 52 *et seq.*, the question was examined with much care. The court laid down the following propositions:

"It is necessary, to enable a legatee to take under our laws, that he be in existence at the time of opening the estate, and have capacity to receive if the legacy is absolute; but if it is conditional, it is sufficient if the capacity to receive exists at the time of the fulfilment of the condition.

"Where legacies were given by the late Julien Poydras, of the parishes of Pointe Coupée and West Baton Rouge, for particular specified objects, the legacies were absolute, but there was no capacity in the legatees to take at the moment of opening the succession, and laws were passed authorizing the Police Juries of those parishes to accept the legacies for the objects named.

"So where legacies were left to two asylums for destitute orphan boys and destitute orphan girls, with directions to the executors to cause the same to be duly incorporated. Held, that these dispositions were conditional, and as soon as the condition was fulfilled by incorporating those asylums, the capacity to take the legacies was then created.

"The direction of the testator to his executors to establish the asylums mentioned in the will, and hand over the legacies to them when incorporated, is not in violation of the provision of the Code which declares that substitutions and *fidei commissa* are abolished.

"The object of abolishing substitutions, &c., was to prevent property from being tied up in the hands of individuals, and placed out of commerce, but it was never contemplated to abolish naked trusts which were to be executed immediately."

The second case in which the question arose and was considered by the Supreme Court, then composed of different Judges, was that of the *Succession of Franklin, Adelia Acklen and her minor child Emma v. J. W. Franklin, et al., trustees, &c.*, 7 A. R., 395 *et seq.* In this there was a difference of opinion among the Judges on other points; but the court was unanimous as to the question now under consideration. Mr. Justice Rost, in delivering the opinion of the majority of the court, says:

"The case of *Milne's Heirs v. Milne's Executors*, already quoted, was one of a bequest *per verba de futuro* to corporations not then in existence, which was to take effect when the corporations should be created. And in the case of *Inglis v. The Trustees of the Sailors' Snug Harbor*, 3 Peter's, 145, the majority of the Supreme Court of the United States interpreted the devise as being one of the same class; neither of these cases conflicts with the decision in the case of the *Baptist Association*, which is, on all hands, admitted to be law. I concede that the weight of authority, under our system of jurisprudence, as well as at Common Law, is in favor of the validity of dispositions *per verba de futuro*, to corporations not *in esse*, to take effect when they are created. But the bequest in this case is of a different kind; in the words of Judge Story, 'it is a devise *in presenti* to persons who should be officers at the death of the testator, and to their successors in the trust; the vesting of the devise was not to be postponed to a future time, until a corporation would be created. It was to take immediate effect, as in the case of the Baptist Association. See the case of the Sailors' Snug Harbor."

Not a single word is to be found in the separate opinions of the Chief Justice, or Justice Slidell, in the least conflicting with the views expressed by Justice Rost.

In the dissenting opinion of Justice Preston, the whole doctrine is thoroughly re-examined, and the conclusion arrived at is in harmony with the doctrine first recognized in the case of *Milne's Heirs v. Milne's Executors*.

These two cases, it is respectfully submitted, settle the jurisprudence of Louisiana on this subject.

When we direct our inquiry as to what is the jurisprudence on this point of the Supreme Court of the United States, we find that the same doctrine is held by that tribunal.

The case of the *Philadelphia Baptist Association et al v. Hart's Executors*, 4 Wheaton's Rep. p. 1 *et seq.*, was a bequest *in presenti*, in the following words: "Item. What shall remain of my military certificates at the time of my decease, both principal and interest, I give and bequeath to the Baptist Association that for ordinary meets at Philadelphia annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family." In that case, the court said:

"At the death of the testator, then, there were no persons in existence who were capable of taking this bequest. Does the subsequent incorporation of the association give it this capacity?

"The rules of law compel the court to answer this question in the negative. The bequest was intended for a society which was not at the time, and might never be, capable of taking it. According to law, it is gone forever. The legacy is void; and the property vests, if not otherwise disposed of by the will, in the next of kin. A body corporate afterwards created, had it even fitted the description of the will, cannot divest this interest, and claim it for their corporation."

The next case in which the question was presented was that of *Inglis v. The Trustees of the Sailors' Snug Harbor*, 3 Peter's Rep. 112 *et seq.*

Mr. Justice Thompson delivered the opinion of the court. He says:

"This case comes up from the Circuit Court for the Southern District of New York, upon several points, on a division of opinion certified by that court. In

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the examination of these points, I shall pursue the order in which they have been discussed at the bar.

"I. Whether the devise in the will of *Robert Richard Randall*, of the lands in question, is a valid devise, so as to divest the heir at law of his legal estate, or to affect the lands in his hands with a trust.

"This question arises upon the residuary clause in the will, in which the testator declares: 'that as to and concerning all the rest, residue, and remainder of my estate, both real and personal, I give, devise, and bequeath the same unto the Chancellor of the State of New York, the Mayor and Recorder of the city of New York, &c., (naming several other persons by their official description only,) to have and to hold all and singular the said rest, residue and remainder of my said real and personal estate, unto them and their respective successors in office, forever, to, for and upon, the uses, trusts, intents and purposes, and subject to the directions and appointments hereinafter mentioned and declared, concerning the same, that is to say: out of the rents, issues and profits of the said rest, residue and remainder of my said real and personal estate, to erect and build upon some eligible part of the land upon which I now reside, an asylum, or marine hospital, to be called 'the Sailors' Snug Harbor,' for the purpose of supporting aged, decrepid and worn out sailors, etc.' And after giving directions as to the management of the fund by his trustees, and declaring that it is his intention, that the institution erected by his will should be perpetual, and that the above mentioned officers for the time being, and their successors, should forever continue to be the governors thereof, and have the superintendence of the same, he then adds, 'and it is my will and desire, that if it cannot legally be done, according to my above intention, by them, without an Act of the Legislature, it is my will and desire, that they will, as soon as possible, apply for an Act of the Legislature to incorporate them for the purposes above specified. And I do hereby declare it to be my will and intention, that the said rest, residue and remainder of my said real and personal estate should be at all events applied for the uses and purposes above set forth; and that it is my desire all courts of law and equity will so construe this my will as to have the said estate appropriated to the above uses, and that the same should in no case, for want of legal form or otherwise, be so construed as that my relations, or any other persons, should heir, possess or enjoy my property, except in the manner and for the uses herein above specified.'

"The Legislature of the State of New York, within a few years after the death of the testator, on the application of trustees, who are also named as executors in the will, passed a law, constituting the persons holding the offices designated in the will, and their successors in office, a body corporate, by the name and style of 'the Trustees of the Sailors' Snug Harbor in the City of New York,' and declaring that they and their successors, by the name and style aforesaid, shall be capable in law of holding and disposing of the said real and personal estate, devised and bequeathed as aforesaid, according to the intentions of the aforesaid will. And that the same is hereby declared to be vested in them and their successors in office for the purposes therein expressed.

"If, after such a plain and unequivocal declaration of the testator with respect to the disposition of his property, so cautiously guarding against, and providing for every supposed difficulty that might arise, any technical objection shall now be interposed to defeat his purpose, it will form an exception to what we find so universally laid down in all our books, as a cardinal rule in the construction of wills, that the intention of the testator is to be sought after and carried into effect. But no such difficulty in my judgment is here presented. If the intention of the testator cannot be carried into effect, precisely in the mode at first contemplated by him, consistently with the rules of law, he has provided an alternative, which, with the aid of the Act of the Legislature, must remove all difficulty.

"The case of the *Baptist Association v. Hart's Executors*, 4 Wheat. 27, is supposed to have a strong bearing upon the present. This is however distinguishable in many important particulars from that. The bequest there was, 'to the Baptist Association that for ordinary meets at Philadelphia.' This association not being incorporated, was considered incapable of taking the trust as a society. It was a devise in *presenti*, to take effect immediately on the death of the testator, and the individuals composing it were numerous and uncertain, and there was no executory bequest over to the association if it should become incorporated. The court, therefore, considered the bequest gone for

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uncertainty as to the devisees, and the property vested in the next of kin, or was disposed of by some other provision in the will. If the testator in that case had bequeathed the property to the Baptist Association on its becoming thereafter and within a reasonable time incorporated, could there be doubt but that the subsequent incorporation would have conferred on the association the capacity of taking and managing the fund.

"In the case now before the court, there is no uncertainty with respect to the individuals who were to execute the trust. The designation of the Trustees by their official character, is equivalent to naming them by their proper names. Each office referred to was filled by a single individual, and the naming of them by their official distinction was a mere *designatio personae*. They are appointed executors by the same description, and no objection could lie to their qualifying and acting as such. The trust was not to be executed by them in their official characters, but in their private and individual capacities. But admitting that if the devise in the present case had been to the officers named in the will and their successors, to execute the trust, and no other contingent provision made, it would fall within the case of the *Baptist Association v. Hart's Executors*.

"The subsequent provisions in the will must remove all difficulty on this ground. If the first mode pointed out by the testator for carrying into execution his will and intention, with respect to this fund, cannot legally take effect, it must be rejected, and the will stands as if it had never been inserted; and the devise would then be to a corporation, to be created by the Legislature, composed of the several officers designated in the will as trustees, to take the estate and execute the trust.

"And what objection can there be to this as a valid executory devise, which is such a disposition of lands, that thereby no estate vests at the death of the deviser, but only on some future contingency? By an executory devise, a freehold may be made to commence in future, and needs no particular estates to support it. The future estate is to arise upon some specified contingency, and the fee simple is left to descend to the heir at law until such contingency happens. A common case put in the books to illustrate the rule is: if one devises land to a *feme sole* and her heirs upon her marriage. This would be a freehold commencing in *futuro*, without any particular estate to support it, and would be void in a deed, though good by executory devise. 2 Black. Com. 175. This contingency must happen within a reasonable time, and the utmost length of time the laws allows for this is, that of a life or lives in being and twenty-one years afterwards. The devise in this case does not purport to be a present devise to a corporation not in being, but a devise to take effect in *futuro* upon the corporation being created. The contingency was not too remote. The incorporation was to be procured, according to the directions in the will, as soon as possible, on its being ascertained that the trust could not legally be carried into effect in the mode first designated by the testator. It is a devise to take effect upon condition that the Legislature should pass a law incorporating the trustees named in the will. Every executory devise is upon some condition or contingency, and takes effect only upon the happening of such contingency or the performance of such condition. As in the case put of a devise to a *feme sole* upon her marriage. The devise depends on the condition of her afterwards marrying.

"The doctrine sanctioned by the court in *Porter's case*, 1 Coke's Rep. 24, admits the validity of a devise to a future incorporation. In answer to the argument that the devise of a charitable use was void under the statute 23, Hen. 8, it was said, that admitting this, yet the condition was not void in that case. For the testator devised that his wife shall have his lands and tenements, upon condition that she, by the advice of learned counsel, in convenient time after his death, shall assure all his lands and tenements for the maintenance and continuance of the said free school, and alms men and alms women forever. So that although the said uses were prohibited by the statute, yet the testator hath devised, that counsel learned should advise, how the said lands and tenements, should be assured, for the uses aforesaid, and that may be advised lawfully, viz: to make a corporation of them by the king's letters patent, and afterwards, by license, to assure the lands and tenements to them. So if a man devise that his executors shall, by the advice of learned counsel, convey his lands to any corporation, spiritual or temporal, this is not against any act of Parliament, because it may lawfully be done by license, &c., and so doubtless

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was the intent of the testator, for he would have the lands assured for the maintenance of the free school and poor for ever, which cannot be done without incorporation and license as aforesaid; so the condition is not against law: *quod fuit concessum per curiam.*

"The devise in that case could not take effect without the incorporation. This was the condition upon which its validity depended, and the incorporation was to be procured after the death of the testator. The devise then, as also in the case now before the court, does not purpose to be a present devise, but to take effect upon some future event. And this distinguishes the present case from that of the *Baptist Association v. Hart's Executors* in another important circumstance. There it was a present devise, here it is a future devise. A devise to the first son of A., he having no son at that time, is void, because it is by way of a present devise, and the devisee is not *in esse*. But a devise to the first son of A. when he shall have one is good, for that is only a future devise, and valid as an executory devise. 1 Salk. 226, 229.

"The cases in the books are very strong to show, that for the purpose of carrying into effect the intention of the testator, any mode pointed out by him will be sanctioned, if consistent with the rules of law, although some may fail. In *Thelluson v. Woodford*, 4 Ves. Jun. 325, Buller, Justice, sitting with the Lord Chancellor, refers to and adopts with approbation the rule laid down by Lord Talbot in *Hopkins v. Hopkins*, that in such cases, (on wills,) the method of the courts is not to set aside the intent, because it cannot take effect so fully as the testator desired, but to let it work as far as it can. Most executory devises, he says, are without any freehold to support them; the number of contingencies is not material, if they are to happen within the limits allowed by law. That it was never held that executory devises are to be governed by the rules of law, as to common law conveyances. The only question is, whether the contingencies are to happen within a reasonable time or not. The master of the rolls in that case says, (p. 329,) he knows of only one general rule of construction, equally for courts of equity and courts of law, applicable to wills. The intention of the testator is to be sought for and the will carried into effect, provided it can be done consistent with the rules of law. And he adds another rule, which has become an established rule of construction, that if the court can see a general intention, consistent with the rules of law, but the testator has attempted to carry it into effect in a way that is not permitted, the court is to give effect to the general intention, though the particular mode shall fail. 1 Peere Wms. 332; 2 Brown's Ch. 51.

"The language of Lord Mansfield, in the case of *Chapman v. Brown*, 3 Burr. 1634, is very strong to show how far courts will go to carry into effect the intention of the testator. To attain the intent, he says, words of limitation shall operate as words of purchase; implications shall supply verbal omissions. The letter shall give way, every inaccuracy of grammar, every impropriety of terms, shall be corrected by the general meaning, if that be clear and manifest.

"In *Bartlett v. King*, 12 Mass. Rep. 543, the Supreme Judicial Court of Massachusetts adopts the rule laid down in *Thelluson v. Woodward*, that the court is bound to carry the will into effect if they can see a general intention consistent with the rules of law, even if the particular mode or manner pointed out by the testator is illegal. And the court refers with approbation to what is laid down by Powell in his *Treatise on Devises*, 421, that a devise is never construed absolutely void for uncertainty, but from necessity, if it be possible to reduce it to certainty it is good. So also in *Finlay v. Riddle*, 3 Binn. Rep. 162, in the Supreme Court of Pennsylvania, the rule is recognized, that the general intent must be carried into effect, even if it is at the expense of the particular intent.

"A rule so reasonable and just in itself, and in such perfect harmony with the whole doctrine of the law in relation to the construction of wills, cannot but receive the approbation and sanction of all courts of justice; and a stronger case for the application of the rule can scarcely be imagined than the one now before the court. The general intent of the testator, that this fund should be applied to the maintenance and support of aged, decrepid and worn-out sailors, cannot be mistaken. And he seems to have anticipated that some difficulty might arise about its being legally done in the manner pointed out by him, and to guard against a failure of his purpose on that account, he directs application to be made to the Legislature for an incorporation, to take and execute the trust according to his will; declaring his will and intention to be, that his

estate should at all events be applied to the uses and purposes aforesaid, and desiring all courts of law and equity so to construe his will as to have his estate applied to such uses. And to make it still more secure, if possible, he finally directs that his will should in no case, for want of legal form or otherwise, be so construed as that his relations, or any other persons, should heir, possess or enjoy his property, except in the manner and for the uses specified in his will.

"The will looks, therefore, to three alternatives:

"1. That the officers named in the will as trustees should take the estate and execute the trust.

"2. If that could not legally be done, then he directs his trustees to procure an act of incorporation, and vests the estate in it for the purpose of executing the trust.

"If both these should fail, his heirs, or whosoever should possess and enjoy the property, are charged with the trust.

"That this trust is fastened upon the land cannot admit of a doubt. Wherever a person by will gives property and points out the object, the property, and the way it shall go, a trust is created, unless he shows clearly that his desire expressed is to be controlled by the trustee, and that he shall have an option to defeat it. 2 Ves. Jun. 335.

"It has been urged by the defendant's counsel that these lands cannot be charged with the trust in the hands of the heir, because the will directs that they shall not be possessed or enjoyed, except in the manner and for the uses specified. That the manner and the use must concur in order to charge the trust on the land. But I apprehend this is a mistaken application of the term manner as here used. It does not refer to the persons who were to execute the trust. But to the mode or manner in which it was to be carried into effect, viz: "by erecting upon some eligible part of the land an asylum or marine hospital, to be called the Sailors' Snug Harbor. And the uses were 'for the purpose of maintaining and supporting aged, decrepid and worn out sailors.' Whoever, therefore, takes the land takes it charged with these uses or trusts, which are to be executed in the manner above mentioned. And if so, there can be no objection to the act of incorporation, and the vesting the title therein declared. It does not interfere with any vested rights in the heir. He has no beneficial interest in the land. And the law only transfers the execution of the trust from him to the corporation, and thereby carrying into effect the clear and manifest intention of the testator. But being of opinion that the legal estate passed under the will, I have not deemed it necessary to pursue the question of trust, and have simply referred to it as being embraced in the point submitted to the court.

"If this is to be considered a devise to a corporation, it will not come within the prohibitions in the statute of wills. 1 Revised Laws, 364. For this Act of incorporation is, *pro tanto*, a repeal of that statute.

"Taking this devise, therefore, in either of the points of view in which it has been considered, the answer to the question put must be, that it is valid, so as to divest the heir of his legal estate, or at all events, to affect the lands in his hands with the trust declared in the will.

"If this view of the devise in the will of *Robert Richard Randall* be correct, it puts an end to the right and claim of the demandant, and might render it unnecessary to examine the other points which have been certified to this court, had the questions come up on a special verdict or bill of exceptions. But coming up on a certificate of a division of opinion, it has been the usual course of this court to express an opinion upon all points.

"It is not, however, deemed necessary to go into a very extended examination of the other questions, as the opinion of the court upon the one already considered, is conclusive against the right of recovery in this action."

See also the able opinion of Mr. Johnson, at page 135 et seq.

In the case of *Vidal et als v. Girard's Executors*, 2 Howard's Rep. 127 et seq., the case of the Baptist Association is expressly overruled. Mr. Justice Story says, at page 196:

"Whatever doubts, therefore, might properly be entertained upon the subject, when the case of the *Trustees of the Philadelphia Baptist Association v. Harb's Executors*, 4 Wheat., was before this court (1819) these doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded."

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Here it seems to me to be clear, that whether the validity of the clause in *Fink's* will, founding the orphan asylum, be tested by the principles of the civil law or by those of the common law, the result is the same.

The institution of the universal or residuary legatee is made *per verba de futuro*. He says:

"It is my wish and desire, and I do hereby declare the same to be my will, that after the payment of my just debts and the several legacies hereinabove mentioned, that the proceeds of the whole of my estate, property, rights, effects and credits, be applied to the erection and maintenance and support of a suitable asylum in this city, to be used solely as an asylum for Protestant widows and orphans, to be called 'Fink's Asylum;' and I do hereby request and authorize my friend *Diederich Bullerdieck*, after my decease, to name and appoint three worthy and responsible persons as trustees to carry out my said intentions respecting the said asylum."

Here every sentence of the devise is *per verba de futuro*, nothing in *presenti*. The asylum is to be established with the proceeds of the residuum of the testator's successions in the city of New Orleans; he requests his executor to designate and appoint three worthy and responsible persons as trustees to carry out his intentions respecting the foundation of the asylum. How can these intentions be carried out, except by applying to the State for an Act of incorporation? It is obvious that the functions of the trustees were limited to taking the necessary steps to obtain the sanction or confirmation of the State and to organize the asylum. This is the whole extent of their trust. The legatee or recipient of the bequest is the charitable institution itself created or founded by the testator himself, subject to the condition that the State will sanction or confirm the asylum, by conferring on it the character and capacity of a juridical person.

II. The State of Louisiana has ratified and confirmed the foundation of the "Fink Asylum."

No objections are urged to the form and regularity of the Act of Incorporation.

A number of highly respectable gentlemen, among whom is the testamentary executor himself, being desirous of carrying out the benevolent intentions of the testator, and of organizing the "Fink's Asylum," prepare a charter which they ask the State to sanction; or in other words, they ask the State to invest the "Fink's Asylum" with the power and capacity of a juridical person. This application is granted; the corporation exists, and has intervened in this suit, asking the protection of the court against the attempt of distant collateral relations to defeat the charitable and noble dispositions which *Fink* has made of his property.

III. What are the objections urged against the validity of the bequest?

It is strenuously insisted that to be "capable of receiving by last will, it is necessary to be conceived at the time of the decease. C. C. 1469. To this objection we answer, in the first place, that it is obvious that the rule laid down in this Article applies to natural persons only, for they alone can be *born alive*; and in the second place we say, that inasmuch as a juridical person is a mere legal entity or abstraction, its conception must necessarily differ from that of a natural person; the conception of the former is mental, that of the latter physical; and in the third place, we submit that the argument, drawn from the provisions of this Article of the Code, is a *petitio principii*. It takes for granted that the asylum was neither conceived nor *in esse*, at the time of the testator's death; and we have shown conclusively, we think, that the confirmation or ratification by the State, of the foundation of the asylum, had a retroactive effect, so that in point of fact, the universal or residuary legatee was *in esse* when the testator died. The doctrine of the retroaction of the accomplishment of a suspensive condition is familiar to every lawyer. It is, therefore, difficult to perceive, in what respect, the Articles 872, 880, 1599 and 1602, or the case of the *Succession of Fisk*, 3 A. R. 705, conflict with the doctrine for which we contend in support of the validity of this bequest. Nor can we see how a proper interpretation of Articles 934, 928, 947, 944, 948, 1469 and 1450 of the Code can possibly lead to a different conclusion.

As to the idea that the succession vested in the executor or trustees and thereby created an impossible title, we respectfully submit that there is not the slightest foundation for it. Nothing, whatever, is vested by this will either in the executor or the trustees to be elected by him. As before observed their

functions are limited to taking the necessary steps to carry the intentions of the testator with respect to the foundation of the asylum into effect; they are the mere temporary agents, for that purpose, and no other. A literal construction of *Isaac Franklin's* will, may perhaps justify the decision in the *Succession of Franklin*, of the majority of the court. But even in that case, it certainly admits of rational doubt, whether the court did not adopt, as their guide, the letter which killeth, instead of carrying out the spirit and intentions which vivify. I, for one, have always entertained the sincere conviction that *Mr. Justice Preston's* dissenting opinion was correct. But, be this as it may, where is the remotest analogy between that case and the one before the court, except with regard to the point decided in the *Milne* case?

It is said that "the whole Roman law is founded on an inference from the law *ejus servorum*, or the preceding law of that title, 362." That the latter law is the origin of the rule, there can be no doubt, but it does not appear to us that that can be considered as a reason for rejecting it; on the contrary, this proves beyond all doubt, to my mind, that *Mr. Justice Preston* was right when he said in the *Franklin* will case "this exception to the general rule, as thus enunciated by *Mackelday*, is not, as has been contended, the mere creature of the statutory laws of Rome, but has its foundation in correct reasoning and the very nature of things. When the law maker lays down the general rule, relative to the acquisition of rights or property by natural persons, by means of a testamentary disposition, he requires the existence of the legatee or testamentary heirs at the time of the death of the testator; for, he who is not in being cannot acquire anything. But when a testator is desirous of becoming the founder of a charitable or educational institution, he does so on the implied condition, that the State will ratify and confirm his benevolent intentions. If the confirmation is withheld the will is defeated; but if granted, it operates like the accomplishment of all suspensive conditions, whether express or implied, and has a retroactive effect. The correctness of these views, I believe, is recognized in every system of jurisprudence, both ancient and modern, and I have heard nothing in the argument of this case, to induce me to entertain the slightest doubt of the soundness of the able opinion, rendered in the case of the *Milne Asylums*."

I am unable to understand, how it can be asserted that the *Milne* case is founded on a fallacy. The learned counsel says, that "existence being necessary to constitute the capacity to take by testament, to remove this disability by a condition would be little short of an absurdity. That this cannot be done is shown conclusively by the concurrence of all jurists." I apprehend that the apparent absurdity results not from the application of the familiar and universally recognized rule we invoke, but from arguing in a circle. As regards the concurrence of all jurists, I flatter myself that I have shown conclusively that they are unanimous in their recognition and approval of the rule which my learned friends attempt to overturn.

What *Marcadé* says in his commentary on the 906th Article of the *Napoleon Code*, refers to the capacity of natural persons, and has no application to the questions we are discussing. Vol. 3, p. 397.

And his observations, so much relied on, when commenting on Article 910 of the *Napoleon Code*, evidently refer to the case where there has been no ratification or confirmation by the State.

It is needless to refer particularly to all the other authorities cited, such as *Merlin*, *Coin-Delisle*, *Toullier*, &c., because they are all considering the capacity of natural persons; and I have shown that when they speak of juridical persons, they admit the rule applied by the Supreme Court of Louisiana, in the case of *Milne's Heirs v. Milne's Executors*, and reaffirmed in that of the *succession of Franklin*. Take, for instance, *Toullier*, whose authority is invoked against us: he says, Vol. 5, No. 204, "Si les dons sont faits par testament l'autorisation du gouvernement pour les recevoir n'est pas moins nécessaire; mais, en attendant, les receveurs des pauvres et des hospices peuvent, sur la simple remise du testament, faire tous les actes conservatoires qui sont jugés nécessaires."

As regards the authority quoted from the 40th *Glück's Commentaries*, the court will find that the author throughout his careful, able and elaborate examination of the subject, fully sustains the views which I have endeavored to submit to the consideration of the court.

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Lastly, it is contended, that the case of the *Congregational Church v. Henderson*, 4 R. R. 211, conflicts with that of the *Heirs of Milne v. Milne's Executors*. An examination of the case will satisfy the court that there is no analogy, whatever, between it and that of Milne. So far from their being any conflict between them, the decision in the Milne case is expressly referred to and approved. Judge Simon, who delivered the opinion of the court, says: "It has been urged that the term, imposed by the testator for the payment of the legacy, is in the nature of a condition, that under the 1460th Article of the Civil Code, when the donation depends on the fulfillment of a condition, it is sufficient, if the donee is capable of receiving, at the moment the condition is accomplished;" and we have been referred to the case of the *Succession of Alex. Milne*, 17 L. R. 46, as containing principles applicable to the question at issue. In this case, it is true, that the testament was opened on the 14th of March, 1832, that the incapacity was removed on the 5th of March, 1841, and that, therefore, five years had not elapsed between the period of the opening of the will and the removal of the incapacity. Thus, it is insisted, that the legatee was capable of receiving at the time the first instalment was to be paid, and this is all that the law requires. But the term, in our opinion, cannot be assimilated to a condition. The payment of the legacy to be made at a certain period, was only delayed without its depending upon any uncertain event which was to happen or not, at the expiration of five years." The court then proceeds to point out the obvious distinction between a condition and a term, for the purpose of proving that the principles recognized in the case of the *Heirs of Milne v. Milne's Executors*, have no application to the case then under consideration. The real ground on which the decision, in that case, rests, is that the contract, under which the plaintiff claimed, had been entered into in fraudem legis and could, therefore, not give rise to any valid obligation.

It is, therefore, clear, I think, that the correctness of the doctrine laid down in the Milne case, was not only expressly recognized and re-affirmed by all the judges, in the case of the succession of Franklin; but that it was also sanctioned in that of the *First Congregational Church of New Orleans v. Henderson*.

Under this state of our jurisprudence, it is respectfully submitted, that the question can hardly be considered as an open one, and notwithstanding the powerful efforts made by our learned adversaries to demonstrate its fallacy, its soundness has not been impugned.

BUCHANAN, J. John David Fink, of New Orleans, died, leaving a will which has been admitted to probate and execution. This will, dated the 7th November, 1855, contains the following clause:

"It is my wish and desire, and I do hereby declare the same to be my will, that after the payment of my just debts, and the several legacies herein above mentioned, that the proceeds of the whole of my estate, property, rights, effects and credits be applied to the erection and maintenance and support of a suitable asylum in this city, to be used solely as an asylum for Protestant widows and orphans, to be called "Fink's Asylum," and I do hereby request and authorize my friend Diederick Bullerdieck, after my decease, to name and appoint three worthy and responsible persons as trustees, to carry out my said intentions respecting the aforesaid asylum."

The plaintiffs, nearest of kin and heirs at law of the testator, pray that the above recited clause of the will be declared null and void, for the following reasons:

1st. Because there was no person in being capable of receiving said bequest at the time of the testator's decease.

2d. Because it creates a perpetuity, which no individual is authorized to do in a case like the present.

3d. Because of the uncertainty and vagueness of the bequest, and the omission of the testator to provide for the mode and manner in which his intentions, whatever they may have been, were to be carried into effect.

4th. Because such testamentary dispositions are in direct opposition to the policy of the law, and could not, in a case like the present, be carried into execution, without making, as far as this disposition is concerned, an entire new will for the testator.

5th. Because the said disposition does not in reality dispose of or transfer the property therein designated to any person or persons; and, as far as the said property is concerned, the testator must be considered to have died intestate.

In considering these objections we will be spared much labor by carefully examining who is the real devisee or legatee under this clause of *Fink's* will.

Note the expressions—"I will that the proceeds of my estate be applied, (after the payment of debts and of particular legacies,) to the erection and maintenance and support of an asylum in this city, to be used solely as an asylum for Protestant widows and orphans, to be called *Fink's Asylum*."

What is the object of the testator's bounty? Not the building to be erected; but the widows and orphans, for whom that building is to be a refuge and a home.

Again, what Protestant widows and orphans are intended? The answer is equally clear. Protestant widows and orphans *in this city*; that is to say, in the city of New Orleans, where the will was made: for it is in this city, says the will, that the asylum is to be erected for Protestant widows and orphans.

The difficulty in this case has arisen principally from *Mr. Fink's* having given a name to the asylum thus proposed to be built and maintained with the proceeds of his estate. But there are no words of devise to the asylum of that name. In this respect, the present case differs from that of *Alexander Milne's* will, reported in 17 La. Rep., 46, the doctrine of which case has been so much questioned by the counsel of plaintiffs. *Milne* declared in his will, his intention that an asylum for destitute orphan boys, and another asylum for destitute orphan girls, should be established at Milneburg, in the parish of Orleans, under the name, &c., and that his executors should cause the same to be incorporated—and to the said contemplated institutions he gave and bequeathed, &c., and instituted for his universal heirs and legatees the said institutions, &c.

We do not feel ourselves called upon to pronounce any opinion upon the correctness of the ruling of our predecessors in relation to *Milne's* will, containing dispositions so evidently distinguishable from those now under consideration. The only particular in which there is an apparent resemblance, is in the injunction of *Fink* to his executor to appoint trustees to carry out his intentions respecting the aforesaid asylum. But the language by no means implies, necessarily, what is expressed in terms unequivocal in the will of *Milne*, namely: that the executor or the trustees, or both together, should take measures for the incorporation of the "*Fink's Asylum*." On the contrary, it appears to us entirely probable that the design of *Fink* was that his executor should nominate trustees, in whom should vest the superintendence of the erection of the asylum, and the administration of the charity, without any other or further authority than what they would derive from the appointment of the executor under the will.

Had the testator gone so far as to name those trustees himself, and to vest his estate in them for the objects and purposes expressed, the will would have been void under Article 1507 of the Louisiana Code. The case of *Franklin's*

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*Succession*, in 7th Annual Reports, would then have been directly in point. On the other hand, the design of the testator may have been that the trustees, so to be appointed by his executor, should merely advise and aid in all means sanctioned by law for the accomplishment of the testator's intention of founding an asylum for Protestant widows and orphans in the city of New Orleans. And were we compelled to give an interpretation of this clause of the will, in reference to the object of the proposed appointment of trustees, we would undoubtedly feel bound to understand this disposition in a sense in which it could have effect, if possible, rather than one in which it could have none. C. C. 1706. But no interpretation of this disposition is necessary. On its face, it is a delegation by the testator to a third person of the choice of administrators of a portion of the estate; and as such, by Article 1566 of the Code, is a mere nullity, and, under Article 1506, must be considered as not written.

Viewing, then, the Protestant widows and orphans in the city of New Orleans as the true residuary legatees of *John D. Fink*, we are dispensed from any remark upon the first ground of plaintiffs, to wit, that there was no person in being at the time of the testator's death, capable of receiving said bequest.

The second ground of objection is, that the will creates a perpetuity; which, say the plaintiffs, no individual is authorized to do in a case like the present.

It is not perceived by us that this will creates a perpetuity, in any other sense than every institution of heir by testament creates a perpetuity. The death of the testator invests the instituted heir with all rights to the same extent as they were possessed by the deceased. C. C. 934, 937. And this is alike the case, whether the instituted heir be a natural person or a mere legal entity; or a class of destitute or afflicted persons, objects of the testator's charity.

The third, fourth and fifth grounds of objection to *Fink's* will, may be considered together. They present, in different aspects, the uncertainty of the objects of the testator's benevolence, as objections to the validity of his will.

Article 1536 of the Code sanctions a donation to the poor of a community. And note that the word *community* in this Article means a municipal corporation. The word in the French text is *commune*, which has that signification. The Article is copied, word for word, from Article 937 of the Code Napoleon. Although Article 1536 is found under the head of donations *inter vivos*, its dispositions have been interpreted by this court in the case of the *Succession of Joseph Claude Mary*, 2 Rob. 438, to be applicable to donations *mortis causa*.

Among the legacies contained in the will of *Mary*, was one of five thousand dollars "to the Orphans of the First Municipality;" and the decision of the court was "that, under Article 1536 of the Civil Code, the city council of the First Municipality will be competent to claim and receive the legacy, and regulate its distribution among the intended objects of the testator's munificence to be found within the limits of the First Municipality." Surely the words "Protestant widows and orphans" used in *Fink's* will, in connection with other words which, as we have said, indicate with certainty his meaning to be "Protestant widows and orphans in the city of New Orleans," are words as definite and precise as the words used in *Mary's* will, "orphans of the First Municipality." This general form of expression is sanctioned by the law quoted.

Neither does it appear to us that the qualification "Protestant" of the noun-substantive, "widows and orphans," is so vague, as to vitiate this bequest. It

will be for the administrators of this charity to determine what widows and what orphans came under the denomination of "Protestant."

The cases of the *Philadelphia Baptist Association v. Hart*, in 4 Wheaton; of *Ingles v. Trustees of Sailors' Snug Harbor*, 3 Peters, and *Vidal v. Girard's Executors*, 2 Howard, have been much discussed in argument.

There is much curious learning in those cases on the subject of the jurisdiction the Courts of Chancery over charities and testamentary trusts, very little of which has any application in Louisiana. The point which those decisions of the Supreme Court of the United States were used to elucidate, the validity of a devise to a corporation, not *in esse* at the time of the opening of the succession of the testator, we have deemed unnecessary to consider herein, as we regard the devise in *Fink's* will as a devise to "the Protestant widows and orphans in New Orleans" and not to the "Fink's Asylum." To the same point, we have been referred to the law 62 of the title *de hereditibus instituendis* of the Roman Digest (book 28, title 5) and the commentaries of two standard German authorities, Mackeldey and Mühlenbruch, upon that law; also to the writings of the French jurists Coin-Delisle, Troplong and others, commenting the 910th Article of the Code Napoleon, an Article which is not copied in our Code.

Did our subject require it, we would be pleased to review the doctrines of these authorities, all of the first rank in three different systems of jurisprudence. We have perused them with care, and with much edification, and may remark *en passant* that the doctrine of the Supreme Court of the United States, in the cases of the Philadelphia Baptist Association and of the Sailors' Snug Harbor, seems very like that of the Supreme Court of Louisiana in the cases of *Milne's* and of *Franklin's* wills. The distinction of bequests *per verba de presenti* and bequests *per verba de futuro*, so strongly drawn by both those courts, and which constituted the point of difference between the cases of the Baptist Association and the Sailors' Snug Harbor, decided by the one, and those of *Milne* and of *Franklin*, decided by the other, was no less decisive of the interpretation of the wills of *Staedel* and of *Blum*, as reported by Mühlenbruch, cases which, says that learned commentator, attracted the attention of all Germany. Glück's Illustration of the Pandects, continued by Mühlenbruch, vol. 40, pages 89 to 108.

Yet this distinction seems entirely unknown to the French jurists, perhaps because our Article 1460, which recognizes it, is not found in the French Code. An approach was made to the recognition of this distinction, and of the rule of the Roman law, "*hæres esto, cum capere potuerit*," in a decision of the Court of Cassation in March, 1854, commented by Troplong, 2d Donations et Testaments, p. 198 et seq., but it seems very questionable whether that decision is regarded as law in France.

A corporation has been formed, by the title of the "Fink's Asylum," under the Act of 14th March, 1855, "for the organization of corporations for literary, scientific, religious and charitable purposes," and has intervened herein, claiming to be the devisee under the clause of the will in question; and as such, to be entitled to take the residue of the estate, after the payment of the debts and particular legacies. The remarks already made by us are decisive of the intervention. The charity created by this will, in our opinion, is legally to be administered only by the city corporation of New Orleans.

It is, therefore, adjudged and decreed, that the judgment of the District Court, so far as regards the plaintiffs, be reversed; that there be judgment

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against plaintiffs, declaring the will of *John David Fink* to be legal and valid; that, as to the intervenor, the Fink's Asylum, the judgment be affirmed dismissing said intervention; that the costs of the lower court be borne by plaintiffs, except those of the intervention, which are to be paid by the intervenor; and that the costs of appeal be paid jointly by the plaintiffs and the intervenor.

SPOFFORD, J., dissenting. Conceding that the doctrine of the case of the *Succession of Mary*, 4 Rob. 438, is correct, that case does not appear to me to sustain the application of the doctrine made in this.

There, the bequest was of a specific sum of money directly "to the orphans of the First Municipality." The only question was, who did the testator intend should administer the charity. He having preserved a complete silence in this respect, the court properly determined that the Council of the First Municipality should control the distribution of the fund rather than the "New Orleans Catholic Association for the relief of Male Orphans," a corporation which the testator did not appear to have had in mind, and which must necessarily have restricted his bounty, which was intended to be disbursed without reference to religion or sex.

I do not understand that in the case alluded to there was any controversy as to the validity of the bequest; the question was, who should administer it.

Here, there was not a bequest by *Fink* "to the Protestant widows and orphans of New Orleans." It seems to me a forced construction to say that because the erection of a building in New Orleans was contemplated, therefore the testator intended to confine his bounty to widows and orphans of New Orleans alone. Yet it is only upon this hypothesis, if at all, that the city would be authorized to accept it in their name, under Article 1536 of the Code.

But the testator has emphatically shown that he did not intend the city authorities to have anything to do with the administration of this charity. He has defined, or attempted to define, quite another power to control this matter. He has authorized a particular individual to name and appoint trustees to take and supervise the execution of a trust. How can we disregard the expression of his will and substitute another will for it?

If the trustees cannot take, it seems to me that there is no one to take the donation, and it falls to the heirs at law. The city of New Orleans makes no claim.

That the trustees cannot take seems to be conceded. And I do not perceive that the *Milne* case, far as it goes, goes so far as to sustain the pretensions of the association, organized under the general law of corporations, and intervening in this cause.

I think the judgment should be affirmed.

*George Eustis, Robert Preaux and P. E. Bonford*, for a re-hearing:

Neither in the written nor in the oral discussions which have taken place, upon the universal disposition contained in *Fink's* will, was it suggested that the heir, instituted by that disposition, was *in esse* at the death of the testator.

If, then, we press with more than usual earnestness our demand for a reargument of this cause, our apology must be found in the fact that the decision of the court conveyed to us the first intimation that there existed in the disputed clause, the elements of a present devise to persons capable of taking when the succession was opened.

In the following views, which we have hurriedly thrown together, we shall endeavor to establish, that the disposition will not bear the interpretation placed upon it by the court; and that even if it did, it would be inoperative to

defeat the title of the legal heirs. In the limited time allowed for the preparation of applications like the present, a careful and well considered treatment of the subject is hardly practicable.

"The Protestant widows and orphans in the city of New Orleans" are, in judgment of the court, the residuary legatees of *John D. Fink*. We assume the court to intend that they take as a class, and not *ut singuli* or as individuals; and further, that the beneficiaries of this disposition are not such Protestant widows and orphans only as happen to be alive when the testator died, but every person in all future time who shall come within the description of the class designated. It is because such a class existed at the time *Fink* died that we understand the court to have rejected the first ground of the plaintiff's action, to wit: that there was no person or being at the time of the testator's death, capable of receiving the bequest.

The point of inquiry, then, is whether a class of persons, simply as a class, is a legal entity, capable of enjoying civil rights, and as such of being instituted testamentary heirs.

Our law recognizes but two descriptions of persons, the natural or physical, and the legal or juridical.

The juridical person is the creature of the law, and except in the solitary instance of partnership associations, which form persons distinct from the persons composing them, no power exists in private individuals to call a juridical person into being. Thus, no number of individuals can, by aggregating themselves together, or by being placed under particular classifications, assume to themselves, or be endowed, save by the exercise of the sovereign power, with a capacity—a personality separate from that of the several members out of which the body is formed. Such associations or classes have no legal existence. They are not the subjects of civil rights; they cannot become the debtors of civil obligations; they cannot give or receive, sue or be sued.

No one would speak of the lawyers, the doctors or the mechanics of a city, or of the Catholics, Presbyterians or Jews, or of any other incorporated class of persons as legal entities, or as possessing any capacities distinct from those of the individuals composing the class. What is there in the class of persons designated in *Fink's* will as the "Protestant widows and orphans in New Orleans" to take them out of this category? As a class they do not constitute a juridical person; as individuals forming the class, they are, it is true, natural persons capable of receiving. But if the will referred to them as individuals, it would embrace only such of them as were in existence at the testator's death, a limitation clearly not intended by the testator; and even with regard to these, the disposition would be null, as in favor of uncertain persons. Besides, if the clause were so limited, there would remain an important interest in the legal heirs unaffected by the disposition, and which would become available on the demise of the last liver included in the class. The "Protestant widows and orphans in New Orleans," then, not being a juridical person, cannot, as a class, be the instituted heir of *Fink*, and the error of the court in so determining them to be is, with all due deference, the more apparent from the impossibility of carrying out to its legal consequences this idea of the capacity of the class in question. For, if the instituted heirs be capable of receiving, why is not the succession simply delivered over to them? Why are they placed in the state of quasi pupillage, and the city of New Orleans appointed their guardian?

It is said the "Protestant widows and orphans," and not the asylum, are the legatees, because the former are the undoubted objects of the testator's bounty, and must, consequently, be presumed to have been intended as his legatees. But it by no means follows that the party to be ultimately benefited by the testamentary disposition is the actual legatee. In the species of legacies known as *modal*, in all cases of legacies with a destination, it constantly happens that the legatee named has no real interest in the bequest, but that the same enures to the advantage of some person or class who may be moreover incapable of taking directly. Indeed, if the expression can be properly used in the connection, the beneficiary of such dispositions may even be an inanimate object. Instances of this character occur more frequently under the French law, where *fidei commissum* are permitted, but they are not unfrequent under our own system. In *Fink's* will, a house was bequeathed to the city for the purpose of establishing a library; in *McDonogh's*, a large property was devised, also to the city, for educational purposes. Sums are constantly left to the Charity Hospital and other incorporated institutions, the benefit of which accrues to the

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sick, the aged and the needy; of the like character are the cases put by the commentators, of legacies left to an academy to found a prize, or to provide for the support of a favorite cat or dog, or to erect a monument to a celebrated personage, &c. No one could say, in the instances cited, that the students who are provided with a library, or the uneducated to whom gratuitous instruction is proffered, or the literary man to whom the prize is awarded, or the domestic animal, or the monument, is the legatee, though clearly in each case the object and the exclusive object of the testator's bounty. There is no warrant, therefore, for saying that the "Protestant widows and orphans in New Orleans" are the legatees of *Fink*, simply because they, as a class, are to reap the benefit of the devise.

Savigny has elaborated the idea of the juridical person at much length and with great clearness. His observations with respect to pious foundations, similar to the one sought to be established by *Fink*, merit consideration, as showing how carefully, even under the influence of a system so favorable to institutions of this description, the distinction between the foundation and the person to be benefited, was preserved, and also how emphatically the necessity of the intervention of the sovereign power is recognized, in order to endow these institutions with the requisite capacity. We quote from the French translation of his treatise on Roman Law, vol. 2, p. 268: "Aussitôt qu'un établissement de ce genre a le caractère de personne juridique, il doit être traité comme un individu, et c'est ce qu'ont fait les empereurs chrétiens. Ainsi donc, un hôpital, etc., est propriétaire au même titre qu'une personne naturelle ou une corporation, et les auteurs se trompent quand ils attribuent ce genre de propriété à l'Etat, à une ville ou à une église."

In sec. 89, p. 274, he treats of the manner in which the juridical person is created. The appositeness of his views to the present case is so striking that, though the extract is longer than we would wish, we cannot refrain from quoting a portion of his observations: "Indépendamment de la raison politique, la nécessité du consentement de l'Etat, pour la formation d'une personne juridique, trouve sa source dans la nature même du droit. L'homme, par le seul fait de son apparition corporelle, proclame son titre à la capacité du Droit, principe auquel l'esclavage faisait chez les Romains une large exception, et dont l'application est bien autrement générale parmi nous. A ce signe visible, chaque homme, chaque juge, sait les droits qu'il doit reconnaître, les droits qu'il doit protéger. Quand la capacité actuelle de l'homme est étendue fictivement à un être idéal, ce signe visible manque, et la volonté de l'autorité suprême peut seule y suppléer en créant des sujets artificiels du Droit: abandonner cette faculté aux volontés individuelles, ce serait infailliblement jeter sur l'état du droit une grande incertitude, sans parler des abus que pourraient entraîner des volontés frauduleuses. A cette raison décisive, prise dans la nature même du Droit, se joignent des considérations politiques et d'économie politique. On reconnaît que des corporations peuvent offrir des dangers, mais l'extension illimitée des fondations n'est pas toujours désirable ou indifférente. Si l'on faisait une riche fondation pour la propagation de livres ou de doctrines dangereuses pour l'Etat, pour la morale ou la religion, l'Etat devrait-il souffrir? Les fondations même de pure bienfaisance ne doivent pas non plus être entièrement abandonnées aux volontés individuelles. Si dans une ville, par exemple, où les établissements en faveur des pauvres seraient bien organisés et pourvus de revenus suffisants, un testateur riche par une charité mal entendue, instituait des aumônes qui viendraient déranger les bons résultats de la charité publique, l'Etat n'aurait aucun motif de donner à cette fondation plus de consistance, en lui conférant les droits de personne juridique. Ici, indépendamment du caractère de la fondation, il s'agit encore d'éviter une accumulation exagérée de biens en main-morte. Ce genre d'abus peut exister même pour les fondations autorisées par l'Etat; mais il n'y aurait aucun moyen d'y remédier, si les particuliers pouvaient toujours créer de nouvelles fondations." P. 278.

To us the intention of *Fink* to create one of these juridical persons appears so clear, that the difficulty which rests upon our minds is to imagine a form of disposition in which that intention could have been made more manifest than it is in the expressions he has used.

He directs that the residue of his property after the payment of his debts, and some particular legacies, shall be "applied"—to what?—"to the erection and maintenance and support of a suitable asylum, in this city, to be used solely as an asylum for Protestant widows and orphans." The widows and orphans

are not mentioned in the disposing part of the clause, but only in connection with the *destination* or use to which this foundation or asylum may be devoted, and that his main object should be made more distinctly to appear he invests the creature, the juridical person he sought to bring into being, with his name, and directs it shall be termed "Fink's Asylum." In addition to this, the executor is to appoint three trustees who are to carry out the intentions of the testator, respecting the aforesaid asylum. These trustees are, 1st, to build the asylum in a suitable manner; 2d, to adopt a mode of administration for its government; 3d, to name it according to the directions of the will, "Fink's Asylum," and then deliver it over to the administrators. It is after all this is done and completed, that the asylum is to be used as an asylum for Protestant widows and orphans; but it is the *asylum* which must be erected and styled; such is the positive and unequivocal will of the testator, expressed in a clear and unambiguous manner, and the only mandate of the trustees is, to carry out and realize these intentions.

It is true that Article 1706 C. C., provides that a disposition must be understood in the sense in which it can have effect, rather than that in which it can have none. But this Article furnishes the rule of interpretation for obscure or ambiguous dispositions, and has no application to the clauses of *Fink's* will, the meaning of which appears to us to be free from reasonable doubt. The true principle to be applied in this case, is that enunciated in the preceding Article (1705), which requires that the intention of the testator should be sought in the proper signification of the terms of the testament. "*Quum in verbis nulla ambiguitas est, non debet admitti voluntatis questio.*"

But a branch of this case remains to be considered, the importance of which cannot well be over estimated.

The capacity of the city to administer and carry into effect this bequest, or, what is the same thing, to take and execute it, was not argued at bar, and the undersigned venture to submit their views, in relation to it, to the consideration of the court, now for the first time.

It can do no harm; it will afford an opportunity to the court to reexamine the important doctrine which is the basis of their opinion, should they deem fit so to do, and the undersigned will have discharged their duties to their destitute clients.

The propositions which they, with great deference will submit to the court, with the confidence that if either be sustainable, an opportunity will be offered for a further investigation of the subject, are:

1st. That the city has no legal capacity to administer or take this bequest.

2d. That under its present organization, it has no means or power to carry it into effect.

3d. That the charge and responsibilities of this administration cannot be imposed on the tax payers, there being no law to authorize it.

The views taken must necessarily be cursory and imperfect, from the very short time allowed for their preparation, and for this, the indulgence of the court is asked.

In the third volume of the Annual Reports, the case of the *Louisiana State Bank v. Orleans Navigation Company et al.*, is reported. In that case, the powers of municipal corporations under our laws were discussed and examined in the arguments of the learned counsel and in the opinion of the court. The case turned on the powers vested in the corporation of New Orleans, and the court held that they must be tested by our own codes, legislation and jurisprudence, and that it was useless to look elsewhere for their limitation or extension; that by the Act of 1805 and various special delegations of authority, the idea of any other power being granted them, such as the police and the preservation of good order among the population require, is excluded by the very terms of the Legislature. The court accordingly decided that the corporation had no authority to loan its credit for the improvement of the navigation of the Bayou St John and of the commerce in that part of the city where the canal terminates. Loc. cit. p. 294 et seq.

It may, therefore, be assumed, that the city of New Orleans is a corporation of limited powers, having only those powers expressly granted, or which are necessary to carry into effect the civil government of the same.

Can this corporation receive or execute administrations, trusts or *fidei commissa* created by donations *inter vivos* or *mortis causa*?

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It can, provided the trust is authorized by law and not otherwise. What trusts is a municipal corporation authorized by law to receive or take? Those trusts which have for their object some matter within the acknowledged powers of administration with which the municipal administration is invested, and none others.

The Article 1536 of the Code, does not purport to confer powers on municipal corporations; it merely provides for the mode in which donations to them may be accepted—that is those donations, the object of which being within the corporate powers, may be legally accepted and carried into effect. The objects mentioned, are those necessarily within the circle of municipal administration, the benefit of an hospital, *the poor of a community—les pauvres d'une commune* or establishments of *public utility*.

It is obvious that publicity, generality, so to speak, universality is the predominant idea inseparable from all these objects, to the exclusion of portions of a separate class and denomination.

Is there anything in our jurisprudence which countervails or extends this doctrine?

The court considers the city of New Orleans as having the capacity to administer this charity, and the opinion of the court requires that it be administered only by the city corporation of New Orleans.

What says the Code?

A corporation cannot be administrator, guardian, or testamentary executor, nor fulfil any other office of perpetual trust. Art. 432.

There are certain matters in which municipal corporations can be administrators and exercise offices of personal trust, and those are matters over which they have control, by virtue of their powers of government, conferred on them by the State. Legacies having objects within that circle have been sustained and confided necessarily to municipal administration. Thus, in the case of *Marie* cited by the court, the court authorized the corporation to take and regulate the distribution of a legacy among the objects of the testator's bounty, found within the limits of the municipality.

This legacy was sustained, as it seems, on account of its generality and exclusion of no class, under the Article 1536.

Note the manner and the grounds on which the doctrine laid down in the case of *Marie* is affirmed by the Supreme Court in the *McDonogh* case, 8 An. Rep. 248.

So the bequest of a sum of money to the orphans of the First Municipality of New Orleans, was recovered by the council of that Municipality. This was a donation *causa mortis, indefinite and comprehensive* in its terms, making no distinction among the beneficiaries either as to age, sex or religion, and was maintained as valid by the Supreme Court.

What was the reason for which the court in that case concurred in the decision of their predecessors? Is not the reason given? Is it not the universality in the operation of the bequest? No distinction as to religion. The object of the legacy being within the legitimate sphere of good government.

The opinion in the *McDonogh* case has in other parts a recognition of the same doctrine.

The *Girard* legacy, which was sustained in part, had for its sole object the health and general prosperity of the inhabitants of New Orleans, and the proceeds of the property bequeathed were to be applied to those purposes. *Girard v. N. O.*, 2 An. 899.

There are sectarian charitable institutions in the State, but they all have their existence by special legislation, and it is believed that no sectarian charity has ever been engrafted on a municipal corporation, nor has it any place in Louisiana, except by a positive law to that effect. Could a trust for the education of a particular class of Protestant or Catholic youths be engrafted on the city government, by reason of the general educational powers? The question answers itself.

With these hasty remarks concerning our legislation and jurisprudence, the undersigned call the attention of the court to the administration of this bequest by the city.

Our first position being that the corporation of New Orleans has no capacity to take this bequest, in furtherance of this absence of capacity, no means have been provided by law for the administration or carrying into effect of it.

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In providing for the poor, they are generally subdivided into classes. It would not be proper that they should be congregated in the same buildings. There are consequently separate establishments for the infirm, for orphans, widows, and perhaps for different sexes. There are several institutions under special laws of the state of this character.

The descendants of the ancient population of Louisiana, the French, Spanish and Italians, and their descendants, a large portion of the German, and more than half the Irish population, may be set down as Catholics, and consequently excluded from the benefit of this Christian bequest.

It is fair to assume that at least three-fifths of this aggregate population of New Orleans are Catholic. Out of every five widows needing this charity, and making admittance to this asylum—*this institution of public utility*—three will have the door shut in their faces—and by whom? The government of their own city. Why? Because they are Catholics!

And who is to exercise this obnoxious, this odious power? The Executive of the city. Whether the power be exercised in the first instance by warden or policeman, the power and the responsibility rests with the Executive—the Mayor of the city.

The necessary consequences of this state of things in a purely popular government, without any conservative element, and constituted by frequent elections under the existing causes of the day, are obvious, and require no elucidation.

The introduction of a noxious element like this into a political municipal system, in its operation can be productive of nothing but difficulty, faction and disorder.

The legislation on the subject of the poor of New Orleans deals with that class as a general aggregation, without any limitation or exception. *Vionel's case*, 4 An. Rep., 43. Statutes of 14th March, 1816, and 17th Feb. 1821.

Under the last head, concerning the responsibility imposed on the city of New Orleans, by this administration, let us suppose a case. Let us suppose the case of a Treasurer putting the amount of this bequest in his breeches pocket, under the hope of a triumphant acquittal by a verdict of his peers; who is responsible for this defalcation, and bound to make it good? Who but the corporators of New Orleans, three-fifths of whose poor were excluded from the charity?

After the decision, first quoted, of the Navigation Company case, it would be quite out of place to refer as authority to any other jurisprudence than our own on this subject.

It is certain that many municipal corporations could be seized of property in trust for charitable purposes in several of the United States and in England. Angell & Ames on Corporations, No. 166. In England the necessity of keeping these trust funds separate from the municipal treasury, has been enforced by an Act of Parliament in the year 1836, by which the appointment of separate trustees is ordered, thus getting out of the difficulty into which the judgment of the court will necessarily involve the city. But in this act there is no attempt to shield the corporations for past misconduct in the management of trust funds. An account has been decreed to be taken in one case for two hundred years back. Grant on Corporations, 514.

It is assumed that the heirs of the testator or, perhaps, the beneficiaries, through the State or persons named in the will, would have a remedy against the city for a misapplication or negligent loss of the charitable funds. Angell & Ames on Corp. sects. 694, 695.

If this view of the subject be correct, the responsibility of this administration is a matter of serious import, and it is asked, with all respect, where is the law attaching it to the city government?

It may not be out of place to state that the control which the government in France has over all bequests of this kind, provides the means in all cases of preventing the consequences which, without a salutary supervision, must result from the indiscriminate receipt of donations of this kind.

The government alone can authorize the execution of testamentary dispositions of this kind.

This power was intended as a check upon the inconsiderate zeal or caprice of testators which would deprive their relations of their succession. The government is the judge of the motive of the testator; it can order the acceptance of the bequest, or refuse it, or what frequently happens, authorize its accep-

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tance on the condition of its reduction to a limit fixed by itself. In establishing the limits, it takes into consideration the fortune left by the testator to his heirs independent of the bequest, the condition and the number of these heirs, the wants of the establishment in favor of which the bequest is made, and its conclusions are the result of the consideration of all these circumstances. Code Napoleon, 910; 8 Duranton, p. 81, sec. 260.

Has the court considered that the city is bound to take upon itself this administration, and cannot repudiate it? Or that a discretion may be exercised in this respect by the municipal government?

Either of these views strongly implies the necessity of some legal authority in order to sustain it, and both concur in sustaining the argument which we have the honor to submit in support of our propositions.

Moreover the property cannot be adjudicated to the city, it not being a party to this suit. See the case of *Musgrove et al. v. Church of St. Louis*, 10 An. p. 431, 432 and 433.

*G. & C. E. Schmidt*, on the same side:

The importance of the principles involved in this cause, and the interest of the heirs whom we represent, impose upon us the duty respectfully to request the reconsideration of the opinion already delivered adverse to the claims of our clients.

In fulfilling this professional obligation we trust we shall be pardoned, if we examine the doctrines of the court with that freedom and independence which our duties require, without, however, losing sight of the respect due to the members of the highest tribunal of the State, whose exalted station and acknowledged impartiality entitle their opinions, even when erroneous, to be treated with great deference.

We are persuaded that inasmuch as the doctrines upon which the opinion of the majority of the court is predicated were not presented, nor even suggested by the counsel of the executor, and could, consequently, not have been foreseen by us, that the court will be disposed attentively to examine such arguments as we may be able to adduce to show that the rules adopted in deciding the cause are not applicable to the present controversy.

The will of the late *John D. Fink* appropriates the residue of his estate, after the payment of his debts and certain legacies, "to the erection and maintenance and support of a suitable asylum, in this city, to be used solely as an asylum for Protestant widows and orphans, to be called '*Fink's Asylum*.'" And the testator further adds, "and I do hereby request and authorize my friend, *Diederich Bullerdieck*, after my decease, to name and appoint three worthy and responsible persons as trustees, to carry out my said intentions respecting the aforesaid asylum."

The above disposition being the one in relation to which this controversy arose, its interpretation and construction were to be determined by the court, in case any doubt arose as to its meaning.

The intention of the testator, according to the admitted rules governing the construction of wills, was to be the guide of the court in determining the import of this testamentary disposition. This appears to be conceded; and we have no doubt it will also be admitted that this intention must be collected from the language used in the will itself, for such is the express provision of the Code, Art. 1705. See, also, *Theall v. Theall et als.*, 7 La. 230. But the intention of *Fink* appears to us so plain, that it is impossible for any person, be he learned or illiterate, to misunderstand it, since he evidently desired to create an institution in New Orleans devoted exclusively to the maintenance and support of Protestant widows and orphans.

We cheerfully admit that in order to arrive at a correct conclusion in relation to the construction of the will, it became necessary in the first place to ascertain who is the real devisee, or legatee, and we are not disposed to deny that "the object of the testator's bounty" was not the building to be erected, but the Protestant widows and orphans for whom this building was to serve as a refuge. But while admitting the truth of these two propositions, we think we can demonstrate that the inference deduced from them is entirely erroneous. The proposition of the court, if reduced to a syllogism, would read thus: "Every person who is the object of the bounty of a testator becomes thereby his devisee or legatee. The Protestant orphans and widows were, in this instance, the objects of his bounty. Ergo, they are his devisees or legatees."

The fallacy of this reasoning consists in the major term, which assumes as true, that *every one* who is the object of the bounty of a testator, thereby becomes a devisee or a legatee, which though *often true*, is not so in this particular instance.

In legal parlance a *devisee* is one to whom a testator bequeathes real estate, a *legatee*, one to whom he gives goods or chattels. Both devisees and legatees are recognized juridical persons, whose legal existence gives them rights which they can enforce in a court of justice. They may demand and enforce the delivery of the devise or legacy from the executor of the will, and if his functions have ceased, from the heirs. But inasmuch as it is evident that no Protestant widows nor orphans would have the right to compel either the executor, or any one else charged with the execution of this portion of *Fink's* will, to deliver to them any part of the residuary bequest or its revenues, they are clearly neither devisees nor legatees.

In proof of this position, we refer to the decision in this very cause, by which the court declare that the City of New Orleans is the legatee; for it is evident that the city authorities alone, should the court adhere to its decision, will have the right to compel the executor to account and to deliver to them the residue of the estate of *Fink*, and that the widows and orphans must be contented to receive such portions of the revenues of the estate as the city may choose to give them in conformity with the regulations they may adopt for the administration of the charity. The city is consequently, by the decision in this cause, the real legatee or devisee, and it is a misnomer to apply such a term to the Protestant widows and orphans.

Having thus shown, as we think, conclusively, that the contemplated institution, to be called *Fink's Asylum*, a private eleemosynary establishment to be organized and managed by trustees to be selected by *Bullerdieck*, was in contemplation of law the sole legatee, and as such charged by the will to carry into effect the intentions of the testator, it follows, as a necessary consequence, that the reasoning which has led to a different conclusion is incorrect.

But if the construction we put upon the will, as above explained, be exact, it is admitted that the bequest is void; because the institution was not in existence at the time of the opening of the succession—and hence incapable of administering the charity. But if so, the legacy falls, and the property intended to be given to the asylum belongs rightfully to the heirs.

In the next place we respectfully insist that by no known rule of judicial construction, can the bequest of the late *John D. Fink* be considered as given to the city of New Orleans, to be by it administered for the benefit of Protestant widows and orphans.

The late Judge Martin, in deciding the case of *Theall v. Theall et al.*, already quoted, says that, "constructions and interpretations are not to be resorted to for the discovery of the testator's intention, when he has used none but plain, unequivocal expressions. Candles are not to be lighted when the sun shines brightly."

The doctrine thus forcibly expressed by this venerable jurist is not only in accordance with the express provisions of our Code, but in conformity to the rules of interpretation adopted in every system of jurisprudence. If, therefore, as we verily believe, the intention of the testator was so clearly expressed that it was impossible to misunderstand it, it left no room for interpretation. In this opinion we have been confirmed by the views taken by our learned adversaries, who considered the sole question involved in this cause as depending on the legal inquiry whether a corporation, created after the opening of the succession, was capable of administering the charity. It appears that even they, who had examined the law applicable to the case in all its various aspects, never for a moment supposed that the city of New Orleans, which had preferred no claim, and to whom the testator certainly never intended to confide the administration of his charity, could have any pretension to be the residuary legatee of the late *John D. Fink*.

The principles adopted by the court in deciding this cause have excited the surprise of all parties, and as the plaintiffs, until the present moment, have had no opportunity of examining them, they hope the court will be disposed carefully to consider the reasons which appear to militate against its decision.

We do not believe, for the reasons already assigned, that there was any occasion to resort either to interpretation or construction of the will. But if

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there was, we are firmly convinced that the construction put upon it by the court cannot stand the test of a serious examination.

The construction of all written language must be either *grammatical* or *logical*. The former examines the meaning of the words employed and the sense in which they are used, as deducible from the grammatical construction of the sentences. The latter supplies, by the aid of right reasoning, the errors and omissions that may occur in the language for the purpose of rendering that clear and precise which appears to be confused or obscure. Grammatical construction construes words as used in their ordinary acceptation, and so does logical construction. But the latter, which views the whole tenor of the language in connection with the subject it is intended to explain, is, by the writers of legal hermeneutics, divided into declarative, extensive and restrictive constructions, (Eschbach, *Introd. générale à l'étude du droit*, Paris ed. pp. 9 and 10; Lieber's *Legal and Political Hermeneutics*, chs. 2 and 3.) Applying these rules to the construction of wills, which are always to be interpreted so as to give effect to the intention of the testator, the reasoning which enables us to ascertain such intention must be *declarative of the will*; and the construction can neither be *extensive*, nor *restrictive*, without violating the intention. It appears to us that this rule has been departed from in the interpretation given by the court when it construes the declaration of the testator that the asylum is to be erected in New Orleans, as equivalent to a positive injunction to confine his liberality to the Protestant widows and orphans *residing in New Orleans*. The testator ordained that a suitable asylum should be erected in the city of New Orleans; that is, within the corporate limits of the city; but it does not therefore follow that all widows and orphans residing beyond those limits should be deprived of his bounty. Such a construction considers the building as the principal object the testator had in view, and the recipient of his beneficence as dependent on the location of the building. Such interpretation is evidently *restrictive* and much too narrow and illiberal, and it is moreover in conflict with the acknowledged objects of charities of this description.

In order to test the accuracy of this interpretation, let us suppose that the testator had said that "Fink's Asylum" should be erected "*in a healthy location in or about New Orleans*," would this imply that all widows and orphans, *not residing in such location*, must be excluded from the benefit of his bounty? Yet by the rule of construction adopted, such would have been the necessary consequence. But as that would have frustrated the testator's intentions, this rule of construction is inadmissible and must be discarded.

The legal definition of a charity is "*a gift to a general public use—which extends to the rich as well as the poor.*" (Grant on the law of Corporations, Phila. ed. p. 125, and the authorities there cited.) But it requires no argument to show that a charity, intended for a *general public use*, ought not to be limited to the exclusive use of a parish or a city.

In addition to these considerations, we have not the least doubt that it is not conformable to the intentions of the testator, who was a German Protestant, and who, no doubt, intended that the widows and orphan children of his countrymen, whether residing in New Orleans or in any other parish of the State, should be permitted to benefit by his liberality. The reasoning of the court on this subject appears to us to amount to this: "The testator ordered the asylum to be built in New Orleans, *ergo*, he intended it for the exclusive use of the Protestant widows and orphans residing in New Orleans; and upon this hypothesis it raises another presumption, to wit: that it was intended for the *poor* Protestant widows and orphans of New Orleans, and then leaving out the qualification of the word *poor*, deduces the inference that it was intended for the *poor* of New Orleans, and that the city is hence entitled to administer the charity.

The premises upon which the whole of this reasoning is predicated are, as we have shown, radically erroneous, and none of the deductions from the premises, even if these were correct, as they are not, is logical.

1st. Because it was not the intention of the testator to limit his beneficence to the widows and orphans residing in New Orleans;

2d. Because charities of this kind, as we have also shown, are not necessarily intended for the exclusive benefit of the poor; and

3d. Because the city cannot legally administer a charity of this kind.

We have already proved the first two of these propositions, and we shall examine the third more attentively hereafter; but before doing so we must be-

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show a passing notice on an observation of the court, to this effect, that "there are no words of devise to the Asylum." This remark was no doubt intended as an argument to show that the charitable institution whose creation was ordained, was not in reality the legatee. But if so, we can hardly believe it would be seriously insisted on. The word *devise* in its legal acceptance, means a bequest of real estate, but is here probably used as comprehending a bequest of both real and personal property. In whichever sense it be employed, the assertion that the testator has used no word of devise is equally erroneous. The testator declares: "It is my *wish and desire*, and I do hereby declare the same to be my *will*, that after the payment," etc., "the proceeds," etc., "be applied to the erection," etc., "of a suitable Asylum," etc. Such a disposition would, at Common Law, where the rules of construction are incomparably more strict than with us, be a valid devise to the trustees of the Asylum, if in existence at the opening of the succession, both of real and personal estate. (*Reed v. Reed*, 9 Mass. 379; *Anderson v. Grebel*, 1 Ashm. 136.) Fink applies "the proceeds of the whole of his estate, property," &c., and both the terms *estate* and *property*, whether used separately or in connection, are, according to innumerable decisions, both in our sister States and in England, declared to constitute a valid devise. (See Bacon's Abridg. *verbis* Legacies and Devises, C. § 2, 3, etc.)

The words "give and bequeath" are, technically, words of devise; but they are not sacramental, especially in wills, where the intention of the testator is to be ascertained and carried into effect. If it were necessary to produce authorities on this subject, those already quoted amply sustain our position, and our own courts have uniformly acted on this principle.

We now resume our inquiry, as to the legal capacity of the city of New Orleans to administer the fund destined for the support of Fink's Asylum, which capacity we believe does not exist. If the city possess this capacity, whence does it derive it? The franchises of the city all depend on its charter, and this emanates from the Legislature. The city, no matter how solemnly its existence has been recognized, can exercise no power not delegated by the Legislature, except those which are inferentially granted for the purpose of carrying the delegated powers into effect. But as neither its charter, nor any other law that can be produced, authorizes it to act as trustee of a charitable institution like the one contemplated in the present case, we have the right to infer that the authority does not exist. It is, no doubt, true that if a bequest were made to the poor of the city of New Orleans, and no person were appointed to administer the trust, that the city would be charged with its administration; but this doctrine depends on principles radically different from those applicable to the present case. These principles were to a certain extent laid down and explained in the case of *The State of Louisiana v. McDonogh's Executors*, 8 An. p. 249, where it is said, that "legacies to pious uses were authorized by law for the purpose of procuring aid from individuals in supplying those wants which the State itself, or the communities into which it is divided, were bound to provide for, in the interest of society, and as a function of government." The court further declares that the support and education of the poor was one of the objects contemplated, but this necessarily applies to such poor as the city was bound to support, even without the aid of charitable donations. In such cases, if the bequest was made to the poor of the city, it had a beneficial interest in the donation, and consequently, on general principles, was entitled to the administration of the fund when the testator had omitted to appoint an administrator. The same principle is acted upon daily in the administration of estates in the Court of Probates, and is the one recognized and sanctioned in the case of the *Succession of Mary* (reported in 2 R., 438, and relied on by the court.) This principle is unquestionably correct, but it is radically different from that promulgated and acted on in the present case; for,

1st. The city of New Orleans is under no obligation to support Protestant widows and orphans, and hence, has no beneficial interest in the administration of property given for their support.

2d. Even if this bequest was, as the court supposes, limited to the Protestant widows and orphans of New Orleans, a supposition which we deem erroneous, yet as the Protestant religion, if any such exist, is neither that of the State of Louisiana, nor of the city of New Orleans, but limited to a sect, or sects, which have no recognized legal existence, it would be impossible for the corporate authorities properly to administer the fund.

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3d. The will does not bestow any bounty on *the poor*, and it is only by assuming that it does so, in contradiction with the legal definition of the term *charity*, which extends such donations to *the rich* as well as *the poor*, as already shown, that such a conclusion is arrived at.

4th. The appointment of the city as administrator of *Fink's* bequest is in direct opposition to the expressed intention of his will, wherein he delegates this power to trustees.

5th. There is no law authorizing the city to undertake the administration of this charity.

For these reasons, and for others, which, if we had time, might easily be assigned, it appears to us that the reasoning of the court, although exceedingly subtle and plausible, is based upon erroneous assumptions and has not the sanction of law for its support.

Under these circumstances, to deprive the plaintiffs, who are the heirs-at-law of the testator, (and as such entitled to all the property of which he has not legally disposed,) of their lawful inheritance, and to give the same to a wealthy corporation would, it seems to us, be neither just nor equitable. The construction which the court has adopted in the interpretation of this will appears to be founded entirely on ingenious conjectures, which have induced it to adopt the principle of *cy-près* which governs the English Courts of Chancery in their construction of charitable uses, but which, until the decision in the present case, has never been followed in any of the tribunals of the United States.

The court has unquestionably the power to adhere to the decision already rendered, even if erroneous, but we are confident that no pride of opinion or of consistency will induce it to adhere to a judgment, although publicly declared, if we have succeeded in convincing it that it is an erroneous application and exposition of the law.

Re-hearing refused.

#### NICHOLAS AND JANE BARTON v. THOMAS KAVANAUGH.

An appeal will not be dismissed, in a case where the Clerk has notice that citations are necessary, by the filing of the petition of appeal but fails to issue them. It is not indispensable that the petition of appeal should contain a prayer for a citation to the appellees.

The husband has under his control personal actions to which his wife is entitled, but the joinder of the wife in the suit does not destroy the action.

In an action for damages for a malicious arrest, the following instructions to the jury were asked by the defendant: "That the plaintiff must not only prove malice, but must also show that there was no probable cause for the prosecution, and that the defendant is not bound to prove probable cause until the plaintiff has shown the absence of it, and that if the plaintiff show malice and not the want of probable cause, the defendant cannot be condemned, as it is just as necessary to show the want of probable cause as it is malice, before a recovery can be had. Held: that the charge asked for was proper, and should have been given to the jury.

Where a person maliciously and without probable cause procures the arrest of another, the error of the magistrate in ordering the arrest on an affidavit which charged no act or offence punishable by law, will not absolve the party procuring the arrest.

The court did not err in declining to instruct the jury that the mere belief of the affiant in the truth of the charges would exonerate him, but it would have been proper to instruct the jury that "probable cause does not depend upon the actual state of the case in point of fact, but upon the honest and reasonable belief of the party prosecuting.

Evidence of malice on the part of the defendant towards other persons than the complaining party is inadmissible.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J. W. Piles & Wooldridge*, for plaintiff. *J. J. Lugenbühl and C. Redmond*, for defendant and appellant.

On the motion to dismiss the appeal:

**LEA, J.** The plaintiffs have moved to dismiss the appeal taken in this case, on the grounds:

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1st. That they have not been cited to answer the appeal.

2d. That the evidence adduced on the trial was not reduced to writing, and no statement of facts accompanies the record.

3d. That there being no statement of facts, the court cannot, under the circumstances, determine whether the District Judge erred in the instructions and rulings embraced in the bills of exceptions.

The order of appeal was granted upon a petition filed for that purpose which, however, contains no prayer for citation to the appellees. The appellees not having been cited, contend that the omission is fatal, as being, under the circumstances, attributable to the fault of the appellant. It was not indispensable that the petition of appeal should contain a prayer for a citation to the appellees. The husband and wife joined in the suit as plaintiffs, uniting in a common demand; the Clerk could not have been at a loss to know to whom citations should issue. There are undoubtedly cases in which it is the duty of the appellant to designate to the Clerk the names of those who are to be cited, and where this has been omitted through the fault of the appellant, the appeal will, on motion to that effect, properly made after due notice given, be dismissed.

But we think the appellant is not in fault for not designating the appellees, about whom there could be no mistake, in a case where the Clerk has notice that citations are necessary *by the filing of the petition of appeal*. See *Ludeling v. Frellsen*, 4 An. 534; *Broussard v. Broussard*, 2 An 769.

As respects the other points urged in support of the motion to dismiss, it may be sufficient to remark, that though the case cannot be examined upon its merits, there is nothing to prevent the court from examining and deciding the questions of law presented by the bills of exceptions taken in the course of the trial.

It is ordered that the rule be dismissed.

On the merits:

SPORFORD, J. The defendant has appealed from a judgment awarding damages against him for the malicious arrest of *Jane Barton*, wife of *Nicholas Barton*.

The suit is brought in the name of both spouses, and the defendant excepted to this joinder of parties.

The husband, perhaps, had the right to sue alone for reparation; C. P. 107; *Holmes v. Holmes*, 9 L. 350. But we do not think that the joinder of the wife in the suit destroys the action. It may be disregarded, as surplusage.

The counsel for the defendant asked the court to charge the jury as follows: "That the plaintiff must not only prove malice, but must also show that there was no probable cause for the prosecution, and that the defendant is not bound to prove probable cause until the plaintiff has shown the absence of it; and that if plaintiff show malice and not the want of probable cause, defendant cannot be condemned, as it is just as necessary to show the want of probable cause as it is malice, before a recovery can be had;" which instructions the court declined to give, and the defendant excepted.

These instructions were appropriate to the case as charged in the petition, and are correct in law. It was, therefore, error in the Judge to refuse to give them. He has assigned no reasons for the refusal. If he had already given them in substance, it should have been so stated in the bill. A suggestion of counsel for the appellee cannot eke out the record. "To maintain an action for this injury the plaintiff must prove: 1st, that he has been prosecuted by the defendant, either criminally or in a civil suit, and that the prosecution is at an end; 2d, that it was instituted maliciously, and without probable cause;

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3d, that he has thereby sustained damage." 2 Greenleaf Ev., § 449. "The plaintiff must show that the prosecution was instituted *maliciously, and without probable cause*; and both these must concur. If it were malicious and unfounded, but there was probable cause for the prosecution, this action cannot be maintained. The question of malice is for the jury; and to sustain this averment the charge must be shown to have been *wilfully false*. In a legal sense, any unlawful act, done wilfully and purposely to the injury of another, is, as against that person, malicious." 2 Greenleaf Ev. § 453.

We also think that the Judge might with equal propriety have instructed the jury, as requested, that the affidavit of the defendant did not charge *Mrs. Barton* with an act or offence punishable by the laws of this State, and that the magistrate erred in ordering her to be arrested thereupon; but the Judge should add, that if they found that the defendant nevertheless had maliciously, and without probable cause procured her to be arrested, the error of the magistrate would not absolve the defendant. For it is not material though the plaintiff was prosecuted by an insufficient process, or before a court without jurisdiction.

The court did not err in declining to instruct the jury that the mere belief of the affiant in the truth of his charges would exonerate him; but it would be proper to instruct them that "probable cause does not depend upon the actual state of the case, in point of fact, but upon the *honest and reasonable belief* of the party prosecuting." 2 Greenleaf Ev. § 455.

It is true, as contended for by the appellee's counsel, that "malice *may* be inferred by the jury from the want of probable cause." But the jury are not bound so to infer malice.

The court should not receive evidence of malice on the part of the defendant towards other persons than the complaining parties.

It is, therefore, ordered, that the judgment of the District Court be avoided, the verdict of the jury set aside, and the cause remanded for a new trial according to law and to the principles announced in this opinion, the costs of this appeal to be borne by the plaintiffs and appellees.

#### SUCCESSION OF HIRAM J. GROVER.—On Opposition to Account of Tutor and Executor.

Under a clause in a will by which the testator constituted his executor *detainer* of his estate, *Adid*, that the *actin* of the executor did not embrace the testator's interest in property belonging to a particular partnership, which the will provided should be continued in accordance with the contract of partnership.

The executor is entitled, however, to his commissions on the net proceeds of the crops received by him from the surviving partner.

**A** PPEAL from the District Court of West Baton Rouge, *Robertson, J.*  
*Thomas Gibbs Morgan*, for plaintiff and appellant. *David N. Barrow*, for defendant.

BUCHANAN, J. *Hiram J. Grover*, of the parish of West Baton Rouge, made his will on the 19th September, 1846, which contained, among others, the following clauses:

"That the partnership existing between me and *Dr. Nolan*, in the plantation on which we reside, be continued in accordance with the contract entered

into between us, and if *Dr. Nolan* is willing, that additional negroes be purchased with the earnings of the plantation, (after the payment of debts and legacies) and placed on it until the joint force amounts to sixty working hands.

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"I hereby appoint *Samuel M. D. Clark*, tutor to my children, *Harriet Pauline*, *Hiram Justus*, *James Hamilton* and *Mary Estelle*, and desire that he will have my children raised in a proper manner, and educated in a manner to make them useful citizens.

"I appoint *Samuel M. D. Clark* executor of this my will and testament, to settle up and have all my just debts paid, and all the provisions of this will carried into effect, and to be testamentary executor and *detainer* of my estate."

Shortly after making this will *Grover* died. The will was admitted to probate, and letters testamentary were issued to *Clark*, as also letters of tutorship.

The inventory of *Grover's* estate was made on the 31st October, 1846, with the following result:

Amount of property held in partnership by the deceased and *John*

|                                               |             |
|-----------------------------------------------|-------------|
| <i>T. Nolan</i> .....                         | _____       |
| Estimation of share of deceased.....          | \$19,759 75 |
| Amount of deceased's individual property..... | 21,099 00   |

Total..... \$40,858 75

According to the terms of the will, and of the contract of partnership between the testator and *John T. Nolan*, referred to in the will, *Nolan* administered the sugar plantation, owned in common by himself and the testator, during the period of nine years from the 26th December, 1845; before the expiration of which period *Clark*, the executor of *Grover's* will and tutor of *Grover's* children, died.

It is very clear, therefore, that although the will, in general terms, constituted *Clark* "detainer" of *Grover's* estate, yet this seizin must be considered as limited to that portion of the estate, as inventoried, which was held by *Grover* in his separate and individual right, not that which formed *Grover's* capital in the sugar planting partnership of *Grover & Nolan*.

The general expressions in the will must be considered as controlled by the clause above quoted, in which the testator declares his wish that the partnership between *Nolan* and himself should continue in accordance with the contract of partnership. Had the will even been silent on that subject, *Nolan* could have resided the executor, had he attempted to take possession of *Grover's* interest in the plantation and its appurtenances. But, in point of fact, there was no such pretension asserted by the executor. *Nolan* always possessed and administered the partnership property without opposition from the executor, to whom he rendered an account yearly, and paid over the net proceeds of the crops. The opposition concedes the right of *Clark's* estate to a commission upon the amounts so paid to *Clark* by *Nolan*, a right which is evident from Article 1677 of the Civil Code.

The claim of the estate of *Clark* to ten per cent. upon the *gross* incomes of his wards, as commissions of tutor, was opposed, and has been abandoned in argument in this court. See case of *Succession of Hargrove*, 9 An. 505. Our conclusions upon the law of the case are entirely in accordance with those of the District District Judge. But we are requested to give a money judgment, which he has omitted to do, and thus settle the balance between the parties, and prevent further litigation.

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|                                                                                                                                                                                                                                        |                |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| Proceeding to do so, in conformity to the principles herein expressed, we find that the account of executorship and tutorship rendered by the widow and representative of <i>S. M. D. Clark</i> , shows a balance in his favor of..... | \$5,321 16     |
| From which deduct, being a charge of 10 per cent. upon the gross proceeds of the crops from 1847 to 1853, inclusive.....                                                                                                               | \$5,529 48     |
| Also commissions of 2½ per cent. upon total of inventory, being \$40,858 75, say.....                                                                                                                                                  | 1,021 46       |
|                                                                                                                                                                                                                                        | <hr/> 6,650 94 |
| Balance against <i>Clark's</i> estate.....                                                                                                                                                                                             | \$1,329 78     |
| But credit <i>Clark's</i> estate with 2½ per cent. commission on <i>Grover's</i> separate estate, as inventoried, say \$21,099                                                                                                         | \$527 47       |
| Also with like commission on amount of crops actually paid over to <i>Clark</i> by <i>Nolan</i> from 1847 to 1852, inclusive, say \$18,864 15.....                                                                                     | 471 60         |
|                                                                                                                                                                                                                                        | <hr/> 999 07   |
| True balance against <i>Clark's</i> estate.....                                                                                                                                                                                        | \$330 71       |

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, and that *William B. Chamberlain*, as tutor of the minors, *Harriet Pauline*, *Hiram Justus* and *James Hamilton Grover* children of *Hiram J. Grover* and *Margaret Hamilton*, both deceased, recover of the succession of *Samuel M. D. Clark*, formerly tutor of said minors, represented by the widow of said *Clark*, and tutrix of his minor children, the sum of three hundred and thirty dollars and seventy-one cents, with legal interest from judicial demand, (14th June, 1854,) with the privilege and general mortgage accorded by law to minors upon the estate of their tutors; the costs to be borne by the estate of *Grover*.

MERRICK, C. J., dissenting. The testator has three modes of compensating the executor.

He may give him a legacy, in which case the executor will receive no commissions. C. C. 1679. He may make him simply executor, and then he will receive only commissions of two and a half per cent. on the estimated value of the object which he has had in his possession and on the sums put into his hands for paying legacies and other charges. C. C. 1677.

The testator may give the executor the seizin or detainer of his estate. In this last case the executor is entitled, for his trouble and care, to a commission of two and a half per cent. on the whole amount of the inventory, making a deduction for what is not productive and what is due by insolvent debtors. C. C. 1676.

The testator is presumed to have known the law, and it strikes me that we ought to suppose he used the term "detainer" with reference to its legal signification, and in order to confer a power upon the executor to protect the entire estate, the interest in the partnership, as well as the individual property, and also to fix a standard by which the executor should be rewarded, and which should be sufficiently liberal to secure his services.

I am, therefore, inclined to think that the executor is entitled to commissions upon one-half of the partnership property.

LEA, J., concurred in this opinion.

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counts, and was consequently not concluded by the judgment homologating the same. This opposition, so far as the same related to the first account, was, on motion of the administratrix, ordered to be stricken out and rejected. After the assignment of the cause for trial, an amendment to the opposition was allowed notwithstanding the objection of the administratrix. A bill of exceptions was taken to this as well as to the ruling of the court below on the motion to strike out, but it is immaterial from our conclusion in the case to pass upon either.

From the last account filed it appears that the administratrix has received, since the homologation of her first account, the sum of \$886 80, and that she has discharged debts alleged to be due by the estate to the amount of \$160 66, leaving a balance of \$722 24 to be applied in part payment of her claim.

It is alleged, as one of the objections to both accounts, that the active debts carried on the inventory of the estate and certain portions of the price of the property thus sold, amounting together to upwards of \$10,000, have not been accounted for.

Upon the issues thus made up between the parties, the court below decreed that *Jacob Harrell* and the other heirs recover of the administratrix the sum \$2,796 64, with interest; that the item No. 1 on the credit side of her account be rejected; that a full and final account of her administration, exhibiting all the assets of the estate as inventoried, be rendered by her on or before the 1st of October, 1856; that her account be corrected and amended by rejecting her claim of \$3,137 08, and so amended, that the same be homologated; and that she pay in due course of administration the sum thus awarded in favor of the heirs. From this judgment the administratrix has appealed.

From this statement of the case, we think it is apparent that the judgment of the court below must be considered erroneous. It appears that, in order to effect a judicial partition between the parties, the property of the estate was sold at auction on certain terms of credit, in accordance with an order of the court, and that the greatest portion thereof was adjudicated to the widow and heirs of the deceased; and that the widow was subsequently appointed administratrix of the succession. As the heirs were not cited or made parties to the account thus rendered and homologated, it is clear that they are not concluded thereby, except as to the passive debts of the estate, for the payment of which the administratrix is entitled to be credited. C. C. 1168, 1172-3. It follows, therefore, that all the other matters were improperly embraced in her accounts and should have been reserved to be passed upon in the action of partition. The Code of Practice, Article 1027, expressly requires the Judge to direct the manner in which the partition shall be made, and to refer the parties to a notary whom he shall appoint to make a partition. The Civil Code also contains the same provision. Articles 1267, 1259; 5 An. 208. If any questions be raised in relation to the separate property of the spouses and collations between the heirs of the deceased, such questions should be determined by the Judge before referring the partition to a notary.

The question touching the liability of the administratrix for any damage which the estate may have sustained in consequence of her negligence, should have been determined by the court below previous to the reference of the partition to a notary. "Any co-heir of age, at the sale of the hereditary effects, can become a purchaser to the amount of the portion owing to him from the succession, and he is not obliged to pay the surplus of the purchase money over

the portion coming to him, until this portion has been definitively fixed by a partition." C. C. 1265; 2 An. 412; 12 R. 666. As the other assets were sufficient to pay all the debts and charges due by the estate, it follows that the administratrix was not bound to take any steps to enforce the payment of the purchase money due by the heirs, and consequently cannot be held liable for any loss or damage which may arise from such purchase by insolvency or otherwise. It appears to us, that the legal rights of the parties litigant can only be ascertained and determined in accordance with the views which we have expressed.

It is, therefore, ordered and decreed, that the judgment of the court below be avoid and reversed; that the cause be remanded for further proceedings according to law; and that the costs of this appeal be paid by the appellee, *James Harrell*.

MERRICK, C. J., recused himself in this case, he having been of counsel.

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CITY OF NEW ORLEANS v. W. W. VAUGHT.—J. B. McLIN, Intervenor  
and Appellee, R. Y. CHARMBURY, Appellant.

The landlord has a privilege upon the property of the defendant not yet removed from the leased premises. His privilege is continued in force by the order of the court directing the Sheriff to retain in his hands the proceeds of the property seized.

APPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*Durant & Hornor*, for appellant. *A. W. Jourdan*, for intervenor.

VOORHIES, J. On the 4th of February, 1851, *James B. McLin* leased several lots of ground to the defendant for the term of five years, at \$400 per annum, payable in advance, for which the latter furnished his four promissory notes, and stipulated to pay besides all the city and State taxes on said property until the expiration of the lease.

On the 3d of April, 1855, an execution in favor of the plaintiff against the defendant was levied on certain movable effects found on the property thus leased. *James B. McLin* thereupon filed an opposition, in which he claimed to have a privilege for rent, amounting to the sum of \$1092 50, which entitled him to be paid in preference to the plaintiff out of the proceeds of the sale, and prayed that the plaintiff and defendant be cited to answer his demand, and for judgment in his favor, &c.

An order directing the Sheriff to retain in his hands the proceeds of the sale until the further order of the court, was granted on the 28th of April, 1855. On the 11th of the same month, the same property was seized under an execution against the defendant in favor of *R. Y. Charmbury*.

The movable effects thus seized continued to remain on the property leased until the 4th of June, 1855, when the same were sold at twelve months' credit under the plaintiff's execution, for the price of \$3525, for which the purchaser executed his twelve months' bonds in favor of the Sheriff.

On the 9th of May, 1856, *James B. McLin* obtained a definitive judgment in his favor for the amount of his claim, with privilege as prayed for. On the 8th of July following, he took a rule upon the Sheriff and *R. G. Charmbury*,

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to show cause why his judgment should not be paid by preference out of the proceeds of the effects thus sold. *Charmbury* answered by denying the existence of any such right of preference, and is appellant from a judgment making the rule absolute.

As the proceeds of the sale are shown to be sufficient to satisfy the claims of the plaintiff and the appellee, consequently the controversy in this case is only between the latter and *Charmbury*.

Two questions are submitted by the appellant for our decision:

"1st. Had *McLin* any landlord's privilege, as against *Charmbury*, on the 28th of April, 1855, when he filed his intervention and third opposition?"

"2d. If he had, had his said privilege been continued in force since that date by the order of court directing the Sheriff to retain in his hands the proceeds of the property seized?"

We are of opinion that both these questions must be decided affirmatively. When *McLin* asserted his privilege, it is clear that the defendant in execution had not been divested of his title to the property thus seized, and that said property had not been removed from the leased premises. C. P. 663; 8 N. S. 361; 1 R. 41; 6 R. 100; 5 An. 112.

The appellee's opposition, claiming his privilege as lessor, was in our opinion seasonably made in order to secure his right to the same, under Articles 395 and 401 of the Code of Practice. As the property was seized and sold under the plaintiff's writ, we do not think the appellee was bound to make a similar opposition in regard to *Charmbury's* execution.

It is, therefore, ordered and decreed, that the judgment of the court below be affirmed, with costs.

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JOHN M. BELL, Sheriff, v. T. KEEFE and J. MAILLOT.

The Sheriff has a right to sue in his official capacity on a bond executed for the price of property sold by the Sheriff, and for which the bond had been executed in favor of his predecessor. When an instrument offered in evidence is not objected to, any indorsement on it is considered as proved.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J. Benjamin, Bradford & Finney*, for plaintiff. *Race & Foster and Mott & Fraser* for defendants and appellant.

**SPOFFORD, J.** The Sheriff sues on the bond in his official capacity. If he has authority to receive the money on it, he has the authority to sue, as the defendants executed the bond in favor of the Sheriff. See *Buisson v. Hyde*, 17 La. 19.

If a transfer to the present plaintiff from his predecessor in office, by whom the bond was taken, were necessary, there is an endorsement which imports such a transfer upon the instrument; and the whole instrument was offered in evidence, without objection on the part of the defendants. Under the ruling of this court in the case of *Maxwell v. Kennedy*, 10 An. 798, the endorsement must be considered as proved.

Judgment affirmed. \*

ESPRIU ROMAGOSA & Co. v. MATEO DE NODAL.—PEDRO DE NODAL, Opponent.

The remedy given to third persons by opposition is limited to the cases specified in the Code of Practice. Such third persons may, as in a separate action, obtain an injunction and arrest the seizure of the property he claims, but he cannot assail the regularity of the plaintiffs proceeding against the defendant in the seizure.

**A**PPPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*Collins and Wooldridge*, for plaintiffs and appellants. *P. S. Biron*, for intervenor and appellee.

VOORHIES, J. This is an attachment suit, in which *Pedro de Nodal* filed an opposition, alleging that the Sheriff, at the instance of the plaintiffs, illegally seized and took into his possession, under the writ, the contents of store No. 135, on Royal street, property which he had purchased in good faith, and of which he was in possession previous to the seizure. That the attachment thus issued is illegal and void, and should be set aside, because the bond signed by *Puig, Mir & Co.*, a commercial firm in this city, is insufficient, as one partner cannot bind another on an attachment bond; that in consequence of the damage which he has sustained in his business, he has a right to question the validity of these proceedings. Subsequently a rule was taken by him to dissolve the attachment, on the ground of the insufficiency of the bond, as stated in his opposition. The rule was made absolute, and the plaintiffs appealed.

We think the Judge *a quo* erred. The remedy given to third persons by opposition is limited to the cases specified in the Code of Practice: 1st. "When the third person making the opposition pretends to be the owner of the thing which has been seized;" 2d. "When he contends that he has a privilege on the proceeds of the thing seized and sold." Art. 396.

Where the opposition has for its object to set aside the order of seizure as having been effected on property claimed by a third person, such opposition is considered as "a separate demand, distinct from the suit in which the order was granted." C. P. 398. Hence the opponent must be considered as a plaintiff in an action of revendication. In order to give effect to his demand, he may obtain an injunction, and thus arrest the seizure of his property. *Ibid*, 399. His right to assail the validity of proceedings in a suit in which his demand is considered separate and distinct, appears to us to be inadmissible. The object of a bond in attachment cases is to secure the payment of such damages as the defendant may recover from the plaintiff, resulting from the wrongful issuing of such attachment.

It is clear that the opponent can have no recourse on such bond to secure the payment of damages which he may have sustained in consequence of the illegal seizure of his property under the plaintiff's attachment. As this is a right which the law intended to secure to the defendant, consequently he alone can either waive it or insist upon it.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed, and that the rule be dismissed at the appellee's costs in both courts.

STATE OF LOUISIANA *v.* THE JUDGE OF THE SIXTH DISTRICT COURT OF  
NEW ORLEANS.

When a party has an adequate remedy by appeal, an application for a writ of mandamus will be refused.

The refusal of the District Judge to allow the attorney in fact of the relator to represent him upon the trial, is a matter which could be presented to this court for revision by a bill of exceptions.

**A**PPPLICATION for a writ of *mandamus* to the Judge of the Sixth District Court of New Orleans. *T. W. Collens* and *G. & C. E. Schmidt*, for the relator.

LEA, J. The relator prays for a rule upon the Judge of the Sixth District Court to show cause why a writ of *mandamus* should not issue, requiring him to allow the attorney in fact of the defendant to appear and defend his interests in a suit pending in said court, in which said relator is the defendant.

He alleges that a vessel belonging to him having been sequestered, he employed the services of *Emile Houillion* to represent and defend his rights in said suit; that said *Houillion* took a rule upon the plaintiff to show cause why the writ should not be set aside; that on the trial of said rule, the court refused to allow the said *Houillion* to introduce evidence in support of the rule, or to argue the same, on the ground that said *Houillion* had not received a written authority to act for the relator at the time the rule was taken upon the plaintiff, and that the court persisted in such refusal, although the petitioner declared in open court that he had authorized the said *Houillion* to take the rule and to act as his attorney in fact throughout the case, and that notwithstanding the offer of the petitioner to execute a written power of attorney to said *Houillion*, the court refused to allow him to appear on his behalf, dismissed the rule taken by him, and maintained the sequestration.

Assuming this statement of the case to be correct, it appears to us that if there be any error in the action of the District Judge the relator has a full and adequate remedy by appeal. The refusal of the District Judge to allow the attorney in fact of the relator to represent him on the trial of the rule is a matter which could be presented to this court for revision by a bill of exceptions, in the same manner as could the refusal of the Judge to receive testimony when offered.

We can see no reason for granting a writ of *mandamus* in this case which might not be extended to every supposed error in the ruling of a District Judge on the trial of a cause. Such a precedent would lead to embarrassment and delay in the administration of justice.

The application is refused.

## THE STATE v. RUFUS WAPLES.

The Act of 1855, entitled "An Act to provide a revenue and the manner of collecting the same," is not unconstitutional.

The practice of the profession of law is not shielded from taxation.

**A**PPEAL from the Second Justice's Court of New Orleans, *C. M. Bradford*, Justice of the Peace. *E. W. Moise*, Attorney General, for the State. *Waples* and *Eustis*, for defendant and appellant.

**MERRICK, C. J.** This is an appeal from the decision of a Justice of the Peace, in a suit brought against the defendant to recover of him the sum of ten dollars, assessed against him as an attorney at law.

The account on which the suit was brought is in these words :

"**R. WAPLES** to the State of Louisiana,

To State License on profession, as attorney-at-law, for the year 1856, \$10."

"**NEW ORLEANS, December, 1st, 1856.**"

It is urged that the collection of this sum, as a license, violates Article 105 of the Constitution, because it impairs a contract, and that defendant having been already licensed to practice law by the Supreme Court under a former law, cannot be deprived of that right without adequate compensation previously made.

It is evident that the suit is brought to collect a tax under sec. 3d, paragraph 2d of the Act of 1855, 504. The fourth section of the same Act, imposing a penalty and making it illegal to carry on or practice any of the trades or professions, specified in the third section, previous to obtaining a license so to do, is only a mode of enforcing collection. The argument, that the permission or license to practice law is a contract between the State and the attorney at law, which shields him from taxation, and which cannot be regulated in any manner during his life time by the legislature, merits no serious reply. It is further urged, that the Act of 1855 violates Article 61 of the Constitution, because it is an encroachment of the executive upon the judicial department. We think, by the Act in question, the legislature has adopted stringent measures to compel the payment of taxes by those exercising trades or professions, but in what manner it limits the power of the courts we are yet uninformed.

It is further urged, that the Act of the Legislature is unconstitutional, because it embraces more than one object, and those objects are not expressed in its title.

The title of the Act is, "An Act to provide a revenue and the manner of collecting the same."

The object of the sections of the law which levy the tax of ten dollars upon attorneys, and provides the mode of enforcing the collection of the same, seems to be clearly embraced within the title of the Act. It will be proper to consider the constitutionality of other portions of the Act when they are shown to affect the rights of the defendant.

Judgment affirmed.

## STATE OF LOUISIANA v. J. Q. A. FELLOWES.

An attorney-at-law may be taxed as well as persons pursuing any other employment.

**A** PPEAL from the Second Justice's Court, *Bradford, J.*  
*J. Q. A. Fellowes, in propria persona, appellant.*

MERRICK, C. J. This case presents the same questions as the case of the *State v. Waples*, just decided.

It also presents the further objection to a recovery by the State, viz: that the claim as a tax is not applicable to the defendant, who, being an attorney, is an officer of the State, and not subject to taxation for exercising the duties of his office.

We know no reason why attorneys-at-law may not be taxed if such be the pleasure of the Legislature, as well as persons pursuing any other employment.

For this, and the reasons given in the case of the *State v. Waples*, the judgment appealed from must be affirmed.

Judgment affirmed.

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 JAMES CARL v. PETER POELMAN et al.

Under the ruling of the court in the case of *Walworth v. Ballard*, 12 An., in an action to render a party liable for a debt due by an estate, on the charge that he had taken possession of the property of the estate without authority, and with the view of appropriating the proceeds to his own use, no recovery can be had without proof of a previous conviction under the penal laws of the State.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Coze & Breaux, for plaintiff and appellant. Race & Foster, for defendants.*

LEA, J. The plaintiff alleges that the late *Peter Ritter* died indebted to him in the sum of \$714 67, and that the defendants have become liable to pay this debt, as intermeddlers in the affairs of the succession of said *Ritter*, "they having taken possession of his estate, consisting of personal property, and sold and disposed of the same without due and legal authority, with a view to appropriate the proceeds of the same to their own use and benefit." No other cause of action is alleged against the defendants, they are sued merely as intermeddlers.

To this petition the defendant *Poelman* excepted, on the ground that he could not be held liable as charged and demanded, until after due conviction under the penal laws of the State. Under the ruling of this court in the case of *Walworth v. Ballard*, recently decided, this defence must prevail; and though not urged by way of exception, on the part of *Mrs. Ritter*, it is, nevertheless, a necessary part of the plaintiff's case to prove such previous conviction, and without such proof no recovery can be had against either of the defendants. See Act of 1820, 96; Greiner's Digest, No. 3548, also Act of 1855, 400, sec. 9.

Judgment affirmed.

## McCALOP v. FLUKER'S HEIRS.

Where proceedings are instituted *via executiva* against the widow in community and tutrix, who takes a suspensive appeal in her capacity as *administratrix* of her deceased husband's estate, she is not entitled to a delay in the Supreme Court to have the heirs of her husband made parties to the appeal. If the heirs ought to have been made parties, and were not, the appellee might have moved to dismiss, but the appellant could not have been permitted to take advantage of her own laches. But it was not necessary to join the heirs in the appeal, for the purposes of which the *administratrix* had full capacity to represent the whole estate.

**A** PPEAL from the District Court of East Feliciana, *Merrick, J.*  
*Smiley & Perrin*, for plaintiff. *D. C. Hardee*, for defendants and appellants.

BUCHANAN, J. Plaintiff instituted proceedings in the Seventh District Court against the widow in community and tutrix of the minor children of *D. J. Fluker*, deceased, in the *via executiva*, upon an act importing confession of judgment signed by said *Fluker*. The widow *Fluker* took a suspensive appeal from the order of seizure and sale, in her quality of *administratrix* of the succession of *D. J. Fluker*.

The appeal was taken in the month of March, 1855, and filed in this court on the 27th of February, 1856. On the day of its filing, the appellant, by counsel, on affidavit of the birth of a posthumous child of *D. J. Fluker*, since the appeal taken, to wit, in June or July, 1855, moved the court for a continuance of the cause in order to make said posthumous child a party to the appeal, and to give appellant time to qualify as tutrix of said child. An order of continuance for said purposes was made on the 29th February, 1856.

At the present term, the appellant by counsel again moves for a continuance, on a suggestion supported by affidavit, that another of *D. J. Fluker's* heirs has attained the age of majority and has married, and should be made a party appellant.

On the other hand, the plaintiff, appellee, moves to rescind and set aside the order of the 29th of February, 1856, on the ground that it was made in error, the appeal being taken by the *administratrix* alone; and furthermore, that the appellant has had ample time to qualify as tutrix of her posthumous child, and should not be allowed to profit by her own laches.

Upon the foregoing statement of facts, it is very plain that our order of the 29th February, 1856, was made unadvisedly, and that the appellant is not entitled to the further delay which she prays for, to make her married daughter party to the appeal. The rule of this court of the 29th May, 1854, provides for continuances to make parties in the place of appellants or appellees who have died pending the appeal. But such is not the case here. The heirs of *D. J. Fluker* were never parties to this appeal, although parties defendant to the suit. If they ought to have been made parties to the appeal, and were not, that would have been a good ground for dismissing the appeal on the motion of the appellee; but should not be used by appellant as a means of delaying the decision of the cause. But we are of opinion that it was not necessary to join *Fluker's* heirs in the appeal. The *administratrix* had full capacity to represent the whole estate for the purposes of the appeal.

It is ordered that the order of the 29th February, 1856, be set aside and rescinded, and that this cause be placed on the trial docket with preference.

## SAMUEL JAMISON v. THE CITY OF NEW ORLEANS.

A judgment homologating the assessment for expense of opening a street, voluntarily executed, has the force of the thing adjudged.

**A**PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*

*T. Gilmore*, for plaintiff. *J. Livingston*, for defendant and appellant.

MERRICK, C. J. The plaintiff having been assessed four hundred dollars for the opening of Benton street, after the homologation of the assessment, paid the same.

*Maunsel White*, against whom there had also been an assessment, appealed, and the Act of 1832, under which it was made, was declared to be unconstitutional, and the judgment was reversed. 9 An. 446.

The plaintiff, who had not appealed, brought this suit to recover back the money paid by him under the assessment.

It is urged by the defendant that the judgment voluntarily executed by the plaintiff has the force of the thing adjudged.

On the other hand, it is urged by plaintiff that the judgment in favor of *Maunsel White* enured to the benefit of all the property holders who were assessed, and that it is unjust that the city should retain plaintiff's money while the other parties in interest were discharged by the judgment from all liabilities, and while there was no liability on the part of the city to open the street.

We think that the exception taken by the defendant must be sustained. The appeal of *White* and others from the homologation of the assessment under the Act of 1832, could only benefit the appellants. Aside, therefore, from the recent decisions overruling the case of *White v. Municipality No. Two*, 9 An. 446, the homologation of the assessment must be considered as having the force of the thing adjudged, as between the present parties. See *Yeatman v. Crandell*, 11 An. 220, and the case of *The Draining Company*, 11 An. 370.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment against the demand of the plaintiff, and that he pay the costs in both courts.

BUCHANAN, J., took no part in this decision.

## T. B. HARPER v. MUNICIPALITY NO. ONE et al.

The petition charged that the defendants had unwarrantably and illegally destroyed a certain railroad; that the iron and materials of the road were the petitioner's property, and that the iron and materials were kept from the petitioner by the defendants, and claimed the value of said materials. Held: That the action was one of damages for a tort, and the prescription of one year applicable to it.

**A**PPEAL from the Fifth District Court of New Orleans, *Augustin, J.*

*T. H. Howard*, for plaintiff and appellant. *J. J. Michel*, for defendant.

SPOFFORD, J. This is an action for the alleged unwarrantable and illegal destruction of a railroad belonging to the plaintiff, of which the iron and other materials are declared to be worth \$7500, for which sum the suit is brought.

The injury is said to have been done in 1840, and the suit was instituted in June, 1850.

HARPER  
v.  
1st MUNICIPALITY.

We concur with the District Judge, that the action must, on the whole, be considered as an action in damages for an alleged tort.

The plea of prescription was, therefore, properly sustained.

Judgment affirmed.

BROWN & JOHNSON, Appellants, v. KENDALL, YOE & Co., Third opponent, CARL KOHN, Appellee.

A Sheriff's deed is a title translatif of property, and the title and possession under it cannot be treated by a third person as a nullity.

APPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
A. T. Steel, for plaintiffs and appellants. Clarke & Bayne, for third opponent.

SPORFORD, J. In January or February 1856, the plaintiffs, under a judgment against *Wm. G. Kendall*, seized in execution a plaining-mill and its apparatus, which had been adjudicated to *Carl Kohn*, on the 17th of November, 1855.

*Carl Kohn* opposed the seizure, and claimed the property as his own. His opposition was filed on the 29th February, 1856.

In support of his allegations he produced all the proceedings under an order of seizure and sale issued at his instance against a certain square of ground and all its appurtenances, as the property of *Wm. G. Kendall*, mortgaged to himself. In the advertisement of this sale the plaining-mill and apparatus, now seized by the plaintiffs as still the property of *Kendall*, were described as composing part of the property seized, and to be sold under the order in favor of *Carl Kohn*. They were so sold, and *Kohn* became the purchaser of the whole; and the plaining-mill, &c., are particularly described in the Sheriff's deed to himself. He is in possession under a title translatif of property, to wit: a Sheriff's deed. *Kendall*, the judgment debtor, has acquiesced in the sale.

Under these circumstances, a third person cannot treat the title and possession of *Kohn* as mere nullities, and seize the property as if it were *Kendall's*. It is unnecessary to inquire whether the plaining-mill, &c., had become immovable by destination.

Judgment affirmed.

## ROBERT FERGUSON v. LAURENT MILLAUDON.

Damages will not be allowed for delay when no time was specified in the contract within which the work was to be completed.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Duncan & McConnell*, for plaintiff. *Benjamin, Bradford & Finney*, for defendant and appellant.

SPOFFORD, J. The plaintiff sues for the price of four boilers manufactured by him for the front plantation of the defendant in the fall of 1854.

The answer is a demand in reconvention for a very large amount of damages alleged to have been sustained in the loss of a portion of a sugar crop that year, by reason of delay in the delivery of the boilers and their bad construction.

The value of the materials and workmanship (supposing the work to be good work) are established.

The only controversy springs out of the reconventional demand.

We do not find that the plaintiff is liable for damages in consequence of delay. No time was specified in the contract within which the boilers were to be completed. The defendant alleges that the contract was made on the 13th August, a very late period. He took upon himself to deliver to the plaintiff some of the materials of his old boilers to be incorporated into the new ones. This was not done until the 21st of August. The plaintiff objected that it was late in the season to undertake such a job, but the defendant insisted on his doing so, and seems to have been cognizant of the impossibility of completing the work by the time he now contends it should have been done. And we think the correspondence of *Millaudon* with the plaintiff shows that there was no violation of even an implied contract as to the *time* of finishing this job. His complaints at the time were confined to the quality of the work.

That was unquestionably defective. But as the boilers, though leaky, made steam enough to run the engines used by the defendant, we do not think that the loss of a portion of the crop was attributable to the defective work of the boilers. At any rate, no such precise data are given in evidence as would enable the court to say that any particular sum was lost to the defendant by reason of the bad workmanship of the boilers, save that which he spent for their repairs. It seems from the correspondence between the parties, that the plaintiff was to put them in good order if they did not work well during the first season, when they were obliged to be used. He failed to do so. The defendant employed a competent mechanic to do this work at the price of twelve hundred dollars. We see no reason why this sum should not be deducted from the plaintiff's demand, instead of six hundred dollars which the District Judge allowed, because one or two of the witnesses thought the repairs might have been done for that sum.

It is, therefore, ordered that the judgment of the District Court be reversed; and it is now ordered, adjudged and decreed, that the plaintiff recover of the defendant the sum of two thousand and one dollars and fifty-six cents, with legal interest from the 26th December, 1854, until paid, that being the balance due the plaintiff, after deducting from his demand so much of the defendant's claim

in reconvention, as should have been allowed in the court below; it is further adjudged and decreed, that the defendant pay the costs incurred in the District Court, and the plaintiff those of this appeal.

FERGUSON  
v.  
MILLAUDON.

### THE STATE v. CHARLES SMITH et al.

The surety in an appearance bond cannot be held liable when it does not appear that there was any order of court admitting the accused to bail, fixing the amount of the bail bond, or authorizing the Sheriff to take the same.

The judicial acts of a court of record are evidenced by the record alone.

Parol evidence was improperly admitted to show that a verbal order had been given in open court to take a bond.

An order rendered, but not entered at the time, may be entered *nunc pro tunc* in proper cases.

APPEAL from the First District Court of New Orleans, *Robertson, J.*

*M. A. Foute*, District Attorney, for State. *Field and Wooldridge*, for appellant.

*SPOFFORD, J.* For the reasons given in the case of the *State v. Cole et al.*, just decided, the motion to dismiss is overruled.

The appeal is taken by *Buck*, surety for the defendant, *James Hubert*, on an appearance bond, from a judgment forfeiting the bond.

It suffices to say that there appears in the record no order of court admitting the accused to bail, fixing the amount of a bail bond, or authorizing the Sheriff to take the same. See *State v. Gilbert*, 10 An. 532, and cases there cited.

There was not, therefore, any evidence before the court upon which the bond in question could be treated as an authentic and valid bond.

On the motion of the surety to set aside the forfeiture, the District Attorney offered the Deputy Sheriff *Fabre* as a witness to prove that the District Judge gave him a verbal order in open court to take the bond. The Judge admitted the evidence against the objection of the appellant, who took a bill of exceptions.

The ruling was erroneous. The First District Court of New Orleans is a court of record; the orders of that court relative to the admission of accused parties to bail are judicial acts; the judicial acts of a court of record are evidenced by the record alone; if the record is lost or destroyed its contents may be proved, as in other cases, by secondary evidence. But what was never of record cannot be supplied by parol in such a proceeding as this. See *State v. Longineau*, 7 An. 700. An order rendered, but not entered at the time, may be entered *nunc pro tunc* in proper cases.

The Deputy Sheriff also testified that he had been in the practice for many years of taking bail bonds without a judicial order. The practice of ministerial officers cannot control the statutes relative to bail. Upon this subject the law is clear, and there is no doubt or discordance in the judicial interpretation of it. It is the duty of ministerial officers throughout the the State to act in conformity to the law, as expounded in the courts, and no practice of theirs, however long continued, can justify a departure from settled rules.

It is, therefore, ordered and decreed, that the judgment of the District Court against *J. A. Buck*, as surety on the bond of *James Hubert*, be avoided and reversed, and that the State take nothing by its motion.

## JEAN SARRAN v. AUGUSTE REGOUFFRE AND WIFE.

When, during the existence of the community, a stock of goods was bought in the name of the wife but it was not shown that she had been a public merchant, either before or since the sale—*Held*: that the purchase must be considered as having been made by the husband, and the debt incurred by it a debt of the community.

**A**PPEAL from the District Court of Ascension, *Duffel, J.*

*A. Gentile*, for plaintiff and appellant. *Henry Duffel*, for defendant.

BUCHANAN, J. We agree in the conclusion of the elaborate and ably reasoned opinion of the District Judge, that the note of *Madame Regouffre*, and mortgage upon her separate estate, were given in reality for a debt of her husband; although the transaction was clothed with the form of a contract of sale of a stock of goods by plaintiff to *Madame Regouffre* individually, *Madame Regouffre* is not proved to have been a public merchant, either before or since the sale in question. The Article 128 of the Code does not, therefore apply. On the contrary, the business of the store was carried on in the joint name of her husband and the witness *Vigné*. The purchase must be considered as having been made by the husband, and as a community debt, for which the separate estate of the wife was not bound, (C. C. 2371,) and no action could be maintained against her while the community existed. 6th Annual, 57.

Judgment affirmed, with costs.

## LOUIS V. PORCHE v. A. LEDOUX.

The new tutor is the proper person to call on the former tutor to account, and has the faculty of standing in judgment for the minor, as regards that cause of action.

Art. 615 C. P., as amended by the Act of 1826, does not imply the nullity of a judgment when a minor has been regularly represented according to law.

The Art. 615 finds its application in the case (among others) where the tutor renders his account to the under tutor, the minor in this instance not being fully represented on the rendition of the account.

A judgment regularly rendered between the new tutor and the former tutor of a minor, will sustain the plea of *res judicata*, in an action brought by the minor, arrived at his majority, against his former tutor.

**A**PPEAL from the District Court of West Baton Rouge, *Robertson, J.*

*U. B. & E. Phillips*, for plaintiff and appellant. *A. Provosty*, for defendant.

MERRICK, C. J. *Madame C. Porche*, the mother of the plaintiff, was confirmed as his tutrix in 1834. She continued as such until 1841, when she resigned her office on account of her health, and the defendant was appointed dative tutor to the plaintiff. She rendered her account to the new tutor, and the same was homologated. The defendant acted as tutor until 1846, when he resigned, and *Madame Porche* was reappointed. He rendered his account in the District Court to *Madame Porche*, the tutrix, and this account was also homologated.

In 1852 the plaintiff having arrived at the age of majority, instituted his action against his mother, as tutrix, calling upon her to render her account. In accordance with his demand she rendered an account, wherein she credited the plaintiff with the amounts received from the defendant under his account.

The minor opposed the account of the tutrix, which was amended by the decree of the court, and so homologated.

The plaintiff in his petition alleges that the account of the defendant, *Ledoux*, rendered in 1846, is erroneous, and contains illegal charges which are set forth at length in the petition. He prays that the account be amended, so as to increase the amount of capital charged to the tutor; that the items of credit allowed him be stricken out, and that plaintiff have judgment for such amount as may be found due him upon such final settlement.

To this petition the defendant pleaded several exceptions, the only one which is important to notice is that of *res judicata*.

In the case of *Monget*, tutor, v. *Walker*, 8 An. 214, it was held that the new tutor was the proper person to call the former tutor to account. If so, he has power to stand in judgment at it regards that cause of action, and it must have that effect upon the rights of the minor which a judgment between any other person and the new tutor would have.

It is provided by Article 615 of the Code of Practice, that "A judgment rendered against a minor may be rescinded, if such minor show either that his cause has not been well defended, or that he has been aggrieved by such judgment. But, that action shall be prescribed if four years have elapsed after the minor has arrived at the age of majority: nor can it be brought by the curator or tutor during the minority of their ward." This Article was amended by the statute of 1826, which declared, that "Art. 615 shall not be taken or construed to imply the nullity of a judgment where a minor has been regularly represented according to law." Acts 1826, 72, § 12.

The minor was properly represented in the rendition of the account of *Ledoux* by the new tutrix, because there was no other person competent to receive or contest it except the tutrix, and it would be unreasonable to hold that the account between a former tutor, or the succession of a former tutor and the new tutor must remain open until a minor, perhaps of tender years, arrives at the age of majority.

The case is different when the tutor renders his account to the *under tutor*. There the minor is not fully represented in the rendition of the account, and no doubt the Article 615 finds its application in that event as well as in other cases where the minor has not been regularly represented in the proceeding.

We think the plea of *res judicata* was properly sustained, and it is evident, from the foregoing reason, that if the amendment praying for the nullity of the judgment of 1846 had been allowed it would not have changed the result.

Judgment affirmed.

## HENDERSON &amp; GAINES v SHIP MAID OF ORLEANS.

Where goods are injured on shipboard the measure of damages is the difference between their value in their damaged state, and their value at the port of destination if they had been delivered in good order, which should be ascertained by a public sale to the highest bidder. The doctrine of abandonment for a constructive total loss, does not appear to apply to a contract of affreightment.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.* *Benjamin, Bradford & Finney*, for plaintiffs. *Durant & Hornor*, for defendants, appellants.

**BUCHANAN, J.** This is a suit for damages upon a shipment of clocks in boxes from New York to New Orleans. The clocks were shipped in good order, as appears by the bills of lading, and were delivered in New Orleans to the plaintiffs, consignees and owners of the same. The packages being stained by water when delivered, were opened and their contents examined by disinterested and competent judges called for the purpose, who testify that they were damaged by salt water to such an extent as to make them worthless; but that they might have produced, at auction, from thirty to forty per cent. of their invoice price. The plaintiffs have sued the ship for the total value of the goods, as in case of non-delivery. This course of proceeding is unusual and not warranted by precedent. The measure of damage is the difference between the value of the goods in their damaged state, and their value at the port of destination had they been delivered in good order. *Rathborn v. Neal*, 4 An. 566. That difference in value should have been ascertained by a public sale to the highest bidder. *Greenwood v. Cooper*, 10 An. 796. It was in the power of plaintiffs to have subjected them to this test, as the clocks have always remained in their possession in the warehouse. It was their duty to have done so. It is plain that plaintiffs cannot keep the clocks and also recover their invoice price as damages. Neither can the plaintiffs be considered as holding the clocks for the account and risk of the common carrier. The doctrine of abandonment for a constructive total loss has never been applied, that we are aware of, to the contract of affreightment.

The proper judgment in this case is a nonsuit, in order that plaintiffs may take steps to liquidate the damages.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; and that there be judgment for defendants as in case of nonsuit, with costs in both courts.

## DAVID AIKEN v. JAMES OGILVIE.

Where several persons buy a tract of land, in the name of one of themselves, for the purpose of dividing it into lots and squares, and selling the same at a profit to be shared among them, the notes and assets, as well as the unsold lots, are subject to the action of partition, and a suit by one of the partners against the other, to compel him to account for sales made by him, will not be barred by the prescription of ten years.

Where it does not appear to have been more the duty of one partner than another to collect debts due to the partnership, and the partner who undertakes to collect them has placed them in the hands of a competent attorney, and has acted in good faith, he ought not to be held responsible for the negligent or irregular acts of such attorney (or other competent agent) although the suit was brought in the name of the individual partner instead of the names of the joint owners.

**A**PPPEAL from the Third District Court of New Orleans, *Kennedy, J.*  
*J. Livingston*, for plaintiff. *C. Roselius* and *P. A. Ducros*, for defendant and appellant.

**MERRICK, C. J.** "On the 27th day of February, 1836, *James Ogilvie, Oliver Aiken* and *John Green* made an agreement by private act, in which it was set forth that *James Ogilvie* had on that day purchased a plantation, jointly with *Oliver Aiken* and *John Green*, each one-third, from *Mr. Louis Fred. Foucher*, that each party had paid his one-third of the cash payment thereon; and which further stipulated that said *Green, Ogilvie* and *Aiken* were joint proprietors of said property, in the proportion of one-third each, and entitled to one-third of the same, with all the rights and privileges, interests and profits, and to demand the same of *James Ogilvie*; each to bear one-third of all expenses and losses on the same; that either two should have a controlling power in the management of the plantation, to sell or otherwise, as they shall think fit, and the third shall conform to the wishes of the other two on all lawful matters, &c.

"On the same day was purchased the plantation of *Foucher*, for the price of \$70,000—\$15,000 cash, and the balance, \$55,000, on a credit of one, two and three years, secured by mortgage, with the right to the purchasers to redeem the same at any time, at a deduction of seven per cent. per annum. Subsequently the front portion of this property was surveyed and divided into squares and lots, and now constitutes what is known as the town of Greenville. This front portion, for the most part, was sold at public auction, by *Isaac L. McCoy*, auctioneer, on the 27th April, 1836. The sales, which were actually completed at that time, amounted to the sum of \$226,770, on which there was collected in cash \$300 for buildings. The balance was sold on a credit of six, twelve, twenty-four and thirty-six months from day of sale, and secured by mortgage.

"On the 11th of July, 1836, most if not all the notes, the proceeds of *McCoy's* sales, remaining undisposed of, were divided among the partners. On the 15th of October, 1836, *Oliver Aiken* departed this life, and by last will and testament constituted *David Aiken* and other parties (plaintiffs by supplemental petition) his only heirs."

In March, 1837, a verbal division took place of the unsold lots in Greenville. The rest of the purchase appears to have been laid out in a town called Friburg, and was sold the 8th of February, 1839, at auction, for \$8,596.

This suit is brought to compel the defendant to account for all sales made by him, and to render him accountable for certain debts alleged to be lost through

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his neglect; and to compel him to render an account of all the lots on hand, and prays for a judgment and interest for the several sums claimed, and for final partition and liquidation of the partnership. The action was commenced in July, 1852.

The defendant filed an answer and an account, in which he claimed, by way of reconvention, a balance against the plaintiff.

The matter was referred to an auditor, who found, in favor of plaintiff, \$20,196 69, and five per cent. interest thereon from 13th December, 1839. This account was opposed by the defendant, and amended by the District Judge so far as to award to the plaintiff certain unsold squares of ground, and decreeing the plaintiff \$16,285 18, with five per cent. interest on \$10,943 13 from the 14th day of April, 1849, until paid.

From this judgment the defendant has appealed. We consider the matter stated in the motion for an appeal as descriptive of the judgment appealed from.

Defendant relies on two grounds:

1st. The action, so far as it has its object to call upon *Ogilvie* for an account, is prescribed. The transactions, out of which the alleged liability to account arose, took place in 1836, and the present action was commenced in December, 1852, more than fourteen years after the obligation which is sought to be enforced originated. It is a personal action, and is prescribed by the prescription of ten years.

2d. That the defendant is erroneously charged \$19,160 and interest, the amount of the purchases by *Rillieux*.

I. The plea of prescription cannot be maintained. The contract between *Aiken*, *Green* and *Ogilvie* was for the purpose of buying a plantation in *Ogilvie's* name, dividing it into lots and squares, and selling the same at a profit and sharing the same equally among them. The land remaining in *Ogilvie's* name, and the notes and assets in the partners' hands, as well as the unsold lots, were subject to the action of partition. We do not think the informal and provisional partitions, if such they may be called, changed the character of the possession of the parties so as to give rise to the prescription of ten years.

II. We are of the opinion that the defendant ought not to be charged with the amount of the purchases of *Rillieux*.

We do not know that the defendant was under any greater obligation to collect these notes than either of the other partners. It is unreasonable that they should stand by twelve or fourteen years and leave their associate to struggle with the collection of the debts, and after it has become difficult to make the proof in justification, step forward and hold him responsible for the oversight of his lawyer in compromising with an insolvent debtor.

For all that appears, the claims were in the hands of a competent lawyer, and we are not disposed to hold the defendant responsible for his acts, although the suit was brought in his name instead of the names of the joint owners. If the defendant's name was used it was for the benefit of his partners. As we hold that the action is not the action of mandate, and therefore not prescribed, but the action of partition, so we think that where it appears that the partner has acted in good faith in matters of business which it was no more his duty to attend to than his co-partners, that he ought not to be held for the negligent or irregular acts of such competent agents in the ordinary discharge of their duty as he may be obliged to employ.

Moreover it does not appear that the plaintiffs have been in any manner in-

jured by the compromise, as it has not been shown that the judgment, even for the amount rendered, could have been satisfied out of any property owned by *Rillieux*.

If this is the only considerable debt which these partners have lost, they have exhibited one of the most fortunate speculations of the inflated period of 1836 which has come under our observation.

As the defendant does not complain of the judgment in any other respect, it will be amended so as to deduct the one-third of the *Rillieux* debt and interest, and the error in the numbers of the squares corrected, as conceded by defendant, and so amended the judgment must be affirmed.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be amended in favor of the plaintiff, so as to order the defendant to make a title to the plaintiff of squares Nos. 55, 61 and 48, instead of 51, 65 and 48, as mentioned in the said decree; and that said judgment be also amended in favor of the defendant, so as to reduce the sum awarded the plaintiffs by said decree from sixteen thousand two hundred and eighty-eight dollars and eighteen cents, with five per cent. interest on ten thousand nine hundred and forty-three dollars and fifteen cents from the 14th April, 1849, to six thousand eight hundred and ninety-two dollars and twenty-five cents, with five per cent. interest on the sum of four thousand six hundred and twenty-three dollars and sixty-five cents, with five per cent. interest thereon per annum from said 14th day of April, 1849, and that said judgment so amended be affirmed, the plaintiffs and appellees paying the costs of appeal, and the defendant the costs of the lower court.

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SAME CASE ON A RE-HEARING.

MERRICK, C. J. In this case the parties, plaintiffs and defendant, consent that the judgment rendered in this case be amended, so far as relates to the squares to be conveyed, so as to conform to the judgment of the court below, after the correction of the errors in the numbers of the squares, and so as to read thus :

It is ordered, &c., that the judgment heretofore rendered by this court be amended so as to read as follows : It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be amended in favor of the plaintiffs, and that *David Aiken* be and is hereby decreed to be the owner of one-half of the property hereinafter described, and that *Frederick W. Aiken*, *Eleanor C. Aiken*, *Helen Aiken*, *Martha Aiken* and *Caroline Aiken* be considered and they are hereby decreed to be the owner each of one-tenth of the same property, viz: squares Nos. 55, 61 and 48 in the town of Greenville, and squares Nos. 2, 3, 4, 5, 6 and 11 in the town of Friburg, according to a plan drawn by *B. Buison*, surveyor of the parish of Jefferson, on the 18th of April, 1836, and deposited in the office of *W. Y. Lewis*, notary public; and that said plaintiffs be put in possession of the property aforesaid.

R. A. STEWART et al. v. HENRY MARSTON. Appellant—JOHN KERNAN,  
Intervenor and Appellee.

In assumpsit of a debt conditional'y, prescription does not commence to run until the condition is accomplished.

APPEAL from the District Court of East Feliciana, *Ratliff, J.* Tried by a Jury. *J. McVea, W. F. Kernan*, for intervenor. *Fuqua & Killbourn*, for defendants and appellants.

COLE, J.\* The Cashier of the Branch of the Union Bank at Clinton was a defaulter, and suits were instituted against his sureties to make them responsible on their bonds.

While these suits were pending, viz, the *Union Bank v. L. Andrews*, and same v. *Nichols & Morris*, the court appointed *George C. Comstock* and *L. Sturges*, auditors in the two cases to examine the books and accounts of the cashier, and allowed each of them two hundred dollars in each case.

*L. Sturges* transferred to intervenor on the 19th of April, 1842, the amount awarded to him by the court.

After this transfer was made, *R. A. Stewart* issued a *fi. fa.* on a judgment due him by *L. Sturges*, and made a pretended seizure of the claim in the hands of the bank, and caused it to be seized and sold, and purchased it. He subsequently institutes this suit to recover the claim from *Henry Marston*, as cashier, and prays for judgment against him in that capacity. In his amendment, however, he prays for judgment against him individually, alleging that he had purchased the assets of the bank and assumed its liabilities, and bases his right to recover upon this alleged assumpsit.

*John Kernan*, the intervenor, alleges that the claim of *Lewis Sturges* was transferred to him prior to the seizure and sale of *Stewart*. He avers that *Marston* is not liable as cashier; because, before the institution of this suit, the branch had ceased to exist in Clinton, and *Marston*, of course, ceased to be cashier, but he also avers, that *Marston* had purchased the assets of the branch and assumed all its liabilities; this among the rest.

The plaintiff, upon the trial below, took a judgment of nonsuit; the claim of the intervenor was tried before a jury, and he obtained a verdict for his demand.

It is urged by appellant that *Kernan* cannot recover, because the assumpsit of *Marston* is limited to debts created during his administration as cashier, and the allowance to the arbitrators was made anterior to that epoch. This objection is invalid, because a draft was given by *Sturges* for the \$400, the amount allowed him as expert, on the cashier of the Branch of the Union Bank at Clinton, and was left for consideration by the board. The bank considered it was the intention of the court to allow the arbitrators but two hundred dollars in each case. *Hardesty*, in his testimony, says: "That *George C. Comstock*, one of the auditors, owed a note in the bank for \$400, on which the bank brought suit, and in defence to the suit of the bank, *Comstock* pleaded the award of \$400, which had been allowed him as one of the auditors.

\*The Hon. J. L. COLE was elected on the 6th of April and took his seat on the 4th of May, in place of the Hon. J. N. LEE, whose time had expired.

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"It was the understanding in the Board of Directors, and with those connected with the amount in document K (the draft), that the action of the board should be determined by the decision of the suit between the Union Bank and *Comstock*. Witness so advised *Stewart*, who was the claimant of the award to *Sturges* by virtue of his seizure, and *John Kernan* was also apprised of it, as the transferee indirectly of *Lewis Sturges*."

The testimony establishes that the bank was to pay the \$400, the amount of the draft, in the event their view of the compensation to the experts was determined to be erroneous by the decision in their suit with *Comstock*, who was sued on a note due by him to the bank, and filed his fees of \$400 in compensation. This case was decided adversely to their view; the plea of compensation was allowed, and their liability to pay became at once fixed.

It is true that the obligation of the bank to pay the fees of *Sturges* was created before the administration of *Marston* as cashier, but the promise of the bank to pay them to a third person, in the event of the occurrence of a certain contingency was an obligation created during the period that *Marston* was cashier.

Although the bank refused to accept absolutely the draft, there was an understanding that the amount of the fees should be paid on the happening of a certain event; *Marston* was certainly aware of this convention, and it is not equitable that the intervenor should lose them, inasmuch as *Marston* assumed to pay all the obligations created by the bank during the period that he was cashier.

The plea of prescription cannot prevail, because the assumpsit of the bank could only be prescribed by the lapse of ten years, and it only began to run from the time when the condition, on which the liability of the bank depended, was accomplished, viz, the decision of the suit in the case of the *Union Bank v. Comstock*.

This suit was decided on the 25th January, 1850, and the service of the petition of *Kernan* was accepted the 21st June, 1855.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed with costs.

Chief Justice MERRICK took no part in this case.

#### JOSEPH E. WILSON v. PETER MCGREAL.

Prior to the Act of 1837 the office of curator of a vacant estate terminated in one year from the date of his appointment. The action to compel the curator of a vacant estate to render his account seems to be of the nature of the action of mandate, and subject to the prescription of ten years from the expiration of his office.

The character the plaintiff has given to his action by his pleadings must determine the prescription applicable to it.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*

*L. Janin*, for plaintiff and appellant. *G. W. Christy* and *P. E. Bonford*, for defendant.

MERRICK, C. J. *Peter McGreal*, the defendant, was appointed curator of the vacant estate of *Francis McGreal*, deceased, on the 19th day of September, 1833, and letters of curatorship issued to him after the completion of the inventory, on the 6th day of November of the same year. The inventory was

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formed of the one undivided half of the goods in a clothing store, held by the deceased in partnership with one *Southworth*, under the style of *Southworth & McGreal*, and the sums due that firm. The debts due by the partnership, if any, were not deducted. The one undivided half was estimated at \$17,656 54.

On the 30th day of August, 1834, the curator filed his account, showing a balance in his hands, including bad debts, of \$1160 13.

This balance was formed by crediting the estate with the following items:  
By amount due per balance sheet, being one-half profits gained by

|                                                                |            |
|----------------------------------------------------------------|------------|
| <i>Southworth &amp; McGreal</i> up to 1st September, 1833..... | \$2,347 38 |
| By amount of judgment against <i>Thomas McAdams</i> .....      | 180 00     |
| By cash.....                                                   | 40 50      |
|                                                                | <hr/>      |
|                                                                | \$2,517 88 |

and deducting the payments made by the curator therefrom.

The Judge ordered public notice to be given the creditors, and all persons interested in the succession, to show cause within ten days why the account presented by the curator should not be homologated.

Nothing further appears, from the documents and records extant, to have been done with the account. The defendant removed to Texas in 1836, where he has since resided, the plaintiff also being a citizen of the same State. On the 13th day of February, 1857, more than twenty-two years after the filing of his account, the defendant was found in this city, which he is in the habit of visiting, and it was made the occasion for the commencement of the present action by *Wilson*, who married a daughter of *Owen McGreal*, a brother of the deceased. *Wilson* alleges that *Owen McGreal*, who is a citizen of the State of California, addressed a letter to him, and requested and authorized him to take all necessary measures to recover his share in the estate of *Francis McGreal*, and also declared that he made a donation of whatever he may receive to his daughter, *Wilson's* wife.

He alleges that the account rendered by *Peter McGreal* is not binding on the heirs, though he is not willing to contest the items of the account for which vouchers have been filed; that soon after *Peter McGreal* had been appointed curator, he formed a partnership with *Southworth*, the former partner of *Francis McGreal*, deceased, and that he treated the interest of the estate in the partnership as his own property, converted it to his own use, and availed himself of the absence and dispersion of his co-heirs to deprive them of their rights in the estate.

The petitioner claims the balance of profits which he alleges the curator acknowledged to have in his hands on the 31st of August, 1834, \$1160 13, and the interest of said *Francis McGreal* in the partnership, estimated in the inventory at \$17,656 56½; in all \$18,816 69½ and twenty per cent. interest.

The prayer of the petition is that defendant be condemned to pay the heirs of said *Francis McGreal*, deceased, \$18,816 69½, with five per cent. interest up to 13th March, 1837, and with twenty per cent. interest afterwards, and that he may be particularly condemned to pay your petitioner *Owen McGreal's* share, to wit: one-third of the estate, and that said *Owen* be recognized as one of the heirs of the deceased.

*Patrick McGreal*, also of Texas, who alleges that *Owen McGreal*, the defendant and himself are the only surviving heirs of *Francis*, intervenes in the suit and adopts the allegations and conclusions of *Wilson's* petition, and prays substantially for the same relief.

The defendant pleaded the prescriptions of one, three, five, ten and twenty years. The plea of prescription having been sustained, the plaintiff has appealed.

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According to the law prior to the Act of 1837 the office of a curator of a vacant estate terminated at the expiration of one year from the date of his appointment. All that remained for him to do afterwards was to render his account. The action to compel him to render the account appears to us to be one in the nature of the action of mandate, and subject to the prescription of ten years against the parties present, and twenty years against those who were absent as the law then stood. C. C. 3508; 3 N. S. 601.

This case does not come within the rule laid down in the case of *Comstock v. Chamberlain*, 4 An. 368, for the curator of the vacant estate prior to the Act of 1837, was *functus officio* at the end of the year of his appointment. He could not, therefore, be considered as in court by virtue of his office after that office had expired. Hence his obligation to account after the expiration of his office became the subject of an action, and that action, like all other actions, was subject to the laws regulating prescription.

But an attempt has been made to take this suit out of the rules of law as to the prescription of the action for the rendition of the account, by showing that it is really an action of partition. In this we think the plaintiff has failed. The suit is brought against the defendant, as the curator of the vacant estate, to compel him to render his account, and to charge him with \$18,816 92½, the amount of the inventory and profits. It is not brought against him as heir, and the co-heir was not made a party to plaintiff's petition, (although he has intervened in the suit,) and there is no prayer for a partition.

We think the character the plaintiff has given his action by his pleadings must govern us in determining the prescription applicable to it.

Whether an action of partition would lie against the defendant as heir for the division of the balance shown by the account of 1834 to be in his hands, or for any other sum, is a question which we do not consider ourselves called upon to determine.

Judgment affirmed.

#### MAUNSEL WHITE v. J. B. WILKINSON.

Where the book-keeper of a commission merchant, offered as a witness to prove his accounts, swears to their correctness, but it appears, on cross-examination, that he made no original entries on the day book, cash book and invoice book—saw none of the goods purchased, and only knows that "he kept the ledger correctly from the entries furnished him by the partners and other clerks"—*Held*: That the proof was insufficient. The clerks who made purchases for defendant ought to have been examined, and the drafts and receipts ought to have been produced.

APPEAL from the District Court of Plaquemines, *Rousseau, J.* Tried by a Jury. *J. Q. Bradford* and *H. D. Ogden*, for plaintiff and appellant. *C. R. Penrose*, for defendant.

MERRICK, C. J. This is an action upon an account of a commission merchant and factor. The balance claimed is \$10,184 20 as due at the institution of the suit in November, 1852, on accounts running back as far as 27th April, 1844, and embracing numerous transactions between the firm, of which the

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plaintiff is the assignee and liquidating partner, and the defendant. The case was tried by a jury in the lower court, who found for the defendant.

After an ineffectual attempt to obtain a new trial, the plaintiff appealed from the judgment rendered against him.

The case has been argued in this court almost entirely upon the question of the sufficiency of the proof offered by the plaintiff. His proof consists in a letter of the defendant, dated June 1st, 1849, (after the receipt of an account current,) acknowledging his indebtedness, as shown by the account, of \$19,235 00, the testimony of the book-keeper who swears that the accounts are correct, and the report of auditors appointed by the court to report upon the state of the account between the parties. We will consider the effect of this proof in its order.

The letter of the defendant certainly shows an indebtedness to the plaintiff in June, 1849, of \$19,184 20, but unfortunately for the plaintiff's case the accounts are continued down to January, 1850, at which time it appears that he had in the interval received, on the other side of his account, more than sufficient to compensate the liquidated balance of June 1, 1849. The letter dispenses the plaintiff from the necessity of proving the correctness of his accounts prior to the 17th of May, 1849, throwing upon the defendant the burden of proving errors if it be alleged that the account is erroneous. But the plaintiff is obliged to establish his account since that period, by legal and sufficient evidence. The proof offered is insufficient.

The book-keeper, who is shown to be an excellent book-keeper, swears that the accounts presented are correct, but when interrogated as to his means of knowledge, we find that he never made an original entry in the day book, cash book and invoice book; that he never saw any of the goods purchased; and, in fine, knows nothing about the correctness of the account, except that he kept the ledger correctly from the entries furnished him by the partners and the other clerks. The clerks who made the purchases of goods for the defendant ought to have been examined, and the drafts which the plaintiff took up, as well as the defendant's receipt for money, ought to have been produced.

The proof of the witness that accounts current were furnished the defendant is found also, on a cross-examination, to be as uncertain as his testimony as to the correctness of the account. At what time and what accounts were delivered to the defendant, the witness is unable to inform us. The witness says, that he merely presumes that the defendant got copies of all of the accounts current. He knows he got some of them, for he handed them himself. Thus it does not appear that any account current was delivered defendant after the letter of June 1st, 1849, and he cannot be bound as for an account stated after that period, without such showing.

The reports of the auditors, aside from the irregular manner in which they are made out, possess no more value as evidence than do the accounts.

The auditors took no testimony and confined their labors to an examination of the accounts furnished by the plaintiff and annexed to the petition. As these accounts have not been proven, the structures built by the auditors upon them must fall with them. Plaintiff's case is without testimony to sustain it.

We think, however, that the judgment should be only one of nonsuit.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the defendant as in case of nonsuit; the defendant and appellee paying the costs of the appeal, and the plaintiff those of the District Court.

J. McHUGH v. MRS. MARY STEWART—W. BRAGG et al., Opponents,  
S. STEWART, Appellant.

The tacit mortgage of the minor on the property of his tutor can only be enforced for the balance which will appear to be due him, upon an account of tutorship rendered or ascertained by a judgment obtained against his tutor in default of rendition of account.

The tutor himself cannot assert this tacit mortgage upon property which was affected by it in his hands, and which he has alienated or incumbered in favor of third persons: *non constat*, that at the termination of the tutorship he will owe the minor anything, and even if this should be the case, the latter would have to proceed first against such property as his tutor might then be possessed of, the law reserving to the third possessors of property sold by the tutor the right of discussion.

APPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*F. Haynes and Collins & Wooldridge*, for plaintiff. *Singleton and Clack*,  
for *S. Stewart*, appellant.

BUCHANAN, J. Defendant, a married woman, mortgaged a house and lot to *Samuel Stewart*, for the security of money borrowed by her from said *Stewart*, after being thereto authorized by a judgment of the Fourth District Court of New Orleans, in conformity to the Act of 1855, No. 200, page 254 of the Session Acts. In her petition, presented to the Fourth District Court, she alleged that the proposed loan was "for her entire benefit, and to finish a valuable building on said lot, and is in no way for the use or benefit of her husband or children, who have no claim on her, but is truly for the purposes above stated." In the act of mortgage, to which her husband, *James Stewart*, was a party, the defendant declared that "under the authorization of the honorable *M. M. Reynolds*, Judge of the Fourth District Court of New Orleans, whose certificate to that effect is hereunto annexed, she has borrowed the sum of twelve hundred dollars from *Samuel Stewart*, of this city, for the uses and purposes set forth in said certificate." The act of mortgage also recites an annexed certificate of the Recorder of Mortgages of New Orleans, of even date, certifying that there existed no mortgages in the name of the mortgagor, and recorded against the property mortgaged, except one in favor of her vendor, *John McHugh*, and one in favor of the mortgagee, *Samuel Stewart*; which latter the mortgagor bound herself to have cancelled immediately.

The present suit was instituted by the vendor of the property, by executory process, upon a protested note, being one of those given by defendant for the price. At the Sheriff's sale under this executory process, on the 7th October, 1856, *Samuel Stewart* became the purchaser of the property, for seventeen hundred dollars cash; out of which, after satisfying the execution of the vendor and other privileges on the property, he retained in his hands, as appears by the Sheriff's return, five hundred and eighty-seven dollars and seventy-six cents, in part satisfaction of his mortgage debt.

The defendant now appears in court in the capacity of natural tutrix of her four minor children, issue of her first marriage, with *Patrick Fitzpatrick*, and claims, by way of third opposition, to take the proceeds of the Sheriff's sale, in preference to the said *Samuel Stewart*, upon the following allegations:

"That said lot, with the improvements thereon, was the only immovable owned by petitioner, and is subject to the tacit mortgage existing in favor of

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petitioner's said minor children, and which amounts to the sum of six hundred and fifty-nine dollars and eighty-seven cents, which sum was received for said minors from the *Succession of John J. Fitzpatrick*, by petitioner in her said capacity, and was in fact used in the purchase and improvement of said property. That petitioner in her said capacity is entitled to receive the said amount of \$659 87 out of the proceeds of said property, in satisfaction of such mortgage, in preference to said *Samuel Stewart*, who alleges a better right, but who is not entitled to receive said surplus."

In support of these allegations the defendant and third opponent has offered in evidence letters of natural tutorship, granted to her as widow of *Patrick Fitzpatrick*, on the 5th December, 1848; also the following document extracted from the *mortuaria* of *John J. Fitzpatrick*, in the Fourth District Court of New Orleans:

"Received, New Orleans, March 7th, 1854, from *Mrs. Mary McHugh*, administratrix of the estate of *John J. Fitzpatrick*, the sum of six hundred and fifty-nine 87-100 dollars, in full of the claim of and portion inherited by *Daniel, Theresa, Edward and John Fitzpatrick*, as per judgment of court in above succession in Fourth District.

[Signed]

MARY FITZPATRICK, tutrix."

Apart from the palpable bad faith on the part of the defendant and third opponent, involved in the assertion of this claim, it is evident that it cannot be listened to, because it inverts the legal position of parties, and anticipates an account of tutorship. In substance, we have here the spectacle of the debtor claiming to be the recipient of a fund, as if she were the creditor. Minors certainly have, by law, a tacit mortgage upon the property of their tutors from the day of the appointment of such tutors, for the security of their faithful administration; C. C. 354, 3282. But this tacit mortgage, like other mortgages, is to be enforced by the mortgagee, not by the mortgagor. It can only be enforced by the minor, and for the balance which will appear to be due him upon an account of tutorship rendered or ascertained by a judgment obtained against his tutor in default of rendition of account; *Holmes v. Hemkin*, 6 Rob. 51. Now, it may very well happen that when the four minors *Fitzpatrick* shall have attained the age of majority their tutrix shall owe them nothing; that the expenses of their education, and the other legal charges against them, or the payment of the debts of their father, may have consumed the whole of the not very large sum received by their tutrix for their account, on the 7th March, 1854. Indeed, it is proved by defendant's own oath that she expended one hundred and seventy dollars in lawyers' fees, in the litigation in the Fourth District Court, which resulted in the judgment mentioned in her receipt.

Or it may be that the minors *Fitzpatrick*, or some of them, may die before attaining the age of majority, and that the whole or a portion of the indebtedness of their mother and tutrix, by reason of the receipt in question, may be thus extinguished by confusion. No account of tutorship has yet been rendered, nor could any have been rendered, and in the absence of such account it is impossible to assume that the whole amount received by the tutrix as aforesaid, is due to her children without any deduction whatever. And suppose it were paid at this time to the tutrix, would this property, in the hands of the purchaser, be thereby relieved from the minors' tacit mortgage? That would be very doubtful, to say the least. For the payment to the tutrix would amount to nothing more than a second receipt by her of the same sum, for account of

her minor children, and for which she would clearly be still liable to them. This last consideration alone seems to demonstrate the inadmissibility of this claim at this time, and in this form. When the minors shall have attained the age of majority, or shall be emancipated by marriage, or when the tutrix shall be from any other cause compelled to account, or when a judgment shall have been obtained against her, or against her succession, in default of an account; and the claims of her children against her shall have been liquidated, and the balance in their favor ascertained, the recourse of the children will be, first, against the property then in possession of their mother and tutrix; and it may be that she will then have property sufficient to satisfy their claims. But if not, then the minors will have their recourse against the third possessors of property alienated by their mother since the date of her appointment as tutrix; the right of discussion being reserved by law to those third possessors, as against the tutrix, (C. C. 3366, C. P. 715,) a right which seems entirely irreconcilable with the pretensions now set up by that tutrix to make a third possessor relieve her of an anticipated responsibility.

We understand the argument of the appellant, *Samuel Stewart*, in this court, as conceding the right of priority of the appellees, *Aitkins, Moodie, Dorand, Bragg and Pike*, for the amounts allowed them respectively, by the judgment appealed from.

It is, therefore, adjudged and decreed, that the judgment of the District Court, as to the appellee, *Mary Stewart*, tutrix, be reversed; that the third opposition of the said *Mary Stewart* herein be dismissed without prejudice to the rights of the minors, if any they have, in the premises, to be exercised at the proper time; that as to the appellees, *Aitkens, Moodie, Dorand, Bragg and Pike*, the judgment be affirmed; that the costs of the opposition of *Mrs. Mary Stewart*, tutrix, in the District Court, be paid by the said *Mrs. Stewart*; and that the costs of appeal be paid, one-half by *Mrs. Stewart*, and one-half by the appellant, *Samuel Stewart*.

#### THE STATE v. LEBLOND et al.

The Supreme Court is without jurisdiction when an indictment is quashed *in limine*, and consequently no fine has been actually imposed, and the offence charged is not punishable with death or imprisonment at hard labor.

APPEAL from the District Court of the parish of St. James, *Duffel, J.*  
*S. M. Berault*, for defendant.

SPOFFORD, J. This appeal was taken by the District Attorney, on behalf of the State, from a judgment quashing an indictment against the defendants for the offence of selling spirituous liquors to a slave without the consent in writing of the owner, overseer or employer of the said slave.

No fine was actually imposed, as the indictment was quashed *in limine*; and the offence charged has never been punishable with death or imprisonment at hard labor.

We are without jurisdiction in the case. Constitution, Art. 62.

Appeal dismissed.

NEW ORLEANS CANAL AND NAVIGATION COMPANY *v.* THE CITY OF NEW ORLEANS.

The plaintiffs were not subrogated, either by law or covenant, to the rights and privileges of the "Orleans Navigation Company," which corporation was dissolved by decree of this court in 1888. It is for the party only whose rights have been invaded to plead the nullity of a law as impairing the obligation of a contract.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy J.*  
*E. H. Durell and C. Morel*, for plaintiffs and appellants. *J. Livingston*, for defendant.

**SPOFFORD, J.** The plaintiffs seek to enjoin the city of New Orleans from draining its streets, squares, &c., through artificial canals and by the aid of machines, into the Bayou St. John, on the ground that such a system of drainage has the effect to render the bayou unfit for navigation by filling up its bed, defiling its waters, and generating pestilential gases and noisome odors.

The plaintiffs base their right to interfere upon the assumption that this system of drainage by the city is a violation of the absolute right of the "New Orleans Canal and Navigation Company."

The New Orleans Draining Company was incorporated on the 19th March, 1835, with a view to the establishment of the present system of drainage to facilitate the passing off of the waters "into the lake, Bayou St. John, or elsewhere." (Acts 1839, p. 79, sec. 21.) Three draining machines have been erected at the junction of canals with the bayou, which create or increase the current from the drains into the bayou by means of splash wheels propelled by steam. One of these machines was erected in 1837, a second in 1840, and a third in 1845, and they have been in operation ever since.

In pursuance of the amended charter of the Draining Company, approved on the 20th March, 1839, (sec. 13,) the machinery, levees, &c., erected by the company, have been delivered over to the city, which has assumed the obligation imposed upon it by that law, of keeping the works in operation.

But the company which now sues came into existence on the 18th October, 1852. It is a voluntary corporation, organized under the general law of March 12th, 1852, "for the purpose of improving the Canal Carondelet and the navigation of the Bayou St. John."

It is obvious that a voluntary company, organized in 1852 for the purpose of improving the navigation of the Bayou St. John, unless it is endowed with or subrogated to the anterior rights of some other company or party, cannot complain of a system of drainage which has constantly been pursued under the authority of the sovereign power, as manifested by a legislative grant in 1835. To meet this difficulty, the plaintiffs' counsel contends that the New Orleans Canal and Navigation Company, created in 1852, is the successor of the Orleans Navigation Company, incorporated in 1805, and fully subrogated to all the rights, privileges and franchises of that company.

In 1852, by a final decree of this court, it was "ordered, adjudged and decreed, that the corporation of the Orleans Navigation Company has forfeited its charter; that it be dissolved and henceforth extinct, for the violations of the conditions of the Act of incorporation." See 7th An. 679.

The appellants claim to succeed to all the franchises and rights of action of the extinct company, by virtue of an Act approved March 18th, 1852, entitled, "An Act relative to the Orleans Navigation Company, the Bayou St. John and Canal Carondelet," and by virtue of a sale of the property of the Orleans Navigation Company, made under the provisions of said Act, at which they became the purchasers.

The Act itself confers upon them no such universal succession. The fourth section is explicit in defining the right bestowed and the conditions of its bestowal. Referring to the sale of the property of the extinct company, it declares "that it shall be a condition of said sale, that if the purchasers shall organize themselves into a corporation under the laws of this State, for a term of twenty-five years, for the purpose of carrying out and effecting all the improvements detailed and described in the reports and plans known as Harrison's reports and plans, including the construction of a new basin at the junction of Canal Carondelet and Bayou St. John, of the depth and dimensions set forth in said reports, and shall actually complete and effect all said improvements within the term of three years from the date of their charter, then the said corporation shall be entitled to receive and exact all such tolls and revenues for the use of said canal, bayou and road, as the Orleans Navigation Company was entitled to receive under its charter; provided, that at the end of said term of twenty-five years, the State of Louisiana shall have the option either of granting to said corporation a renewal of the right of receiving said tolls for a second term of twenty-five years, or of purchasing for itself the property and improvements of the company at the appraised value thereof; and provided further, that if said second term of twenty-five years be granted, the whole property shall revert to the State of Louisiana, at the end of said second term, without any payment or compensation made to said company."

It will here be seen that the old company is only alluded to in order to fix the rate of toll which this company shall be permitted to charge by the grant of the Legislature, and not by virtue of its purchase of the property of the old company.

If the sale of the "property" included a sale of all the rights and franchises of the former company, it was superfluous for the Legislature to say anything about the rate of toll to be charged by the new company.

Hence, the "entire property of said company, real and personal, movable and immovable," of which the liquidator was to take possession, and sell at auction, according to the first section of this Act, only embraced corporeal things owned by and moneys due to the company. This property did not embrace the chartered rights of the company which, before the sale, had been extinguished beyond recall.

We conclude that all the plaintiffs' rights accrued in 1852, and that the New Orleans Canal and Navigation Company has never been subrogated, either by law or by covenant, to the rights, franchises and privileges in general of the Orleans Navigation Company. It is, therefore, unnecessary to inquire whether the legislation of 1835 and 1839, and the action of the Draining Company and the city under it, infringed the privileges of the Orleans Navigation Company, and might have been enjoined by it. Whatever right of action that company had in this behalf has not been transferred to the present plaintiffs; it perished with the old company.

Nor can the present company be heard to plead that the legislation of 1835

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and 1839 was unconstitutional in impairing the vested rights of the old company; that was a matter entirely between the State and the old company, in which this company has no interest, because it is not the universal successor of the other; that legislation certainly impaired no vested rights of a company which came into being ten years afterwards; and it is only for the party whose rights are invaded to plead the nullity of a law impairing the obligation of a contract.

The plaintiffs entered upon an arduous undertaking with their eyes open; they assumed to dredge and keep in navigable order the Bayou St. John in spite of the draining machines; and the evidence shows it can be done. The fact that it is expensive does not give the new corporation a legal right to drive the city to abandon its ancient system of drainage into the Bayou St. John, which is naturally subject to a servitude of drain, and to open at a heavy cost new channels from the river to the lake shore. It is probable that such a system must ultimately be adopted. But this is an important question of policy, with which we cannot interfere under the showing made by the plaintiffs in injunction. As we do not find that the city has done or is doing anything in violation of the vested rights of the New Orleans Canal and Navigation Company, it is ordered that the judgment appealed from be affirmed, with costs.

#### D. AUGUSTIN v. H. B. EGGLESTON.

The statute under which plaintiff contests the election of defendant as Judge of the Fifth District of New Orleans, required him to set forth *specially all the grounds of contest*; if on account of the alleged violation of a particular law, he ought to have specified what provisions of such law were violated.

The mere position of the ballot-box will not make an election null and void without any resulting injury.

Elections are to be determined by the majority of the ballots cast, and are not to be set aside on account of the meagreness of the vote, without distinct and circumstantial allegations of error, fraud, violence, or illegality affecting the result.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*

*James Augustin*, for plaintiff and appellant. *Randall Hunt*, for defendant.

**SPOFFORD, J.** Considering that the first Monday of April, 1857, was the day fixed by law for electing a Judge of the Fifth District Court of New Orleans; that a writ of election duly issued and proclamation thereof was duly made; that an election for said officer was actually held on that day, both plaintiff and defendant being candidates; that the returns as made are conceded to indicate the election of the defendant; that the plaintiff has suggested no error in the returns; that the statute under which the proceeding was instituted required the plaintiff to *specially set forth all the grounds of contest*; that the first ground set forth is vague and insufficient, because if the election law of March 19th, 1857, were valid, (upon which we intimate no opinion,) the plaintiff has not specified what provisions of the said law might have been observed and were not, or what was done which ought not to have been done; that the second ground of contest assigned is untenable, because no law has been referred to which makes an election null and void simply on account of the position of

the ballot-boxes, without any resulting injury being alleged; that the third ground assigned by the plaintiff was abandoned by him during the oral argument in this court; and considering, finally, that the fourth and last ground of contest is immaterial, since elections are determined by the majority of the ballots cast, and are not to be set aside on account of the meagreness of the vote, without distinct and circumstantial allegations of error, fraud, violence or illegality affecting the result; it is ordered and decreed that the judgment appealed from be affirmed, with costs.

Mr. Justice COLE took no part in this case.

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FRANCES BABIN AND HUSBAND v. M. C. LE BLANC, Tutor.

The doctrine in the case of *Maillefer v. Saillet*, 4 An. 375, that the marriage of a minor in another State, when contracted in violation of our own laws, does not operate the emancipation of the minor, recognised and reaffirmed.

APPEAL from the District Court of West Baton Rouge, *Robertson, J.*  
E. W. Robertson and J. D. Stuart, for plaintiff. D. N. Barrow, for defendant and appellant.

MERRICK, C. J. The plaintiff, a minor, who claimed to have been emancipated by her marriage with *Lafayette Caldwell*, brings this suit for the partition of the property held in common with her minor co-heirs against the defendant, their tutor.

The defendant excepted to plaintiff's right to institute the action.

The proof on the exception shows that the father and mother of the plaintiff died in September and October, 1853; that the defendant applied to the proper court to be appointed tutor to the plaintiff and her co-heirs; that the plaintiff and *Lafayette Caldwell*, after the death of her parents, both of them being residents of the parish of West Baton Rouge and no tutor having yet been appointed, went to Natchez, in the State of Mississippi, for the purpose of being married, and were there married and returned to West Baton Rouge, where they have since resided.

We think the exception ought to have been sustained.

It is evident that the parties were married in Natchez in order to evade our laws, which required the consent of a tutor to the marriage of a minor. In the case of *Maillefer v. Saillet*, (4 An. 375,) it was held in substance, that emancipation is a consequence of the marriage which the law authorizes, and not of that made in fraud of our laws; that the courts of another State cannot emancipate minors whose domicile is in Louisiana, and that a marriage there in opposition to our laws, cannot produce any greater effect towards the emancipation of the minor.

We are satisfied with the decision in the case of *Maillefer v. Saillet*, and as the marriage in Mississippi did not have the effect of emancipating the minor, it is clear she was not authorized to bring this suit.

It is, therefore, ordered, adjudged and decreed by the court, that the decree of the lower court be avoided and reversed, and that the exception filed by the defendant be sustained; and the plaintiff's suit be dismissed, she and her said husband paying the costs of both courts.

## SUCCESSION OF FRITZ—On rule taken by S. H. DAVIS.

The terms of sale of the property of a succession accepted with benefit of inventory were for cash. The property, an immovable, did not bring the appraisalment. *Held*: That there was no sale while the purchaser could compel the tutrix to complete, although the property was ordered to be sold to pay debts. It should have been re-advertised and sold on terms of credit of not less than twelve months. C. P. 990, 991, 992.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.* *Cutler & Ellison and Semmes & Labatt*, for plaintiff in rule and appellant. *T. W. Collins*, for tutrix.

MERRICK, C. J. The judgment of the District Court must be affirmed.

The terms of sale of the property of the succession, accepted with the benefit of inventory, were for cash. *The property, an immovable, did not bring the appraisalment.* There was, therefore, no sale which the purchaser could compel the tutrix to complete, although the property was sold to pay debts. It should have been re-advertised and sold on terms of credit of not less than twelve months.

The case is governed by Articles 990, 991 and 992 of the Code of Practice, which are in these words, viz:

ART. 990. It shall be the duty of the several Judges of probates, on the application of the creditors or any of the creditors of a vacant estate, to cause, on the requisite advertisements being made, so much of the property of said estate as is necessary to pay the debts of the same, which may be due, to be offered for sale and sold at public auction to the highest bidder, for cash if the creditors require it; and if, on thus offering said property for sale, the appraised value shall not be bid and obtained, then the same shall, in not less than fifteen, nor more than twenty-five days from the time it is thus offered, be sold at public auction, after public advertisement, to the highest bidder, for what it will bring, on a credit of twelve months; provided, however, that in all sales of effects belonging to a vacant estate on a credit, the purchaser shall give bond and security to the satisfaction of the Probate Judge and curator, and a mortgage on the real estate so purchased.

ART. 991. It shall be the duty of the Judge of probates, in all cases of vacant estates, on the application of the creditors, or any creditor thereof whose debt shall not then be due, to sell, after the usual advertisements, upon the conditions contained in the preceding Article, so much of the estate as will be sufficient to pay the claim or claims of the creditors who shall make the application, and on such terms of credit as will correspond with the falling due of the several claims of the creditors.

ART. 992. The principles contained in the two preceding Articles, shall apply to all successions accepted with the benefit of inventory, whether the heirs are minors or of age, and to all successions administered by administrators.

Judgment affirmed.

## WM. MURE v. WM. S. DONNELL.

Where a charge of false packing is made, in reference to cotton of various planters, in different sections of the country, under circumstances rendering the charge improbable, and the plaintiff urges a reclamation against the factor who sold him the cotton in lots, and without any particular representations as to quality, the cotton having been sampled by the seller and re-sampled by the purchaser, the latter must furnish *clear, consistent and cogent proof* to enable him to recover. Nor is it sufficient for the plaintiff to show that the cotton, or a portion of it, was *mixed*; it must also be proved that it was mixed to the prejudice of the buyer, and be made legally certain that the cotton was inferior to the samples by which it was sold. An unreasonable custom will not be enforced. But whether the cotton was *fraudulently* packed of mixed qualities, or was mixed by carelessness or accident, if it was *inferior* to the samples, by which it was sold, the buyer is entitled to relief, *provided* it was so packed that its defects could not have been discovered on simple inspection.

The sampling of the cotton by plaintiff's brokers in Liverpool, and want of correspondence between the cotton he sold there and his samples taken there, cannot affect the defendant. The contract used on, having been made here, must be governed by our laws.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J.*  
*W. D. Hennen*, for plaintiff and appellant. *T. J. Semmes* and *Robert Mott*, for defendant.

MERRICK, C. J. The plaintiff alleges in substance that on the 24th day of May, 1854, he bought, in this city, of the defendant, 320 bales of cotton, consisting of four parcels, whereof the *first* consisted of 130 bales (O. H. shipping mark) of a quality represented by said *Donnell* to be middling; the *second* lot, of 48 bales, with a different shipping mark, also by said *Donnell* represented to be of the same quality; the *third* lot, of 90 bales, also of a different shipping mark, and represented to be of a quality termed good ordinary to low middling; and the *fourth* of a lot of fifty-two bales, of still a different shipping mark, and by said *Donnell* represented to be of a quality termed ordinary; that petitioner paid, in consideration of the different qualities of said cotton, a gross sum for the aggregate number of pounds of said cotton at the rate of 7½ cents per pound, amounting to \$10,390 84; that said *Donnell* represented that said first lot, which was sold by the sample, was all good and merchantable cotton, of a quality called middling; that if he had known the actual quality of 53 bales of said first lot, he would not have given more than five cents per pound for said 53 bales; that said cotton was bought to ship to Liverpool, as said *Donnell* knew; that it was so shipped, and said first lot was there sold in market for 5½d. per pound; that the purchasers thereof discovered that 53 bales thereof were falsely and fraudulently packed, the interior being altogether different from the exterior; that said interior was trashy, unsound and unmerchantable, and that he was compelled to take back the cotton and pay fifty dollars expenses to the purchasers; that he has incurred, for storage, insurance, and other expenses in the preservation of said cotton, \$300; that said 53 bales contain 23,300 pounds, and that the difference between the price he would have paid had he known the quality and the price he actually paid was \$600. The petition concludes with a prayer for judgment for \$900 damages.

The answer admits that the defendant sold the 320 bales of cotton at 7½ cents by sample, according to the custom of the trade in New Orleans, and avers that the plaintiff having re-sampled the same through his broker, accord-

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ing to usage, received the lot without objection, and paid the price thereof. He denies that the said lot of cotton was falsely packed, and that the fifty-three bales mentioned in the petition were his cotton, and denies that he made any representations whatsoever respecting the cotton, or that he had any knowledge of its destination or the object for which it was purchased.

The proof shows that the cotton was sold in New Orleans by sample, in the usual manner, and that the lot consisted of at least three qualities, viz: middling, good ordinary and ordinary; the broker who acted for the plaintiff says there were four grades, thus contradicting his classification made at the time. The price agreed upon was, as admitted by the answer, a round price for the whole 320 bales. The only representation made by the vendor was that there were about so many bales middling cotton in the lot, the witness does not remember how many bales. It was an inducement to make the purchase. Middling cotton at that time was worth  $8\frac{1}{2}$  cents, and the lowest quality of the lot six cents, in New Orleans.

After the purchase, the plaintiff's broker marked 130 bales O. H. and 48 bales J. J. for shipment as middling, 90 bales as good ordinary and 52 bales as ordinary.

The record does not inform us what became of the forty-eight bales of cotton marked J. J. The proof shows that the 130 bales marked O. H. were sold at Liverpool to *Messrs. Woods & Co.*, on account of the plaintiff, at  $5\frac{1}{2}$  pence per pound by samples, without reference to the classification, but the samples were classed by the Liverpool broker as good middling.

The plaintiff further shows that fifty-three of the bales contained mixed cotton, the exterior of the bales being good middling cotton, worth  $5\frac{1}{2}$  pence, and the interior being ordinary, and not worth more than  $4\frac{1}{2}$  pence, and that the average value of the whole bale being worth only four pence three farthings per pound.

The 320 bales were from *nineteen* planters from various quarters and different rivers. The 130 bales were from *thirteen* different planters, and, what is surprising, *the 52 bales out of the 130 were from the same number of planters.*

The proof shows, as just observed, that the cotton was mixed. One witness, the Liverpool purchaser, *Thomas Woods*, swears "most certainly that the cotton was fraudulently packed for the purpose of deceiving." The certificate of the Liverpool brokers who examined the cotton state that the cotton was unmerchantable, in consequence of being irregularly packed, having two qualities of cotton in the same bale, and not worth more than  $4\frac{1}{2}$  pence per pound.

In applying the testimony to the allegations in the petition, it is incumbent upon the plaintiff to make out his case by clear, consistent and cogent proof, for the case he states is deprived of probability from the fact that it convicts *thirteen* different planters from different parts of the cotton region tributary to the commerce of this city with falsely and fraudulently packing five out of every thirteen in a small lot of one hundred and thirty bales of cotton. Were it pretended that one or two planters had been guilty of a fraud of this kind, it would more readily command our belief.

But it is shown in the testimony of witnesses resident here that the cleanest and finest portion of the cotton, in ginning, falls at a distance from the gin, and that the more common portion, from its gravity, falls next to the gin. Hence, without any design to defraud on the part of the planter the bale may present a mixed appearance, although it is really the same cotton, but taken from dif-

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several parts of the lint-room. The mixed appearance of the cotton examined in Liverpool may, therefore, be accounted for without supposing that it was fraudulently packed.

But whether the cotton was falsely packed or mixed by carelessness or accident, if it did not correspond with and was inferior to the samples by which it was sold, the purchaser is entitled to relief, provided it was so packed that its defects could not be discovered on simple inspection.

The contract under which this action is brought was made here, and is therefore to be governed by our laws. The sampling of the cotton by plaintiff's brokers in Liverpool, and the want of correspondence between the cotton he sold there and his samples taken there, must be without influence on the present case, for the defendant was no party to that contract. The question is, was there error or fraud in the sale of 320 bales of cotton made in this city on the 24th day of May, 1854, which will enable the plaintiff to claim a diminution of the price?

We have already seen that the sale was made of three hundred and twenty bales sold by sample, and the only representation made by defendant was that the lot contained about so many bales of middling cotton, the number not being recollected by the witness.

The plaintiff alleges in his petition that the representation was that the lot contained one hundred and seventy-eight bales of middling cotton. The District Judge has demonstrated by a calculation that this cannot be true because, at the price alleged to have been given for the different grades, the gross sum paid would have been \$10,896 90 instead of \$10,390 84, the amount actually paid, there having been 143,322 pounds sold.

He further shows, that at the prices alleged by the plaintiff, in his petition, to have been given, as well as the classification there stated and actually made by the plaintiff's broker, either of the following combinations will produce (within a fraction) the gross sum paid by plaintiff, viz: 128 bales middling, 90 bales good ordinary and 102 ordinary, or 65 bales middling, 52 bales ordinary and 203 good ordinary.

As there is no proof on the subject, the defendant is at liberty to assume any combination which will sustain the contract, and if it appear reasonable, the court ought to adopt it. If the plaintiff would recover under a contract not proved with certainty, he should show that his contract has been violated under any reasonable construction which can be placed upon it as proved.

It is next to be considered whether there is sufficient proof in the record to enable the plaintiff to recover aside from the representations of the plaintiff? The plaintiff's main witness, as we have seen, swears that there were four qualities of cotton sold by the defendant to plaintiff as middling, low middling, good ordinary and ordinary, but his actual classification made but three. How many bales there were of each kind is a matter of pure conjecture. Now it is shown that the lowest grade contained in the fifty-three bales complained of was, with a trifling exception, ordinary cotton, and corresponded with the lowest grade sold by defendant to plaintiff.

These fifty-three bales were not compared with the samples taken in New Orleans, and there is nothing to show with legal certainty that they may not have been classed as ordinary cotton. If so, the plaintiff has no reason to complain, for he has not been injured if a part or the principal portion of the cotton was of a better quality than its sample.

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Courts sit to redress real and not imaginary injuries, and any custom, therefore, which would authorize the buyer, after delivery and payment of the price, to throw back the cotton upon the hands of the vendor, and rescind the sale because cotton of a finer quality than the sample had been mixed in the bale in packing would be an unreasonable custom, and could not be enforced in a court of justice. The proof, therefore, which the plaintiff has adduced to show that fifty-three bales of this cotton was mixed is insufficient to enable him to recover. He should have rendered it legally certain that it was inferior to the samples by which it was sold to him.

Judgment affirmed.

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WILLIAM BARRY v. WILLIAM KIMBALL et als.

The presumption created by the Act of 1840 that slaves found on ships, steamboats, or other vessels, without the consent in writing of the owner, were received on board with the intention of depriving their masters of them, is liable to be destroyed by the testimony of at least two witnesses, not employed on board, and corroborating circumstances.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*A. P. Field and J. Henderson, jr.,* for plaintiff. *J. Van Maitre,* for defendants and appellants.

**SPOFFORD, J.** This case was formerly before the court (see 10 An. 787) and was remanded for a new trial.

The defendants have again appealed from a judgment against them, for the value of the plaintiff's slave, lost by being drowned after falling from their boat into the Mississippi river.

No negligence in the matter of the drowning is attributed to the defendants.

The plaintiff relies entirely upon the rigorous provisions of the Act of 1840, (page 89,) concerning slaves found on ships, steamboats, or other vessels, without the consent in writing of the owner.

The presumption created by that statute that slaves so found were received on board with the intention of depriving their masters of them, is liable to be destroyed "on the testimony of at least two witnesses, not employed on board of said vessel, and on corroborating circumstances."

We have in this case the testimony of two competent witnesses, and corroborating circumstances, establishing to our satisfaction facts which are utterly irreconcilable with the hypothesis that the defendants carried away the plaintiff's slave on their boat without his master's consent, and with intent to deprive the owner of him.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed, and that there be judgment for the defendants, with costs in both courts.

## M. S. HEDRICK v. THOMAS AND CHARLOTTE BANNISTER.

Same case, 10th Annual, pages 208 and 792.

The circumstance of plaintiff having suffered more than four years to elapse from the maturity of the due-bill held by him before he put it in suit, combined with the fact of a settlement made in the mean time between the parties, which purported to be in full of all demands, is sufficient to throw upon the plaintiff the *onus* of proving that the consideration of the due-bill was something distinct from the credit allowed him in the settlement in question.

**A** PPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*Collins & Wooldridge*, for plaintiff and appellant. *Durant & Horner*,  
 for defendants.

BUCHANAN, J. The plaintiff has suffered two nonsuits upon the same cause of action stated in his petition in this case. See the facts detailed in the opinions of this court, reported in 10 An. 208 and 792.

The circumstance of plaintiff having suffered more than four years to elapse from the maturity of *Mrs. Bannister's* due-bill held by him before he put it in suit, combined with the fact of a settlement made in the mean time between plaintiff and *Mrs. Bannister*, which purported to be in full of all demands, appeared to us sufficient to throw upon plaintiff the *onus* of proving that the consideration of the due-bill was something distinct from the credit allowed him in the settlement in question. That settlement is in the form of an account current, with a receipt of plaintiff at bottom for the balance therein shown to be due him "in full."

The only evidence offered by plaintiff in the present suit, to make out an existing indebtedness on the part of defendants, notwithstanding his receipt in full, is the testimony of two witnesses, named *Beachbard* and *Mrs. Warner*, of acknowledgments made in their presence by *Mrs. Bannister*, after the decision of the case reported in 10 An. 792, to the effect that she had resisted *Hedrick's* claim in that suit "out of revenge;" that she would have paid *Hedrick* the thousand dollars which she borrowed of him "had he behaved himself."

We agree with the District Judge in considering the testimony of these two witnesses unreliable, even were they not contradicted, as one of them is, by another witness.

In the cross-examination of *Beachbard* and of *Mrs. Warner*, it appears that they were strangers to *Mrs. Bannister*, and were never in her store but twice. These visits having reference to the purchase of a lady's bonnet, were, according to *Beachbard*, in January, 1856, and according to *Mrs. Warner*, in January or February, 1856.

The decision of this court in the former suit was rendered in December, 1855, and the present suit was instituted January 24th, 1856. If we are to believe these witnesses, *Mrs. Bannister* was very busily engaged in the interval between the decision of one suit and the commencement of the other in making out a case for her adversary under the decision of this court by boasting to chance customers that she had got an unjust advantage of *Hedrick*; and those customers must have lost no time in conveying those indiscreet avowals to *Hedrick*, although one of them (*Beachbard*) was a stranger to *Hedrick*, and the other (*Mrs. Warner*) considers him, to use her own language, as "very mean."

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The judgment of the court below was a nonsuit. The appellees pray that this judgment be amended by awarding a final judgment in their favor. We think them entitled to that amendment of the judgment. Plaintiff has had abundant notice and opportunity to show that the loan, which was the consideration of the due-bill sued on, was not the same as that which figures to his credit in the account current and settlement made eight months after the maturity of that due-bill. The difference of fifty dollars in the amount of the due-bill and of the credit in the account current (the latter being \$1050 and the former \$1000) would be but the interest, at seven and one-half per cent. of the amount of the due-bill from its maturity until the settlement.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended, and that there be judgment for defendants, with costs in both courts.

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JOHN M. BELL, Sheriff, v. THOMAS KEEFE et al.

The Sheriff may sue upon and enforce the payment of a bond given by the defendants for property seized and sold by him in course of judicial proceedings, otherwise in cases of protracted litigation the rights of parties might be impaired or lost by insolvency or prescription.

The Articles 708, 716, 717 and 718 of the Code of Practice apply to cases where the rights of parties are fixed and determined.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*C. A. Taylor and Benjamin, Bradford & Finney*, for plaintiff. *Mott & Fraser*, for defendants and appellants.

VOORHIES, J. This is an action to enforce the payment of a bond given by the defendants as part payment of the price of the steamer "S. F. J. Trabuc," seized and sold by the Sheriff in the course of judicial proceedings in the suit of *R. W. Adams* against the owners of said boat.

The defence rests solely on the ground that the plaintiff has no authority to bring the action, and has no interest in the subject matter in dispute.

"The depositary is bound to use the same interest in preserving the deposit that he uses in preserving his own property." C. C. 2908.

In the case of *Parish v. Hozey, Sheriff*, 17 L. R. 580, the defendant was held liable for the amount of a bill of exchange, on the ground that he had neglected to have it protested whilst in his hands as judicial depositary, whereby the endorser was discharged. The object of the sequestration was not, as observed by the court, the preservation of a mere worthless piece of paper. Had he taken the necessary steps to collect it, and brought the amount into court, it would have been in accordance with the obligations which the law imposed upon him, in other words, the same diligence, it is to be presumed, he would have used in the preservation of his own property.

In the case at bar, as the legal agent of the parties litigant, for whose benefit, we assume, the bond was taken in that suit, we are unable to discover any good reason why the plaintiff should not maintain the action. Were it otherwise, in cases where the litigation was procrastinated, the rights of parties might be seriously impaired, and even lost, by insolvency or prescription.

The speedy collection of the bond is certainly the safest or surest means of preserving the rights of the parties. 17 L. R. 24; see *Bell, Sheriff, v. Keefe & Maillot*, recently decided. The Articles of the Code of Practice (703, 716, 717, 718,) to which we have been referred, we do not think apply to the present case, but to cases where the respective rights of parties are fixed and determined.

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Judgment affirmed.

H. H. & S. F. SLATTER v. C. TIERNAN et al.—THOMAS PENNEY, Garnishee.

Judgment was rendered upon a rule against a garnishee, who was ordered to deliver the assets in his possession to the Sheriff, within a delay fixed, to satisfy plaintiff's judgment against defendant, otherwise to be held liable therefor. *Held*: That after his appearance and joinder of issue on the rule the garnishee was bound without further notice to comply with the order, or assign sufficient reasons for his non-compliance.

The property and effects of the defendant are considered as levied upon by the Sheriff from the date of the service of the interrogatories upon the garnishee.

In tendering a compliance with the order, the garnishee would have the right to require a copy of the order, otherwise when he refuses to comply with the order.

**A**PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*J. J. Henderson*, for plaintiffs. *Benjamin, Bradford & Finney*, for garnishee and appellant.

**VOORHIES, J.** The commercial firm of *Tiernan, Cuddy & Co.* was dissolved by a decree of the late First District Court of New Orleans, on the 18th of April, 1839, and *Charles Tiernan*, one of the partners, was appointed liquidator of its concerns.

On the 27th of May, 1841, the plaintiffs, *H. H. & S. F. Slatter*, obtained a judgment against *Charles Tiernan*, individually, and as surviving partner of the late firm of *Tiernan, Cuddy & Co.*, for the sum of \$13,150, with interest, cost of protest, and costs of suit. On a writ of *fieri facias* issued on this judgment on the 27th of March, 1854, the plaintiffs engrafted under the Act of 1839, proceedings in garnishment against *Thomas Penney*. The District Court considered *Penney* liable, and accordingly gave judgment against him in favor of the plaintiffs. On appeal taken by *Penney*, the judgment thus rendered against him was reversed by our predecessors, and the case remanded for further proceeding. See 6 An. 567.

On the remanding of the case, *Penney* filed a supplemental answer, to which he annexed the deed of trust together with a schedule of the assets mentioned in the same, and his account with *Tiernan, Cuddy & Co.* On a rule taken by the plaintiffs, the supplemental answer was ordered to be stricken from the record, except the deed of trust and account. A rule was then taken by the plaintiffs upon *Penney* to make him liable, on the ground that his answers to the interrogatories propounded to him were evasive and insufficient. On the trial of this rule, the judge *a quo* considered it essential, under the decision of our predecessors, that *Penney* should have been put in default by some other proceeding, and thereupon discharged the rule; leaving to the plaintiffs the right to proceed in any other manner they might think proper. On the 13th

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of May, 1852, the plaintiffs tendered and filed a traverse to *Penney's* answer to the interrogatories propounded to him, and also took a rule upon him to show cause why he should not deliver to the Sheriff within thirty days the assets in his possession, as evidenced by the deed of trust and account annexed to his answers. *Penney* pleaded a general denial to the traverse, and prayed for a trial by jury. As no further steps appear to have been taken on this issue, we think it may be fairly inferred from the subsequent proceedings in the cause, that it was waived by the parties. In relation to the rule, *John R. Grymes*, appointed curator *ad hoc* to represent *Penney*, filed an exception to it, on the ground that the matters and things therein set forth could not be enquired into and decided in this state of the proceedings. An answer was also filed by him, in which he denied that *Penney* had ever taken possession of any of the documents, titles, or evidences of debts set forth in the rule, or that he was in any manner liable to the plaintiffs. On the trial of the rule, the only evidence offered by *Penney*, was the record of a suit of *F. Beaumont v. Charles Tiernan et al*, in the Chancery Court of Mississippi. As nothing shows that *Penney* ever insisted upon the decision of the exception or a trial by jury in the court below, we are bound to presume that he must have waived both. Under these circumstances, the rule was made absolute, and *Penney*, the garnishee, ordered to deliver to the Sheriff, within ninety days, the assets thus held by him for the purpose of satisfying the plaintiffs' judgment against the defendant; otherwise, to be held liable therefor. *Penney* having failed and neglected to comply with this order, a final judgment was accordingly rendered against him in favor of the plaintiffs. He has appealed from both these judgments.

In this court, *Penney* seeks the reversal of the judgments thus rendered against him on various grounds, among others, that the interlocutory judgment was never legally served upon him, nor was the Sheriff authorized by any legal warrant or process either to require or to receive from him said assets, as the writ of *feri facias* issued at the time of the garnishment had been returned.

After his appearance and joinder of issue on the rule, we think *Penney* was bound, without any further notice, either to comply with the order or to assign sufficient reason for his non-compliance. The return on the writ of *feri facias*, the basis of the garnishment, shows that all the assets of the defendant in *Penney's* possession was seized by the Sheriff, and notice thereof given to all the parties concerned. This was all that could be effected in the execution of the writ during the pendency of the controversy between the plaintiffs and *Penney*, the garnishee. We do not think the garnishee could question the authority of the Sheriff under the interlocutory judgment. Hence it was immaterial, as to him, whether the writ had been returned or not. But we do not think that such return could have the effect of prejudicing the plaintiffs' rights. Under the Act of 1839, the property and effects of the defendant are deemed as levied upon by the Sheriff from the date of the service of the interrogatories on the garnishee. Such constructive seizure, therefore, exists in the present case. But it is insisted, that *Penney* was not in default, inasmuch as it is not shown that a copy of the order was in the hands of the Sheriff. It may be true, in tendering a compliance, the garnishee had a right to require such copy, but as such tender was not made, we do not think he has any reason to complain. It is also objected, that the garnishee in his answer distinctly denied

that he had in his possession any of the assets embraced in the schedule, with the exception of certain claims or debts due *Tiernan, Cuddy & Co.*, which were in the hands of lawyers in the whole south west, and in suit in many different courts. A careful examination of the answers of the garnishee, in connection with the deed of trust, schedule and account, has led us to the conclusion that he had at the time of the garnishment in his possession sufficient funds, property and effects belonging to the late firm of *Tiernan, Cuddy & Co.*, to satisfy the plaintiffs' claim. But the right to apply these assets to the payment of the plaintiffs' judgment against *Charles Tiernan* is denied, on the ground that the latter had no authority to stand in judgment for the succession of his deceased partners. This may be conceded, but we do not think the garnishee can, under the circumstances, avail himself of it as a defence or shield for his refusal to comply with the order of the court below. Whether those assets may be legally sold under, or applied to the payment of the plaintiffs' judgment or not, is a question which we think the garnishee cannot be permitted to raise in this case. It is perfectly clear, under the decree of the late First District Court of New Orleans, *Tiernan*, as liquidator, was invested with authority to apply the funds of the partnership to the payment of its debts. It is not denied, that the plaintiffs' debt was a debt due by the partnership, and, consequently, entitled to be paid out of its assets. In relation to the deed of trust, it is clear that it cannot affect the rights of creditors in this State. 18 L. 554; 3 An. 394; 17 L. 590.

Judgment affirmed.

LEA, J., dissenting.

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#### MACKY & MORRIS v. C. DEBLANC—EGAÑA et al, Warrantors.

Persons owning or chartering a steamboat, are bound by the acts of the Captain employed by them, in matters appertaining to the regular business of the boat, as also a planter for engagements entered into for him by his overseer acting strictly in the line of his employment.

APPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*Michel & Gilmore*, for plaintiff. *C. Dufour*, for defendant and appellant.  
*G. Legardeur* and *St. Paul & Bouny*, for the warrantors.

BUCHANAN, J. Plaintiffs sold *Juan Y. De Egaña*, a merchant residing in New Orleans, a flatboat load of coal, deliverable at the Fanny plantation, belonging to *Egaña*, on the left bank of the river, thirty or forty miles below town. The plaintiffs sent the flatboat down the river in charge of an agent, who being driven to the right bank, when opposite the Fanny plantation, by a strong north east wind, tied up the boat to the bank in a position of safety, and the next morning crossed the river and informed the overseer and manager of the plantation of the arrival of the coal, and of the reason which detained it at the opposite side of the river, namely, the violence of the wind, which, by this time, had increased to a gale. The overseer expressed great anxiety to have the coal, as they were out of fuel for the making of the crop of sugar, it being the 24th of December, and the grinding of the cane not completed. Contrary to the opinion of the plaintiffs' agent, who thought it advisable to wait

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until the wind should subside, before attempting to bring the flatboat across the river, the overseer engaged the steamboat Red River, (then chartered by defendant and running for his account,) to tow the flatboat and her cargo of coal to the Fanny plantation, across the river, in the teeth of the gale of wind then blowing.

On being applied to for this purpose by *Norman*, the overseer of *Egaña*, the captain of the steamboat at first positively refused, on account of the great risk of sinking the flatboat; but was finally persuaded to undertake the job, by a formal guaranty given him by the overseer in the name of *Egaña*, the owner of the plantation, to be responsible for the value of the coal boat in case of accident, the overseer adding his individual guaranty to the same effect. The result was what had been anticipated by many persons who have given their evidence, and feared by the captain of the steamboat himself. Notwithstanding every precaution used in approaching the flatboat to take her in tow, the contact between the steamboat and the flatboat, in the violent agitation of the elements at the time, was fatal to the latter, which was stove and sunk in a very few minutes, in deep water, being a total loss. Plaintiffs claim of defendant in this action the value of the coal, for what is termed in the petition, "the gross imprudence and carelessness of the commander of the steamboat in attempting to take the flatboat and tow her across the river." The answer was a general denial.

By an amended answer, the defendant specially pleads:

1. That he is not personally liable for the acts and doing of *Captain Louallier*, the commander of the steamboat Red River, in the premises.

2d. That if liable for the loss of the flatboat and coal in question, he is entitled to call in warranty *Juan Y. Egaña* and *Thomas H. Norman*, upon the special warranty given by the latter in his own name and as agent of the former, to *Captain Louallier*, against all risk and responsibility by reason of the attempt to tow the flatboat.

Defendant accordingly calls said *Egaña* and *Norman* in warranty of this demand, and prays for such judgment over against them, as may be rendered against himself in favor of plaintiffs.

*Egaña* pleads the general issue; admits that *Norman* was his overseer; but denies that he had authority to bind him in the manner alleged in the call in warranty. Lastly, he avers that the steamboat Red River was engaged by plaintiffs' agent to tow the flatboat to the landing of the Fanny plantation, where the coal was to be delivered, and consequently the loss should be borne by plaintiffs.

*Norman's* representative (he having died in the mean time) pleads an exception, which it is unnecessary to notice, and the general issue.

The facts of the case we assume to be as we have stated them, having duly considered the conflict which certainly exists in the depositions of some of the witnesses, with the view thus taken.

That conflict principally exists in relation to the very material fact of the agency of *Burfield*, in the employment of the steamboat Red River to tow the flatboat. Three witnesses, *Vollman*, *Schexnaider* and *Duncan*, have been examined for *Norman*, in relation to the conversation which took place between *Burfield* and *Norman* when the former came to the Fanny plantation and gave notice of the arrival of the coal. The testimony of these witnesses is irreconcilable with that of *Burfield* in some respects. But *Duncan*, the only one of

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the three who were cross-examined, corroborates, on his cross-examination, the statement of *Burfield*, that *Norman* had given to *Burfield* a paper or note for *Captain Louallier*, requesting him to take the flatboat in tow. And what corroborates still further the testimony of *Burfield* is the fact, stated by no less than six witnesses, to wit, the captain, mate, two clerks, and two passengers of the steamboat *Red River*, that *Norman* came on board of the boat and engaged her to tow the flatboat, by solicitations urged against the objections of the captain, and finally successful, through the proffer of a guaranty against responsibility.

The circumstances of the hiring of the steamboat are abundantly proved by those witnesses, and the tacit participation or assent which would be implied from the conveyance by *Burfield* of *Norman's* letter to *Captain Louallier*, is wanting; for it is proved that letter was never delivered.

Two questions of law arise in the case in relation to the capacity of *Louallier* to bind defendant, and of *Norman* to bind *Egaña*, in relation to the matters involved in this litigation.

We solve both those questions in the affirmative.

It is admitted by the pleadings, that the steamboat *Red River* was chartered by the defendant for a coasting trade in the parish of *Plaquemines*. It is proved that she was running under this charter-party for account of defendant, and that the captain of the steamboat was employed (that is to say paid) by him at the time of this occurrence. Two witnesses, captains of boats in the same trade, show that the towing from one side of the river to the other, or down the river, of vessels conveying goods, &c., for planters, was a part of the regular business of the *Red River* as a coasting packet in the parish of *Plaquemines*.

The other question of law, namely, the capacity of *Norman* to bind *Egaña* in the premises, is equally clear. The pleadings admit that *Norman* was the overseer of *Egaña's* plantation. It is in proof that *Norman* had the entire control and management of this plantation. *Egaña*, the owner, was never seen there by witnesses who constantly visited it for years on business. On other occasions similar contracts to this had been made by *Norman* for this plantation. Besides, it is plain from the evidence, that *Norman* was acting strictly in the line of his employment, in making a contract for the transportation of this coal from the other side of the river. It is proved that the coal was urgently needed for the use of the plantation. It is not for us to say what injury *Norman* may have anticipated to the crop confided to his care, from a delay of a few days in the delivery of this fuel. This consideration might, in his eyes, acting with an intelligent view of the interests of his employer, have been well worth the risk of the value of the flatboat load of coal. *Norman* was *Egaña's* agent for receiving and delivering of the coal. He was without authority to receive it any other place than at the plantation; and in fact, his witnesses swear that he refused to accept delivery of it elsewhere. But it is not the less certain, that he engaged the steamboat to facilitate its delivery at the plantation, and that, as the only means of engaging the steamboat, he pledged the guarantee of his employer *Egaña* against any reclamation on the part of the owners of the coal, in the case of its loss. Under the circumstances we consider *Egaña* bound by this guarantee. It is admitted, as well as proved, that *Norman* was the manager of *Egaña's* plantation. That plantation was cultivated in sugar cane and *Norman* was then engaged in taking off the

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crop. The supply of fuel indispensable for that purpose was an essential part of his administration. The Civil Code, Article 2969, says: "Powers granted to persons who exercise a profession, or fulfil certain functions of doing any business in the ordinary course of affairs to which they are devoted, need not be specified, but are inferred from the functions which these mandataries exercise."

It does not appear that plaintiffs were bound to make delivery of the coal at any specified time. The coal boat was moored in perfect safety, when plaintiffs' agent, *Burfield*, reported himself to *Norman*; and *Burfield* was disposed to have kept his boat so moored, until the wind should have lulled, before attempting to make the delivery, which he could then have done without risk. As we have seen, the agent of plaintiffs in no manner authorized and sanctioned the attempt to tow the flatboat across the river. Indeed that fact, which is disputed in argument, clearly results from the demand of a guarantee by Captain *Louallier* from *Norman*. Why this guarantee, if the agent of the owners of the flatboat authorized her being taken in tow by the steamboat?

We are of opinion that plaintiffs have made out a case against defendant, as temporary owner of the steamboat *Red River*. The attempt to tow the flatboat was an act confessedly of great imprudence and unauthorized by plaintiffs. C. C. 2295.

We are likewise of opinion, that a contract of guarantee is proved against *Mr. Egana*, which obliges him to indemnify defendant for the consequences of the imprudent act which was the cause of plaintiffs' action.

It is, therefore, adjudged and decreed, that the judgment of the District Court, in favor of plaintiffs against defendant, be affirmed; that the judgment dismissing the call in warranty to *Juan Y. De Egana*, be reversed; that defendant, *Charles DeBlanc* have judgment against said *Juan Y. De Egana* for the sum of \$2,579, and costs of the District Court; and that the costs of appeal be paid, one-half by defendant, and one-half by the warrantor, *Egana*.

VOORHIES, J., dissenting. The plaintiffs seek to make the defendant liable for the loss of a flatboat load of coal, which was sunk by the steamboat *Red River* on the 24th of December, 1853. It is alleged in their petition, that this coal was sent down by them to be delivered, a part at the *Fanny* plantation and the remainder at other plantations; that on arriving in the neighborhood of the *Fanny* plantation, the flatboat was compelled, by a strong wind then prevailing, to stop on the opposite shore; that the steamer *Red River* came towards the flatboat on the 24th of December, 1853, whilst the same wind continued to prevail, with the alleged intention of towing the same across the river to the *Fanny* plantation; and in doing so, came in collision with and instantly sunk the flatboat; that under the circumstances it was dangerous and hazardous for the steamer to approach the flatboat, and that, in attempting to take and tow her across the river, the captain acted with gross imprudence and carelessness, and was warned of the danger of approaching the flatboat, as he would inevitably sink her.

The defendant, after pleading the general issue, avers, among other things, that when the steamer *Red River* stopped to land some freight at the *Fanny* plantation, on the 24th of December, 1853, *Thomas H. Norman*, the overseer and special agent of *Juan Y. De Egana*, in the exercise of his agency, told the captain that there was a coal boat on the other side of the river which he urgently required, as it contained coal for the use of the plantation, representing

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that he would hold the steamer harmless in case of any accident; that this request was the result of an understanding between *Norman* and the plaintiffs' agent, who had charge of the flatboat. He also avers, that if he should be considered liable under the circumstances, that then *Egana* and *Norman* are bound to him in warranty, and therefore prays that they be accordingly cited.

The testimony of *Burfield*, the plaintiffs' agent, shows that he was compelled by the force of the wind to land the flatboat opposite to the Fanny plantation on the night of the 23d of December; that in the morning at sun-rise he crossed over to the Fanny plantation, where he remained about an hour. The wind was then blowing lightly, but greatly increased until 1 o'clock P. M. *Mr. Norman* told him that he would get the flatboat towed across, and directed him to go to *Mr. Duncan*, the carpenter, and get an order from him upon the steamboat *Red River*, authorizing him to tow the flatboat over, which he did; and with this order in his pocket, he went back to his flatboat, where he remained until she was sunk. They also gave him a flag to hail the steamer, but did not use it because the wind was too high.

*Theodore Dietz* testifies, that at the time the steamboat was approaching, he saw the men on the flatboat preparing for receiving the steamer; they were hauling ropes.

Taking the testimony of these witnesses in connection with all the other circumstances, it would be unreasonable to come to any other conclusion than that suggested by the defendant's answer, that the request of *Norman* was the result of an understanding between him and the plaintiffs' agent. If such had not been the case, why did *Burfield* take the order and flag from the plantation? On approaching the flatboat, why the preparation for receiving the steamer by hauling ropes, &c.? There is not a title of evidence which shows that *Burfield* ever made any resistance or objection to the act. On the contrary, it is evident that he stood on the flatboat awaiting the steamer to tow her across the river to the Fanny plantation, according to his understanding with *Norman*. Hence, as the act was done with the permission of the plaintiffs' agent, it is clear that the defendant cannot be considered as a trespasser.

But it is insisted by the plaintiffs that the defendant is liable, because the loss was occasioned by the gross imprudence and carelessness of the captain.

The evidence shows conclusively, that the captain declined at first to accept the proposition of *Norman* on account of the peril, but afterwards assented on the grounds stated in the defendant's answer. It is clear, according to the maxim "*volenti non fit injuria*," that the defendant cannot be held liable to the plaintiffs for the loss of their boat load of coal.

In regard to the question as to the liability of *Egana* to the plaintiffs, it is clearly a matter which cannot be considered under the pleadings. A judgment in favor of the defendant in the present suit, must necessarily operate as a discharge to him on the claim in warranty.

I am, therefore, of opinion that the judgment of the court below ought to be reversed and given in favor of the defendant.

STATE v. JOHN ROHFRISCHT and MRS. JOHN ROHFRISCHT, alias CATHARINE DOBLER.

Where testimony had been given without objection, as shown by the bill of exceptions, and its exclusion had, therefore, become impossible, the Jury being already in possession of it—*Held*: That a motion to exclude such testimony was unmeaning and was properly overruled.

In providing against the crime of arson, the statute makes no distinction in reference to the ownership of the house, whether belonging to the accused or to a third person.

The Judge *a quo* did not err in admitting evidence that another and different firing of the premises had taken place three or four weeks previously to the firing charged in the indictment, and under circumstances tending to throw suspicion on the defendants of the same crime they are now charged with, and of which testimony had already been offered to the Jury.

It is competent for the State to prove by a witness that the defendant had offered such witness a bribe to swear falsely that certain other witnesses, who had testified on the part of the State, had threatened to burn defendants' house the day before the fire testified to by them. It is not a sufficient objection to such evidence, that the defendant had not introduced any testimony. The evidence objected to did not purport to rebut or discredit any evidence which it was anticipated the accused were about to offer.

A verdict in a capital case of "guilty without capital punishment," is justified by the 25th section of the Act of 1855, relative to criminal proceedings.

The endorsement of the name of the offence on the indictment, is no part of the finding of the Grand Jury.

The ruling of the late Court of Errors and Appeals, that the term felony is unknown to the laws of Louisiana, was an unadvised *dictum*, and is not concurred in by this court.

**A**PPEAL from the First District Court of New Orleans, *Robertson, J.*  
*E. W. Moise*, Attorney General, for the State. *E. Abell* and *G. Schmidt*, for defendants and appellants.

**BUCHANAN, J.** The defendants were indicted and convicted under the 46th section of the Act of 1855, (Session Acts, p. 137,) *Mrs. Rohfrisch* of "feloniously, wilfully and maliciously" setting fire to a mansion-house, and *John Rohfrisch* of counselling, procuring and commanding the said *Mrs. Rohfrisch* "the said felony in manner and form aforesaid to commit."

The case comes up upon six bills of exceptions and a motion in arrest of judgment.

The first bill of exceptions states that a witness testified he was clerk of an insurance company in which *John Rohfrisch*, the accused, insured the coffee-house No. 8 Poydras street, called the Live-Oak Coffee-house, and that said contract was in writing. Whereupon defendants, through their counsel, moved the court to exclude this testimony from the Jury then and there sworn and empannelled to try the cause; which motion was overruled.

This motion was unmeaning. The bill shows that the testimony had already been given without objection, and its exclusion had therefore become impossible, the Jury being already in possession of it.

The second exception is to the refusal of the Judge to charge the Jury "if they believed, from the testimony, the house burnt was the house of the defendant *John Rohfrisch*, or that of his wife, the accused could not be convicted of the offence charged."

The Judge properly refused to give this charge. The statute under which the defendants were prosecuted makes no such distinction as is here presented.

The third bill of exceptions, as it appears in the transcript, is unintelligible.

The fourth bill is to the admission of evidence that another and different firing of the premises of defendants had taken place three or four weeks previously to the firing charged in the indictment, and under "circumstances tending to throw suspicion on defendants of having committed the same crime for which they were here and at this time indicted and charged, and of which testimony had already been offered to the Jury." The ruling of the court was correct, upon the authority of *State v. Patza*, 3d An. 512.

The fifth bill of exceptions is to the admission of a witness to prove that he, the witness, had been offered by the defendant *John Rohfrisch* a bribe to falsely swear that certain other witnesses of the State, who had testified on the trial, had threatened to burn the house of defendant the day before the fire testified to by them; to which the defendants objected, "because they had as yet introduced no testimony."

No authority has been quoted in support of this objection, and no good reason is perceived why the State might not prove this fact as a part of its case, before the accused offered *their* testimony. The evidence objected to did not purport to discredit or rebut any evidence which it was anticipated the accused were about to offer.

The sixth bill of exceptions is imperfect and unintelligible in the transcript.

Defendants moved to arrest the judgment on the ground that the verdict "guilty without capital punishment," is equivalent to a verdict of not guilty of the offence charged in the indictment, because the statute in such case made and provided, declares that any person who shall be convicted of such offence shall suffer death.

The law is as stated. But the verdict is justified by the 25th section of the Act of 1855, relative to criminal proceedings (page 154 Session Acts).

Various other objections have been made in argument by the counsel of the accused to the regularity and legality of the proceedings in the nature of assignments of error, which we next proceed to notice.

The indictment is endorsed "Arson"—"A true bill," and it is said that it results from such endorsement that the common law definition of "arson" must govern this case. The endorsement of the name of the offence of which the prisoner is charged on the back of the indictment, is no part of the finding of the Grand Jury. 1 M. R. 221; 2 An. 924; 3 An. 154.

The averments of the indictment "before the committing of the said *felony*," and "did counsel, &c., the said *felony*" are objected to; it being argued for defendants, on the authority of *Charlot's* case, in 8th Robinson, that the term *felony* is unknown to the laws of Louisiana. Although the late Court of Errors and Appeals did hold that language in the case quoted, yet it was an unadvised *dictum*. The term *felony* occurs in many of our statutes, antecedent to that opinion. It is only necessary to cite the territorial statute of crimes and misdemeanors of 1805 and the supplementary statute of 1818. (Bullard & Curry, 245, 260, 261.) See also the Acts of 1855, p. 172, section 2, which prescribes the use of the word "feloniously" in an indictment for the offence therein spoken of.

It is also objected in argument, that it appears from the face of the indictment, that the defendant, *Mrs. John Rohfrisch*, alias *Catharine Dobler*, committed the offence by order of her husband. Without going any further into the argument on this head, it suffices to say that the indictment does not charge

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or allege that the two defendants are husband and wife. The designation of the female defendant as *Mrs. John Rohfrisch* does not amount to such an averment, even if it stood by itself. But it is coupled with an *alias*.

Judgment affirmed, with costs.

#### SUCCESSION OF THORAME—Opposition of MYLNE ASYLUM, appellant.

In interpreting a will, the intention of the testator must be ascertained as far as practicable, and regard will be had to all the facts and circumstances under which the will was made.

**A**PPEAL from the Second District Court of New Orleans, *Morgan, J. J. & E. Bermudez*, for Mylne Asylum, appellant. *H. Griffon*, for the executors. *J. & A. Pitot* and *A. Roberts*, for St. Mary's Catholic Orphan Asylum.

**BUCHANAN, J.** *Jean Pierre Thorame*, by his will made in Paris, and duly admitted to probate and execution in New Orleans, devised and bequeathed one-third of the net total of his estate to the asylum for male orphans established in the Third District of the city of New Orleans.

There are two charitable corporations answering the description of this clause of the will of *Thorame*, both being located or established within the corporate limits of the Third District of New Orleans. Each of these institutions claims, to the exclusion of the other, to have the benefit of this legacy.

The corporate appellation of one of these claimants is "The Mylne Asylum for Destitute Orphan Boys."

That of the other is "The St. Mary's Catholic Orphan Boys Asylum."

In interpreting this will, our first duty is to ascertain, as far as practicable, the intention of the testator. C. C. 1705.

And in the outset of this investigation we are satisfied that the intention of *Thorame* was to make one orphan asylum, and no more, the object of his bounty; the singular number of the substantives "hospice" and "asyle" being the grammatical form of an olographic will, whose every sentence bespeaks its author to have been a man of education and of high intelligence. The clause of the will which is the subject of consideration, is, indeed, a model of diction as well as of sentiment; a noble thought finely expressed. It reads as follows:

"Je donne et lègue le tiers du total net de ma succession à l'hospice ou asyle des orphelins dont l'institution est établie dans le Troisième District de la Nouvelle-Orléans, en témoignage de ma reconnaissance pour la terre hospitalière qui, après l'année 1815, dont les événements politiques d'Europe avaient brisé une carrière pleine d'espérances, est venue m'offrir les moyens d'en créer une nouvelle et d'acquérir honorablement les biens que je laisse après moi."

It is apparent that the testator had a particular asylum in view. The District Judge concluded from the evidence that the contemplated object of the testator's charity was the St. Mary's Catholic Orphan Boys' Asylum, and we think the balance of probabilities preponderates strongly in favor of that interpretation.

The testator was a resident of New Orleans from the year 1817 to the year 1835 or 1836. Having amassed a competency by the industrious exercise of an honorable profession, he left this city in 1835 or 1836, and spent the remain-

der of his days in Paris, where he died on the 7th June, 1856. But, although *Mr. Thorame* was thus absent in person, yet his relations with this country and with the city of New Orleans were intimate and continuous to the end of his existence.

He describes himself in his will as a naturalized citizen of the United States, and makes particular mention of the day of his naturalization and of the court in which he was naturalized. His fortune remained, to the day of his death, invested in real estate, bank stock and mortgages in the city of New Orleans, administered by agents with whom we must presume he was in constant correspondence, and besides whom we find mentioned in the will and in the testimony on trial the names of many respectable citizens of New Orleans, with whom the testator was on terms of intimacy.

It is thus perceived that *Mr. Thorame* had abundant opportunities of being well informed in relation to the charitable institutions existing in the Third District of the city of New Orleans at the time of making his will, which was the 15th October, 1854, nearly two years previous to his death.

We are next to enquire to which of the two institutions which claim to be the object of this charity, it is most likely, from the evidence, that *Mr. Thorame's* attention should have been directed, either by personal observation during his sojourn in New Orleans, or by his correspondents, after his departure?

The Mylne Asylum for Destitute Orphan Boys certainly came into existence after *Thorame's* departure from Louisiana. It was founded by the last will of *Alexander Mylne*, whose succession was opened in October, 1838, and was incorporated by Act of the Legislature of February, 1839. This asylum is proved to have been first opened in June, 1839. It was discontinued a short time afterwards, and remained closed until the 15th August, 1854, when it was reopened, and from that time to the present, it has supported about thirty orphans at a time. This asylum was richly endowed by the will of its founder, and is now in the possession of property estimated at \$24,000.

The St. Mary's Catholic Male Orphan Asylum was incorporated by the Legislature of this State in March, 1836, under a different name, and may therefore have been in existence previous to *Thorame's* departure from Louisiana. It was founded by an association of charitable persons, has been in active operation from the date of its incorporation, without intermission, and has always depended solely upon contributions of its corporators and upon collections made for its benefit at religious ceremonies and elsewhere. It has also received assistance from the city, and is the institution to which the Mayor, as dispenser of the municipal charity, has been in the habit for many years of sending destitute male orphans for shelter and sustenance. With means thus derived entirely from voluntary contributions, and under the superintendence of an aged and respectable citizen, *Mr. Anthony Rasch*, who has for many years devoted himself to this work, this institution shelters and supports upwards of two hundred male orphans of all ages, from the earliest infancy to fourteen years.

Established at first on the Bayou St. John, within the Second District of this city, the St. Mary's Catholic Boys' Asylum was removed in April, 1840, to the Third District, where it has ever since remained.

With these facts before us, we cannot doubt that the St. Mary's Asylum was that which was intended by the testator. In point of fact, the Mylne Asylum had no actual existence for the purposes of its foundation until within precisely two months of the period when *Thorame* penned his will on the other side of

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the Atlantic; and the insignificant scale of its operations, compared with those of its rival, at the end of the two years of its existence, (when the witnesses testified in this cause,) renders it more than improbable that it could have acquired a notoriety, at the end of the two months, which would have procured for it from *Mr. Thorame* the title of *the* asylum for male orphans established in the Third District.

Judgment affirmed, with costs.

### STATE v. ADAM SCOTT and THERESA SMELSER.

Where, at request of prisoners' counsel, the Judge charged the jury that they were the judges of the law as well as of the facts, that this was the law of the case and of the State, as decided by the Supreme Court, but added, that in his opinion, it was "bad law"—*Held*: That the accused was not prejudiced by the Judge's expressing his personal opinion against the law.

His telling the jury that *this was the law of the case before them*, was equivalent to telling them that his private opinion, in regard to the correctness or policy of the law, should not weigh with them, but they must take the law as expounded by the Supreme Court.

But the charge as given, without qualification, conceded too much to the prisoner, and did not represent accurately the ruling heretofore made by this tribunal upon the point in question. The jury are *not* judges of the law and facts in the same sense. They are exclusively judges of the facts; but of the law only subordinately. They may find a general verdict of guilty or not guilty, and on so doing must pass upon the law as well as the fact. But, while they are under no compulsion to take the instructions of the court as law, they are expected to apply the law as expounded by the court to the facts which they may find.

The omission of the Judge to charge some matter which may occur to the counsel as favorable to the prisoner, but which the Judge was not asked to give in charge to the jury cannot be regarded as error.

The Supreme court can only act in criminal cases upon matters which appear by bills of exceptions or assignments of error.

**A**PPEAL from the First District Court of New Orleans, *Robertson, J.*  
*E. W. Moise*, Attorney General, for the State. *A. P. Field, R. Hunt*  
and *R. H. Broune*, for the accused.

**SPOFFORD, J.** The prisoner *Scott*, convicted of murder, and sentenced to the penitentiary for life, has appealed to this court.

His counsel asked the judge who presided at the trial to charge the jury, "that they were judges of the law as well as of the facts," when the Judge remarked, "I will charge you, gentlemen of the jury, that that is the law of this case, that it is the law of the State of Louisiana, as decided by the Supreme court; though, in my opinion, it is bad law." To this a bill of exceptions was taken, and it is now contended that the verdict should be avoided on account of the remark of the Judge, that the law, as he understood it to have been decided by this court, was "bad law."

We do not think so. Assuming, what is not strictly correct, that this court has ever said that it would be right to tell a jury "that they are judges of the law as well as of the fact in a criminal case," without adding any explanation as to the relative provinces of the court and jury, we cannot perceive that the prisoner was prejudiced by the District Judge's expression of his personal opinion that, this law was "bad law," for he at the same time told the jury that whether good or bad, *it was the law of the case before them*, which was as

much as to tell them that his personal opinion of the correctness or policy of the law should not weigh with them, but they must take the law as expounded by this court.

But, we think the learned Judge misapprehended the opinion of this court, and, by the unqualified charge he gave, conceded more to the prisoner's counsel than was necessary.

We have said that, "in criminal, as in civil cases, the jury are judges of the law as well as of the facts; but not in precisely the same sense." They are the exclusive judges of the facts; they are, subordinately, judges of the law, because a general verdict of "guilty" or "not guilty," requires a decision upon both law and fact. But it would be absurd to require the Judge to instruct the jury in the law governing the case, and then say they may pay no heed to it, if it suits their caprice to overrule it; it would be absurd to allow the prisoner to except to the charge of the Judge and ask this court to reverse a verdict of guilty merely because the Judge erred in his charge. If under the theory of our law, a charge by the court was nothing more than an argument of counsel, to be heeded or not by the jury as it happened to strike their judgment. The jury should listen attentively and respectfully to the law, as expounded by the court, because they are expected to apply the law, *as thus expounded*, to the facts which they may find. They are not under a *compulsion* to take the instructions of the court as law; but they are expected to do so, and it must be an extraordinary case indeed where they would be justified in disregarding the instructions of the Judge, who sits indifferent between the State and the prisoner, the authorized expounder of the law. If the jury assume to interpret the law in opposition to the charge of the Judge, there is no remedy even if justice be outraged thereby; if they heed the instructions, and the instructions are right, justice is done; if they are wrong and prejudicial to the prisoner, he has his remedy by a bill of exceptions and an appeal. See *State v. Ballerio*, 11 An. 81; *State v. Scott*, 11 An. 429; *Tresca v. Maddox*, 11 An. 206; *Bostwick v. Gasquet*, 10 Rob. 81. We think some such explanation as this should be added when a court instructs the jury that they are judges of the law and the fact.

The prisoner excepted that the Judge in his charge (which comes up in writing), intimated his opinion that the accused was guilty of murder, and substantially urged a conviction. We are unable to gather these inferences from a careful perusal of the charge. The remarks are all of a general character, and are not objected to as being incorrect in any detail. If there were other remarks pertinent to the case and favorable to the prisoner which might have been made, the counsel of the prisoner had a right to suggest them to the court and ask the court to give them to the jury. The Attorney General is correct in asserting, that "the omission to charge some matter in the mind of the prisoner's counsel that might have been useful to the prisoner, cannot be regarded as error, for the court can have no knowledge of the unexpressed views of counsel."

We are without jurisdiction to reverse the action of the Judge upon the motion for a new trial, or to avoid the verdict, upon other grounds than those which appear by bills of exceptions or assignments of error. No bill of exceptions was taken to the objectionable remark of the Judge, made before the trial was concluded, and we cannot notice it.

The judgment is, therefore, affirmed, with costs.

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MERRICK, C. J., dissenting. I am inclined to think the charge given was equivalent to an intimation to the jury that the decision of the Supreme Court was not law, in the opinion of the Judge of the lower court.

For the reason stated in my opinion in the *Ballerio* case, I think the jury ought to have been informed that they were judges of the law and the fact, without the qualification annexed by the Judge.

NEW ORLEANS, JACKSON AND GREAT NORTHERN RAILROAD COMPANY v.  
THOMAS B. LEA.

The certificate of the secretary of an incorporated company, bearing its seal, affords *prima facie* evidence of the facts therein stated. The court is bound to presume, from such certificate, that legal notice was given to the stockholders of the company of a meeting of which they were entitled to be notified. A special tax was imposed in aid of the corporation, the holders of the tax receipts to become stockholders in the company for the amount thereof. *Held*: That the payment of the tax does not release the stockholders from the obligations contracted by them under the charter. Instalments of the subscription of the stockholders, fixed and required to be paid in by resolutions of the Board of Directors, cannot be regarded as open accounts, and prescribed against as such. Such instalments may be considered at least as equal to *accounts stated*.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*George W. Christy*, for plaintiffs. *W. J. Vason*, for defendant and appellant.

VOORHIES, J. This suit is brought to recover from the defendant the sum of \$1000, amount of his subscription to forty shares of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company.

The action is resisted by the defendant on several grounds, one of which is that the plaintiff, although bearing the same name, is not the same company to whose capital stock he subscribed, but a company since created by a Legislative Act entitled "An Act to incorporate the New Orleans, Jackson and Great Northern Railroad Company," into which the former was merged, and the terms, conditions and stipulations of its charter materially altered, by extending it from a limited to a perpetual corporation, increasing its capital stock from three to eight millions of dollars, and removing all restrictions upon the powers of the President and Directors, so as to lead to other changes as to the manner of subscribing to and paying for the the stock and constituting the Board of Directors, &c.

The New Orleans, Jackson and Great Northern Railroad Company was incorporated under the legislative Act, entitled "An Act for the organization of corporations for works of public improvement and utility," approved March 11th, 1852. Under the 5th section of that Act, the stockholders of any corporation, at a general meeting convened for that purpose, are authorized to make any modification, addition, or change in their act of incorporation, with the assent of those representing three-fourths of the stock at such meeting. As that section must be considered as constituting a part of the charter of the company to which the defendant is a party, it is, therefore, binding upon him; moreover, the 9th section of the charter itself provides, "that all meetings of stockholders called for the purpose of increasing or diminishing the capital stock of the company, or for any of the purposes enumerated in the 5th section

of the Act of the 12th of March, 1852, shall be composed of persons holding in their own right, or as agents for others, at least three-fourths of the stock of the company, in order to take valid and binding action in the premises."

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The question then recurs, were the amendments to the charter of the company under the legislative Act of the 22d of April, 1853, assented to or sanctioned by the stockholders? The evidence shows that at a general meeting of the stockholders of the company, held on the 30th of April, 1853, they were submitted to the consideration of said meeting and sanctioned by the vote of stockholders representing 19959 shares, more than three-fourths of the entire stock of the company, and that none of the stockholders voted against them. But it is objected by the defendant, that the proof on this point is defective and insufficient. We do not think so. The certificate of the secretary, bearing the seal of the company, affords, in our opinion, *prima facie* evidence of the facts therein stated. Angell and Ames on Cor., § § 635, 679. The *onus* was, therefore, on the defendant to show the falsity of the certificate in this case, and he has not attempted to do so. It is argued from the fact that the meeting was held only a few days after the passage of the legislative Act, that legal notice was not given to the stockholders of such meeting. We are bound to presume from the certificate of the secretary of the company that such notice was given. We can perceive no good reason why it could not have been done prior to the passage of the Act, the provisions of which the stockholders had doubtless been apprised, previous to their enactment. The objection that the amendments were not sanctioned by the requisite number of votes, appears to us to be equally untenable. The charter provides that, "the corporation shall go into operation and be organized so soon as shares of stock to the amount of \$300,000 shall have been subscribed." The subscription to stock by private individuals at the date of the trial below, as shown by the evidence, amounted to \$617,000, equal to 24,680 shares. At the time of the meeting, neither the State nor the city had subscribed to stock in the company. The Acts authorizing them to subscribe were passed, the one relating to the State on the 28th of April, 1853, and the other to the city, on the 15th March, 1854. There is no proof of any previous subscription either by a parish or municipal corporation under the provisions of the legislative Act of the 12th of March, 1852. Had such subscription existed, the burden was on the defendant to have shown it. The other objection urged in connection with this ground do not appear to us pertinent to the subject-matter in controversy or defence to the action.

The second ground of defence may be considered, we think, as a corollary of the preceeding one.

The third ground urged by the defendant is, that since his subscription a special tax has been levied by the Common Council on his real estate and slaves in the city, for the benefit of the plaintiff, in pursuance of a legislative Act, to be collected annually for twenty years, on account of which he has already paid the sum of \$396 50, which he is entitled to have imputed to the payment of any just debt that he may be legally liable to the plaintiff for; and, moreover, that he is discharged from his subscription in consequence of said tax, which he also urges to be illegal and unconstitutional. Under the law and city ordinance, holders of such tax receipts become stockholders in the company for the amount thereof. The stockholders of the company were not, as we are aware of, exempted from the payment of the tax thus levied, nor can such payment have the effect of releasing them from the obligations which they have

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contracted under the charter. The question as to the legality and constitutionality of the tax is a matter in our opinion which cannot be properly considered between the parties to this action.

The prescription of three years is also interposed by the defendant as a bar to the action. The written contract of the defendant is for the payment of a specific sum of money, to be payable or exigible by instalments as should be required under the terms of the charter. Instalments of the subscription of the stockholders, fixed by resolutions of the Board and required to be paid in, cannot, in our opinion, be viewed in the light of *open accounts*, to which the prescription invoked under the statute of 1852 is applicable. Such instalments may be considered at least as equal to *stated accounts*. 4 An. 197; *N. O., J. & G. N. R. Co. v. Estlin*, ante p. 184.

Judgment affirmed.

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STATE v. H. B. ELLIS et al.

The State may appeal in criminal cases where the indictment, charging an offence punishable with death or imprisonment at hard labor, has been quashed before trial, or held bad upon a demurrer.

Where there is a discrepancy between the English and French texts of a statute, the former must prevail.

The English text is emphatically *the law*. It was intended and is required that the laws should be published and thus promulgated in both languages; but they are enacted, as required by the Constitution, in the language in which the Constitution of the United States is written. A *bona fide* translation into French, and publication of the original and translation, is all that is required; and a mistake in the translation is in the same category with a typographical error.

A person present aiding and abetting at the commission of an offence is a principal, and may be punished as such; (overruling the decision in the case of the *State v. Hendry*, 10 An. 207.)

**A**PPEAL from the District Court of St. John the Baptist, *Duffel, J.*  
*E. W. Moise*, Attorney General, for the State. *St. M. Berault*, for defendants.

SPOFFORD, J. The State has appealed from a judgment of the Fourth Judicial District Court, quashing an indictment preferred against the defendants for an alleged assault with a dangerous weapon, and inflicting a wound less than mayhem upon one *Joseph Vicknair*.

The appellees have moved to dismiss the appeal, upon the ground that the State has no right of appeal in criminal cases.

Under the Constitution of 1812 the Supreme Court had no criminal jurisdiction. The evils resulting from an unsettled and discordant administration of the criminal law by a multitude of tribunals, each empowered to decide in a last resort, were found to be so great that in 1843 a special court was erected with appellate jurisdiction in this class of cases, whose decisions were reported as authoritative expositions of the criminal law for the guidance of courts of the first instance. The court was called "a Court of Errors and Appeals in Criminal Matters."

The second section of the Act constituting it provided that "this court shall have only appellate jurisdiction, with power to review questions of law; which questions shall be presented by bills of exceptions taken to the opinion of the Judge of the lower court, or by the assignment of errors apparent on the face

of the record, taken and made in manner and form as now provided for by law for appeals in civil cases."

The fifth section provided "that said court shall have jurisdiction of all questions of law arising in the progress of any prosecution for violation of any penal law of the State, where the punishment may be death or imprisonment at hard labor." Acts of 1843, 59.

Under this law the question arose, in a case quite parallel to the present, whether the State had a right to appeal as well as the accused. And it was held that the right of appeal existed in favor of the State from a judgment quashing an indictment. *State v. Jones*, 8 Rob. 573.

In the subsequent case of the *State v. Jones*, 8 Rob. 617, an appeal taken by the District Attorney from a similar judgment was entertained without question.

The Constitution of 1845, for the first time, invested the Supreme Court with criminal jurisdiction in certain specified cases. In Article 63 it was declared that the Supreme Court should have appellate jurisdiction only, in criminal cases on questions of law alone, whenever the punishment of death or hard labor may be inflicted, or when a fine exceeding three hundred dollars is actually imposed.

The phraseology of the corresponding Article in our present Constitution is slightly different. This court's appellate jurisdiction extends "to all criminal cases on questions of law alone, whenever the offence charged is punishable with death or imprisonment at hard labor, or when a fine exceeding three hundred dollars is actually imposed." Constitution of 1852, Art. 62.

In 7 An. 40, (*State v. Cheevers*), our predecessors entertained an appeal on behalf of the State from a judgment quashing an indictment. This was under the Constitution of 1845. In 10 An. 207, (*State v. Hendry*), we entertained a similar appeal under the present Constitution. In neither of these cases, however, does there appear to have been a question made as to the right of the State to appeal.

We see no objection to the practice, provided it is limited to the class of cases found in the precedents, to wit: those where the indictment has been quashed before a trial, or held bad upon a demurrer, and where it purports to charge an offence punishable with death or imprisonment at hard labor.

If the prisoner has not been tried he has not been in jeopardy, and if a new indictment could be preferred after a prior one for the same offence has been quashed, there can be no greater danger in reinstating an indictment which has been erroneously quashed before a trial upon the merits.

The motion to dismiss is, therefore, overruled.

The appellants were indicted under the 11th section of the crimes Act of March 14th, 1855, (Session Acts, p. 131.): "Whoever shall, with a dangerous weapon, or with intent to kill, inflict a wound less than mayhem upon another person, shall, on conviction, be imprisoned not exceeding two years nor less than six months, with or without hard labor, and fined not exceeding one thousand dollars."

The French translation of this law in the Act of 1855 differs in two particulars from the English text: the copulative *et* is used instead of the disjunctive *or* in the first clause, making it necessary for the use of a dangerous weapon and the intent to kill to concur, in order to constitute the offence; and the phrase "wound less than mayhem," is translated "blessure qui la priverait de l'usage de l'un de ses membres," which would amount to mayhem.

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The Act of March 14th, 1855, is a part of the revisory legislation of that year, and it appears that the errors of the old translation of the Act of 1829 have been copied and perpetuated in the new law.

The objection is now taken that, as the two texts are incompatible, there is no law whatever upon the subject matter; because the Constitution requires (Art. 129) that "the Constitution and laws of the State shall be promulgated in the English and French languages."

If this constitutional provision is, as contended by the appellees, not directory merely but mandatory, we do not see how it can avail them. For if the Act of 1855 has no binding force as to the class of offences charged, then the Act of 1829, from which a portion of it was taken, has not been repealed *quoad* that class of offences; for it is only laws upon the *same subject matter* upon which a provision is made in the new law that are repealed: and the argument of the appellees is, that the new law, being self-contradictory, goes for naught as to assaults with a dangerous weapon and assaults with intent to kill, and inflicting a wound less than mayhem or equivalent to mayhem.

But we do not think the argument admissible. The old provision of the Constitution of 1812 and 1845 has been retained in our present Constitution: "The laws, public records, and the judicial and legislative written proceedings of the State shall be promulgated, preserved and conducted in the language in which the Constitution of the United States is written." Constitution of 1812, Art. vi, sec. 15; Constitution of 1845, Art. 103; Constitution of 1852, Art. 100. We know that the practice of the legislative department under this provision has been to introduce and carry through the various stages of legislation bills in the English language alone. They are translated into French for enrollment by a clerk, but the statutes are adopted in the English only. They are not even required by the Constitution to be translated before receiving the Governor's signature.

The English text, therefore, of our ordinary statutes is emphatically *the law*. The French version is not the work of the two Houses and the Governor, but is a mere clerical labor, its correctness depending upon the skill and accuracy of the clerk employed.

Now, when the Constitution of 1845, in Article 132, introduced the provision that the laws should be promulgated in the English and French languages, it certainly did not intend to detract from the authoritative force of the English text in which, by a previous provision, (Art. 103,) it had declared the "legislative proceeding" should be "conducted." It intended no more than that the laws passed in English should be translated into French before promulgation, and that the original and the translation should then be published and thus promulgated together. The English text was still to continue *the law* as expressed in the identical words of the law-maker. The French was to be only a translation of that law done by a clerk. The English was to be the original, the French a copy.

The promulgation of laws is an executive function. The mode of promulgation may be prescribed by the Legislature, and differs in different countries and at different times. "Elle consiste, en réalité, dans l'opposition faite par le chef de l'Etat, de la formule qui ordonne l'exécution de la loi." 1 Marcadé, No. 28.

Promulgation is the extrinsic act which gives a law, perfect in itself, executive force. Unless the law provides that it shall be executory from its passage or from a certain date, it is presumed to be executory only from its promulga-

tion. *Buhol v. Boudesquie*, 8 N. S. 493; *Merchants' Bank of New Orleans*, 2 An. 68; C. C., Articles 4, 5, 6 and 7. The printing of a law is not its promulgation.

By our present statute, (Act of 1855, 341,) which is substantially a reenactment of the law of 1827, (page 172,) "all laws enacted by the Legislature of this State shall be *considered* promulgated at the place where the State gazette is published, the day after the *publication* of such laws in the State gazette, and in all other parts of the State thirty days after the publication.

But it is to be presumed that when the framers of the Constitution declared that the laws should be "promulgated" in English and French, they used the term as synonymous with the word "published." The question then is, have the laws been "published" in the English and French languages? The particular law in question is the "Act relative to crimes and offences," approved March 14th, 1855. That law, composed of 127 sections, enacted in the English language only, but translated by a clerk into French, has been published in the State gazette, in the English in which it was passed and in the French into which it was translated by the clerk.

Can a few blunders of the translating clerk vitiate the law? We think not. The English text is paramount, and the tribunals are authorized to correct the translation if erroneous. The translation was not the act of the law-maker, and we are not bound by it. See the cases upon this mistranslation, *State v. Mix*, 8 Rob. 549; also 9 An. 313; 10 An. 141.

Still less do we think that these blunders make the promulgation void. Such errors are inevitable. Human language, at best, is an imperfect medium of human thought. The greater part of the time of courts is consumed in trying to find out what the Legislature meant, even where courts and Legislature speak the same vernacular. The difficulty is doubled when ideas obscurely expressed in one language are to be turned into another. If the error of a translating clerk can destroy or change the law, he holds the most important office in the State, with a veto power larger than that of the Governor. We do not think the Constitution contemplated a verbal exactness in the promulgation of laws, and that it suffices if there has been a *bona fide* translation of the original statute into French, and a publication of the original and the translation in the State gazette.

Clerical and typographical errors in the publication do not impair the validity of the law, which is to be found in the rolls themselves. And an error of translation should, we think, be placed in the same category. We therefore conclude that the law "relative to crimes and offences," notwithstanding a few inaccuracies of translation, has been promulgated in French and English in the sense of the Constitution.

It was because the District Judge thought differently that he quashed this indictment.

But two of the defendants, *Derby* and *Edrington*, contend that they should be discharged, because they are accused as aiders and abettors to a crime (inflicting a wound less than mayhem) which does not admit of accessories, and they rely upon the case of the *State v. Hendry*, 10 An. 207. But these parties are indicted as principals in the same count with the other defendant, so that the case of the *State v. Hendry* is not altogether in point. Moreover, on reviewing that case, we are not satisfied with its doctrine in the full extent to which it seems to have been carried.

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A person *present*, aiding and abetting the commission of an offence, is a principal, and may be punished as such. We notice that in the revisory legislation of 1855, the expressions "aiders and abettors" in several of the statutes referred to in the *State v. Hendry* have been omitted as surplusage, and the argument drawn from this phraseology fails. Moreover the 11th section of the Act of 1855, relative to crimes, (page 149,) declares that "whoever shall be convicted as accessory before the fact to *any* crime or offence shall suffer the same kind and extent of punishment, according to the circumstances of the case, as might lawfully be inflicted upon the principal offender for such crime or offence."

This law, first enacted in 1818, seems to have been overlooked in the case of the *State v. Hendry*. If the doctrine of a portion of that case was correct, it would follow that an accessory before the fact to the crime charged in this indictment, but not present at its commission, could be punished as surely as the principal, while an accessory at the fact, or the person present aiding and abetting its commission, might not be punished at all.

We cannot admit this as a correct exposition of the legislative will, and the case relied upon by the appellees must be so far overruled.

It is, therefore, ordered, that the judgment be reversed, the indictment reinstated, and the cause remanded, to be proceeded in according to law, as against all the parties accused.

#### DR. H. DARET v. CAPTAIN A G. GRAY.

Where a runaway slave is received on board ship by an imposition practiced on the officers by a forged pass and calculated to deceive, and it is clear from the evidence that the officers were actually deceived thereby, the owner recovering such slave is not entitled to damages from the master of the vessel on account of the deterioration in value of the slave by his running away; this viciousness of character was manifested before he was received on board the ship by his running away and procuring the forged pass.

Masters of ships and other vessels being prohibited, by the third section of the Act of 1816, from transporting or attempting to transport any negro, mulatto or other person of color, from New Orleans, *under any pretence whatsoever*, without the performance of certain prescribed formalities, the failure by the officers of the ship to conform to the requirements of the law, will make the master liable for the reasonable expenses of the owner in recovering his slave, and this on general principles as well as by the terms of the fourth section of the Act of 1816.

The master of a ship is bound to third persons, both by the commercial law and this statute, for the acts of all persons under, or supposed to be under, his command, while engaged about their ordinary duties as subordinate officers of the ship or as seamen.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J. C. Janin*, for plaintiff and appellant. *W. H. Hunt*, for defendant.

MERRICK, C. J. The plaintiff was in March, 1854, the owner of a mulatto man, a mulatto woman and their two children. These slaves being in possession of forged papers, obtained tickets from the Pacific Mail Steamship Company for a passage from New Orleans to Aspinwall, and went aboard the steamship *Eldorado*, about the 23d of March, 1854, and proceeded with the steamship to the Balize, where they were discovered through the agency of a telegraphic dispatch, and were secured and returned with the pilot (who took out the *Eldorado*) to this city. The plaintiff alleges that the slaves were received

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on the steamship without the consent of the petitioner; that by the receiving of said slaves on board the said steamer, the defendant caused him damages to the amount of four hundred and forty-five dollars and twenty-five cents, viz, four hundred dollars for depreciating the value of the said slaves and forty-five dollars and twenty-five cents for telegraphic dispatches, public notices in several papers, jail fees, &c. He prays for a judgment accordingly, and a privilege upon the steamship. The answer was a general denial. There was judgment for the defendant, and the plaintiff is the appellant.

The testimony shows that the papers produced by the slaves to the agent of the steamship company, purported to be executed before two prominent notaries of this city, and were well calculated to deceive any person except those most thoroughly acquainted with the hand writing of the notaries; that it is customary to examine the tickets of the passengers and search for secreted negroes only after leaving the wharf at New Orleans, on account of the crowd and on account of the intrusion of persons at the departure of the steamships; that this duty is performed by the purser, assisted by the steward and other hands; that the tickets and free papers of the slaves were examined and being supposed to be in due form, they were permitted to proceed; that the captain has no agency in issuing the tickets and receiving the same, or examining the passengers, and that in this instance, as soon as he received the telegraphic dispatch, he took the responsibility of returning the slaves to the city; that they were received by the plaintiff and that the ninety dollars paid by them for their passage was also paid over to him.

It will be observed that this suit is not brought to recover a statutory penalty, but, *first*, the depreciation in value of the slaves consequent upon their having runaway or absconded on board of the vessel; and, *secondly*, costs charges and money expended in recovering the slaves.

We do not think the first ground can be maintained. The proof, it is true, shows that the plaintiff sold the slaves and that he suffered large deductions from their apparent value, on account of their having runaway. The habit of running away is a vice inherent in the slave. That vice had developed itself before the slaves went on board the defendant's ship. It was when they procured their forged papers and clandestinely left their master's house to go on board of the ship, that they became runaways. They were corrupt when they imposed their purchased forgeries upon the officers of the ship, and the captain of the ship cannot be held responsible for the deterioration in the value of the slaves, which he had no agency in producing, and who was only made, by a neglect of a form of law, the instrument of giving greater publicity to such defects.

On the second branch of the plaintiff's demand, we observe that by the third section of the Act of 1816, masters of ships and other vessels are prohibited under any pretence whatsoever from transporting or attempting to transport any negro, mulatto or other person of color from New Orleans, without taking such person before the Mayor and having lodged with him a declaration containing a description of such negro, mulatto or other person of color, and having satisfied the Mayor by authentic proof, or the oaths or the affidavits of two credible witnesses, or the written direction of the owner, and having obtained from the Mayor a written certificate. In the other parishes, the like duty is to be performed by the Judge. See Bullard & Curry's Dig. p. 253-4.

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This precaution, which might have prevented the injury, was not observed by the officers of the ship and the defendant is liable for the reasonable expenses of the plaintiff in recovering his property, which was made more difficult to recover by the negligence of the officers of the steamship. The fourth section of the Act makes the master liable for the damages which the owner of the slaves sustains, and we think he would be responsible, on general principles, without the aid of this section. It is no answer to the plaintiff's action that the negligence was that of other persons, and that he had in fact no agency in receiving the slaves on board of the ship. He is bound to third persons, both by the commercial law and the Statute, for the acts of all persons under or supposed to be under his command, while engaged about their ordinary duties as subordinate officers of the ship or as seamen. If some of these duties are entrusted to third persons, he must assure himself that their acts which he finds himself, from the nature of his office, obliged to endorse, are not unlawful. 17 L. R. 545, 546.

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the lower court be avoided and reversed. And it is now ordered, adjudged and decreed, that the plaintiff recover and have judgment against the said defendant, *A. G. Gray*, for the sum of thirty-four dollars, with legal interest thereon, from the third day of May, 1854, and that the defendant pay the costs of both courts.

#### MELINDA KNIGHT v. REUBEN KNIGHT.—Opposition of J. E. SUTTON.

The copy of a sale under private signature, introduced in evidence for the purpose of proving its registry, has no effect without the original.

**A**PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*A. T. Steele*, for opponent and appellant. *J. S. Whitaker*, for appellee.  
VOORHIES, *J.* *James E. Sutton* claims the ownership of a slave named *Louisa*, seized and advertised to be sold by the Sheriff of the parish of Orleans as the property of the defendant. He alleges that he acquired a *bona fide* title to her by act under private signature, dated the — of November, 1854. He therefore prays that she be decreed to be his property. On a supplemental petition filed by him, the sale was enjoined.

The plaintiff pleaded a general denial, and prayed for a dissolution of the injunction, with damages and costs.

A supplemental petition was subsequently filed by the opponent, but there appears to be no issue joined on it, and hence it cannot be taken into consideration.

The case being considered solely with reference to the issue thus presented, the question which then arises is whether the proof is sufficient to maintain the action. We think not. The evidence shows that on the 11th of June, 1853, *Reuben Knight* sold and conveyed by authentic act the slave *Louisa* to *Albert G. Bailey*, under whom the opponent claims to hold his title. On the trial below, the opponent introduced the copy of an act under private signature from *Bailey* to him, for the purpose, as stated in the note of evidence, of proving its

registry in the conveyance office, certified as follows: "I, Register of Conveyances, certify the foregoing to be a true copy of the inscription made in my office, on the seventeenth of January, 1855, in Book No. 64, folio 578."

It is evident that this document was entitled to no effect without the production of the original. The opponent then offered a document purporting to be a duplicate of the original made out by *Bailey* himself since the institution of the present suit, which was rejected, and forms the subject of a bill of exceptions. Were we to concede its admissibility, we do not think it would be entitled to any effect against the plaintiff.

On the other hand, it is shown that the slave *Louisa* was sold by *Bailey* to *Mrs. Pryor* on the 7th of February, 1853. On the 17th of June, 1854, *Sutton* obtained a judgment against *Bailey* for the sum of \$800. A writ of *feri facias* thereon was returned as follows:

"Received November 7th, 1854, and on the same day I seized a negro woman named *Louisa*, which slave was claimed by *Reuben Knight* as his property, and upon his presenting his title to the Sheriff for said negro woman, she was released from seizure. No property found after due demand made of both parties. Returned 4th Monday of December, 1854."

The alleged recorded *sous seing privé* sale from *Bailey* to *Sutton* purports to have been made on the 18th of November, 1854. It is, therefore, perfectly clear that *Sutton* could not then be considered as the owner of the slave in question, thus seized under his execution as the property of his debtor. The testimony of the Deputy Sheriff, who made and released the seizure, shows that *Sutton* did not complain of it. It is moreover shown, that *Edward Parmely* held the slave *Louisa*, as lessee of *Reuben Knight*, from January to the 15th or 20th of March, 1854. *Knight's* possession in 1854 is also abundantly proved by other witnesses.

Judgment affirmed.

#### SUCCESSION OF HARMAN JONES—On rule taken by D. H. JONES, Appellant.

The 58th and 59th Articles of the Civil Code, relating to the sending into provisional possession of the presumptive heirs of an absentee, have no application to the question whether letters of tutorship have been properly granted upon the persons and property of minors whose father is alleged to be dead.

The certificate of the Register of Births and Deaths for the parish of Orleans is a legal document, creating of itself a *prima facie* presumption of the death of a party.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*Elmore & King*, for plaintiff in rule and appellant. *C. Roselius* and *A. W. Jourdan*, for tutrix and defendant.

**BUCHANAN, J.** The succession of *Harman Jones* was opened by his widow, by petition to the Second District Court of New Orleans, filed on the 21st of May, 1856, to be qualified as natural tutrix of the two minor children of said *Jones*. To this petition was annexed a certificate of the Register of Births and Deaths in and for the city and parish of Orleans, certifying the death of *Har-*

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*man Jones.* About nine months after the widow *Jones* had qualified as tutrix, and made an inventory, under orders of the court, one *David H. Jones*, the brother of *Harman Jones*, and against whom the widow and tutrix had instituted suit for an alleged indebtedness to the succession, took a rule in the Second District Court to set aside the mortuary proceeding and to revoke the letters of tutorship, on the ground that there was no evidence of the death of *Harman Jones*, and that the length of time required for the presumption of the death of an absentee after he was last heard from had not elapsed.

There is one exception to the form of proceeding by rule which it is unnecessary to examine, inasmuch as the judgment upon the merits, for defendant in rule, is entirely justified by the law and the evidence.

*Harman Jones* is proved to have left the port of New Orleans, on board a schooner called the *Florinda*, bound to San Francisco, California, in July, 1849. On the 15th November, 1849, he wrote from Rio de Janeiro, conveying information that the *Florinda* was undergoing repairs in that port, which would be finished the same day, and that she would immediately prosecute her voyage to her port of destination. Since the date of that letter, neither the schooner *Florinda* nor *Harman Jones* have ever been heard of.

His family and relatives, including *David H. Jones*, the mover in this rule, went into mourning for *Harman Jones* as for a person deceased. *David H. Jones* told one of the witnesses that his brother *Harman* was dead, and exhibited a great show of distress on the subject. *David H. Jones* even collected, under a power of attorney, the amount of insurance effected on cargo per schooner *Florinda* for this voyage, upon his own affidavit of a portion of the facts above detailed, as proof of a total loss of the vessel and cargo. The insurance company paid him the amount of the policy, on the 11th of October, 1850, five years and a half before the succession of *Harman Jones* was opened by his widow.

The burden of proof was upon the mover in this rule to rebut the very strong, not to say conclusive presumption of the death of *Harman Jones*, arising from these circumstances. Not the slightest attempt to rebut them is made by him.

His counsel relies altogether upon the provisions of the 58th and 59th Articles of the Civil Code, relative to the sending into provisional possession of the presumptive heirs of an absentee. These Articles have no application to the case before the court. The question for our decision is whether letters of tutorship have been granted improperly upon the persons and property of minors whose father is still living.

The certificate of the Register of Births and Deaths for the parish of Orleans, introduced without objection in evidence, is a legal document, creating of itself a *prima facie* presumption of the death of *Harman Jones*, which is corroborated by facts emanating in a great measure from the very party who now disputes that death.

Judgment affirmed, with costs.

## SUCCESSION OF S. B. DAVIS.

A testamentary executor domiciled out of the State is not entitled to letters without giving security, as is required from dative testamentary executors.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*E. A. Bradford and H. H. Straubridge*, for plaintiff in rule. *F. Preston and Purvis & Dugué*, for defendant and appellant.

**SPOFFORD, J.** *Samuel B. Davis* died at his domicile in Delaware, leaving a last will. The succession was opened in Delaware before the court charged with such matters, and letters testamentary issued to one *Peter A. Brown*.

It does not appear that any property, real or personal, was left by the deceased *Davis* in the State of Louisiana, although it would seem from the statements of the parties to this litigation, that suits have been instituted against one or more citizens of this State, upon certain promissory notes belonging to the succession opened in Delaware.

About a year after letters were issued to *Brown* as executor of the estate in Delaware he filed a petition in the Second District Court of New Orleans, annexing a copy of his letters and of the will as probated in Delaware, and prayed to be recognized as executor of the said will and authorized to act as such.

The following order was thereupon rendered *ex parte*:

"Let the last will and testament of the deceased, of which the accompanying is an authentic copy, be approved, registered and executed, and let the petitioner be recognized as the testamentary executor of the deceased and be authorized to act as such."

Shortly afterwards a motion was filed by the present appellees, praying the court to rescind the foregoing order, on the grounds—

- 1st. That *Brown* was not testamentary executor as alleged;
- 2d. That he had not taken an oath or given security as required by law in Louisiana, and that the order was illegal in not requiring him to do so;
- 3d. That he had failed to comply with the other requisites of the law of Louisiana concerning executors, administrators and successions.

Upon a hearing, the rule was made absolute, and the entire order, as quoted above, was revoked and annulled.

The executor *Brown* has appealed.

The judgment appealed from is partly right and partly wrong.

It is right in rescinding so much of the original order as declares the appellant to be testamentary executor of the will of *Samuel B. Davis*, and authorized to act as such; it is wrong in annulling that portion of the order which admits the will to registry and orders its execution.

The latter order is fully justified by the Articles 1681 and 1682 of the Civil Code; they do not appear to have been repealed by the statute of March 16th, 1842, which is rather supplementary to than subversive of those Articles.

It is, therefore, ordered and decreed, that so much of the judgment appealed from as revokes that portion of the order of 9th December, 1856, which declares that the will of *Samuel B. Davis* be approved, registered and executed,

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be avoided and reversed, and the said order reinstated *pro tanto*; and it is further adjudged that, in other respects, the judgment appealed from be affirmed, the costs of this appeal to be borne by the appellees, and those of the District Court by the appellant, defendant in the rule.

## R. W. RAYNE v. MARY B. O'BRIEN AND HUSBAND.

The appeal will be dismissed under the rule of court of 29th May, 1854, where the appellant has died since the appeal, and the administrator having received the twenty-five days' notice required by that rule, fails to make himself a party.

The delay for applications for re-hearing is fixed by law at three judicial days, and longer time should not be allowed within which to move to reinstate an appeal dismissed under a rule of court.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Race & Foster*, for plaintiffs. *A. Roberts*, for defendants and appellants.

On the motion to dismiss appeal:

BUCHANAN, J. The plaintiff and appellee moves to dismiss this appeal under the rule of court of the 29th May, 1854, the appellant, *Mary O'Brien*, having died since the appeal, and the administrator having received the twenty-five days' notice required by that rule, to make himself a party without having done so.

Appeal dismissed.

On the motion to reinstate the appeal:

BUCHANAN, J. The record of appeal was filed in this case, in this court, on the 7th June, 1854, and the appeal was dismissed on the 4th February, 1856, under the provisions of the rule of court of the 29th May, 1854. The proceedings for the dismissal of the appeal were perfectly regular, and upon proper showing.

On the 27th April, 1857, more than a year after the judgment of dismissal, the administrator of the appellant, *Mary O'Brien*, moved to reinstate the appeal.

This motion is entirely too late. The delay for applications for re-hearing upon the final decision of the most important questions that come before us, is fixed by law at three judicial days; and no reason is perceived why a longer time should be allowed for reinstating an appeal dismissed under our rule, especially when the party making the application is a resident of the place where the court holds its sessions, as in the present case.

Rule to reinstate discharged, at costs of mover.

# SUCCESSION OF CELESTE CROIZET, Widow GONDRAU—On Opposition to Account of S. GONDRAU, Administrator.

Proof of verbal acknowledgments of indebtedness is not entitled to much weight, particularly after the death of the person who is alleged to have made them.

Where a minor arrived at the age of majority gives a receipt to his tutor, the receipt is not conclusive against him, and the fact which it recites may be contradicted by oral testimony.

**A** PPEAL from the District Court of West Baton Rouge, *Robertson, J.*  
*U. B. & E. Phillips* and *F. O. Bouis*, for opponents and appellants.  
*A. Provosty*, for the appellee.

**COLE, J.** *Madame Julie Celeste Croizet*, widow of *Pierre Gondran*, died in October, 1853; her son, *Simon Gondran*, was appointed administrator of her estate on the 3d November, 1853. Her heirs were there, to wit, *Simon Gondran*, *Adele Gondran*, wife of *F. O. Bouis*, and *Martin O. LeBlanc*, son of *Julia Bouis*, wife of *Octave LeBlanc*.

*Julia Bouis* was the daughter of *Madame Gondran* by a former marriage.

On the 10th February, 1855, more than a year after the administrator was appointed, *Martin O. LeBlanc* took a rule to compel him to file an account. It was rendered on the 9th March, but no vouchers were filed, and afterwards an order was obtained, which directed him to file them.

Oppositions were made by *M. O. LeBlanc* to the original and amended tableaux, and an opposition was offered to be filed, by *F. O. Bouis*, for his claim as overseer, which had been put on the tableau, but for which the administrator took a nonsuit. The District Court objected to receive it as coming too late.

The oppositions of *LeBlanc* were sustained in part by the lower court.

*LeBlanc*, *Bouis* and the administrator have appealed.

The principal items objected to by *LeBlanc* are the claims of *F. O. Bouis*, and an item put down in the tableau as being due *Simon Gondran*, the administrator, by the deceased, as his tutrix, for the balance due him in the estate of his father, *Pierre Gondran*.

We will advert first to the claims of *Bouis*, who is the principal creditor of the succession. They amount in principal and interest to about \$20,000.

They consist of, 1st. A note made by *Madame Gondran* to him or order for \$8,591 38, dated 10th June, 1848, payable in March, 1849, with eight per cent. after maturity. 2d. An account for his wages, as overseer and hire of negroes, \$5,196 66. And 3d. Note in favor of *A. Robin*, paid by him, with eight per cent. interest, from 10th April, 1854, for \$1,568 89.

*Bouis* was son-in-law of deceased, and lived with his family in her house from 1842 to 1853.

He acted also as her agent from 1848 to 1852; shipped molasses in his own name from *Madame Gondran's* place for several years, and received the proceeds amounting to \$7,058 66.

It was the duty of *Bouis* to have presented an accurate account of his transactions in his fiduciary capacity.

He has not done this, and he seeks to sustain a part of his demand by proof of verbal acknowledgments of indebtedness on the part of the deceased.

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Not much weight is given in law to this species of evidence, particularly when such recognition is pretended to have been made by one since deceased.

We do not doubt the integrity of the witnesses, but it must be remembered, that this confession of debt was made by one who probably knew but little about her business, and had confided for years the administration of a great part of her affairs to *Bouis*, and who, it is likely, was not aware of the exact relations of her affairs with him, of the manner in which he had conducted them, of his responsibilities to her, of the debts he had paid or created in her behalf.

When these things are considered, such acknowledgments can have but small effect, particularly as she is dead; for if *Mrs. Gondran* was living, she could plead that this recognition was made in error, and that she was not aware of the real condition of affairs between *Bouis* and herself.

The Judge *a quo* viewed the obligation of *Bouis*, as agent, to render an account, and the character of such acknowledgments, in the same light that has just been portrayed.

He rejected his claim for wages, as overseer, but allowed \$3,300 for hire of negroes, from which sum, he deducted \$2,900 50, credits by amounts paid *Bouis* as admitted in his account.

The lower court made this deduction on the principle, that as *Bouis* had not rendered a perfect statement of his acts as agent, the credits in his account rendered, admitted by him, must be charged against him, without considering as correct, unless proved, the other portions of his account that consisted of charges against the estate.

The Judge *a quo* also allowed *Bouis* the note of \$8,591 38 and interest; opponent offered testimony to show, that *Bouis* had shipped molasses belonging to *Mrs. Gondran*, at various times, the proceeds of which exceeded six thousand dollars, and came into his hands.

The counsel of administrator objected to such testimony to establish a credit on the note, as it was not an amount equally liquidated. The court rejected it, believing it was inadmissible as a plea in compensation on the note.

This was erroneous. *Bouis* was the agent of *Mrs. Gondran*; the moment then he received her funds, and appropriated them to himself, compensation took place between an amount, that she owed him, equal to that he had appropriated, and although he may have held claims of various kinds against her, the law imputes the payment to the most onerous, which was the note.

As to the plea that the amount of the proceeds was not equally liquidated, this is incorrect, because money paid is certainly as much liquidated as a note, and in the opinion of the generality of mankind, more so; payment can always be plead.

*Bouis* held claims against deceased; it is not to be presumed he intended feloniously to keep the proceeds of the molasses, but when he appropriated them he considered them as a payment *pro tanto*, and as he has not accounted for them, they might be placed to their account as an off-set to the note; but the evidence shows, he paid some claims for her, and transacted generally her business. It is just then to give *Bouis* an opportunity in the lower court to render an exact account of his relations as agent for the deceased, to show all the sums received, and disbursed, at what time each amount came into his hands and was paid out; also, a full account of his claims against *Mrs. Gondran* and the credits thereon. He could not censure us if we were to render

judgment on the evidence now before us, for it was his duty to have rendered such an account when he presented his claim against a deceased person, but we have concluded to give a nonsuit on all his demands against the estate, and permit him to present them hereafter in a proper form. It is impossible to do justice between him and the estate as the case now stands.

The other principle item opposed by *LeBlanc* is that of \$3,656 25, as being due *Simon Gondran*, the administrator, for balance due him in the estate of his father, *Pierre Gondran*, by the deceased, as his tutrix.

The grounds of opposition are, that it has been paid; prescription is also plead. The evidence on the part of *LeBlanc*, the opponent, consists in an act of "quittance" passed before a public officer, in which *Simon Gondran* acknowledges to have received from his mother, the deceased, the full amount of this claim.

The District Court refused to admit evidence to prove that, in fact, he had never received from his mother the amount stated in the "quittance," and that he gave her the said receipt only to enable her to raise a loan by mortgaging her property, which she could not do so long as his legal mortgage remained the first on the records. The ground sustained by the court is, that the written receipt could not be contradicted by parol evidence.

The Judge *a quo* erred. This evidence was admissible; the act of "quittance" was null and void between the parties, it being in derogation of the law which declares, "that every agreement which may take place between the tutor and the minor arrived at age of majority, shall be null and void, unless the same was entered into after the rendering of a full account and delivery of the vouchers, the whole being made to appear by the receipt of the person to whom the account was rendered, ten days previous to the agreement." C. C. sec. 284, Art. 355.

This Article was enacted for the protection of minors, and if they have not the right to establish the real nature of their transactions with their tutors, the laws made for their protection would have no effect whatever. This receipt was signed by *Simon Gondran* about one year after he arrived at the age of majority. As a receipt, it is merely *prima facie* evidence of the fact of payment, and not conclusive, and, therefore, the fact which it recites may be contradicted by oral testimony. Vide 5 An. 408; 10 An. 749; and 9 An. 129.

The court also considered the claim barred by the prescription of four and five years.

Even supposing that under the circumstances of this case, prescription could be successfully plead, yet the party ought to have the opportunity of showing that the course of prescription was arrested, if such was the case, by some one of the modes pointed out by law.

This part of the tableau must be sent back for further action of the lower court.

The administrator has placed himself on the tableau for \$1,384 85, being the total amount of commissions allowed by law on the whole assets of the estate. As this is only a provisional account, and the entire amount due the succession is not yet collected, he can only charge his fees on the part of the assets actually received by him. This tableau being, however, not artistically framed, does not exhibit what is the total sum that has been received by the administrator; there must, therefore, be a nonsuit for his commissions.

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The account must be corrected also in two items, admitted by counsel of administrator in his brief to be just, to wit, for \$177 for wood sold by the administrator and owned in partnership with the deceased, and for \$250 cash found in the estate, for which no credit was given by error of counsel.

As regards the amended account filed on the 7th January, 1856, claiming upon the part of the administrator a credit against the estate of \$2,160 for hire of slaves during the years 1850, 1851 and 1852, this claim is prescribed by Art. 3503 C. C. and is rejected.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed; and proceeding to render such judgment as ought to have been rendered by the lower court, it is ordered, adjudged and decreed, that the account be amended as follows, to wit, that there be a nonsuit in favor of *Simon Gondran*, administrator of the succession of *Julie Celeste Croizet*, widow of *P. Gondran*, against all the claims of *F. O. Bouis*, whether on the tableau or presented by way of opposition.

It is further ordered, that the administrator must be charged with cash in hand, belonging to the estate, being two hundred and fifty dollars, and the administrator must charge himself with the amount of wood sold, as admitted by him, to wit, one hundred and seventy-seven dollars (\$177); that the claim of *S. Gondran* for negro hire during the years 1850, 1851 and 1852, for \$2,160 is rejected.

That there be a nonsuit in favor of the estate against the commissions of the administrator as put on the tableau.

It is further ordered, that this case be sent back to the lower court, only to have the claim examined and adjudicated upon, of *S. Gondran* for \$3,656 25, being the alleged balance due him by the deceased, as his tutrix, in the estate of his father, *Pierre Gondran*; and the District Court is instructed to admit parol testimony offered in relation to the "quittance" given by him to his mother, by act passed before *Valery Ledoux*, the 2d April, 1849.

It is therefore further ordered, adjudged and decreed, that the account be amended in conformity with the above decree, and that it be homologated in all other respects, and that the administrator file an account within 20 days from the time this judgment is executory, in conformity to law, giving the credits and debits of the estate, and stating the balance in conformity with this judgment, and reserving, out of the funds on hand at the time of filing the present tableau, the *pro rata* share of *S. Gondran* for his claim aforesaid, of \$3,656 25, or the whole of it, if said funds suffice to pay in full the claims of all the creditors on the tableau, as amended; that he distribute the balance of said funds among the creditors who are thereon according to this decree, according to their legal rank and privilege.

It is further ordered and decreed, that the costs, so far as incurred, of the lower court, be paid by the estate; that three-fourths of the costs of appeal be paid by the estate, and the other fourth thereof by *F. O. Bouis*.

THE STATE *v.* JUDGE OF THE SIXTH JUDICIAL DISTRICT.

A *mandamus* will be issued by the Supreme Court only as auxiliary to its appellate jurisdiction. The Constitution does not confine the judiciary to the examination of such questions as may arise under the laws in force at the time of its adoption, but leaves to the Legislature the power of creating new classes of cases for the action of the courts. It is not necessary, to constitute a judicial proceeding, that it should have all the requirements of a regular suit.

The Act of 1855 "To enable married women to contract debts and bind their paraphernal or dotal property," is but an extension of the powers already vested in the courts, and the Legislature had the right of imposing the duty required by this Act upon any court of original jurisdiction. It not appearing that the refusal of the Judge to grant the certificate will occasion the applicant damage to the amount of \$300, the *mandamus* is for this additional reason refused.

ON the application of *Ann L. Webb* for a *mandamus* to the Judge of the District Court of East Baton Rouge, *Beale, J.*

MERRICK, C J. The relator applied to the Judge of the Sixth District Court, under the Act of 1855, (p. 254,) to be authorized to execute a mortgage in order, as is alleged, to pay a pressing debt due on account of the paraphernal estate of the wife.

The late District Judge being of the opinion that the duty imposed by the Act of 1855 is not judicial, declined to examine the applicant and grant or refuse the certificate authorized by the statute. He cites in support of his position the first Article of the Constitution, which divides the powers of the government into three departments, and prohibits each of the departments from exercising powers properly belonging to either of the others, and he concludes that the duty imposed by the Act properly belongs to the executive department, and ought to have been confided to a clerk or notary public, as deputy executive officers.

The present Judge in answer to the application for the *mandamus*, says that he waives any further answer to the application, and submits the case upon the reasons of his predecessor, as an answer, and as the ground of his refusal to act in the premises.

The line of demarkation between the different departments of the government is on many subjects so faint, that it sometimes presents questions of great embarrassment. The Constitution has but sketched the main outlines, and the filling up has been left to the departments themselves, and notably to the judiciary to determine where the one power ceases and the other begins. Hence great caution ought to be used in the determination of these questions. We find by the Constitution of 1845, it was provided that "No duties or functions should ever be attached by law to the Supreme or District Courts, or the several Judges thereof, except such as are judicial."

This prohibition has been omitted from the Constitution of 1852, and the question rests, as correctly stated by the Judge *a quo*, upon Article one of the present Constitution, which is nearly identical with the same Article in the Constitution of 1812.

We find that the Attorney General, the District Attorneys, Justices of the Peace, the Clerks, Sheriffs and Coroners are classed, as to their general duties, by the Constitution as belonging to the department of the judiciary.

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Under the Constitution of 1812, the Judges of the parish courts performed, for a period of thirty years, ministerial duties of the most opposite and varied characters. They ordered, as Judges of the probate court, the sale of real and personal estate, and sold it as auctioneers; they ordered petitions and executed their own orders as notaries public; they received wills as notaries, and ordered the same to be executed after the death of the party, as Judges; and finally, recorded the same as clerks of their own courts. They were Registers of Mortgages; they presided over Police Juries; they were Judges of elections; they authenticated the indentures of apprentices, and in certain cases transferred their unexpired terms; they licensed peddlars, registered births and deaths, recorded the brands of cattle, and held inquests over those who appeared to have come to their deaths by violence. Yet we are not aware that it was ever supposed that any of these multifarious duties were executive in the sense of the Constitution of 1812. They appear to have been considered ministerial, and as belonging rather to the judicial than the executive department of the government.

The ministerial duties, whether performed by the person exercising the judicial functions or by another officer as his agent, (as in the case of a Justice of the Peace who still acts as his own clerk,) are essential to the very existence of the judiciary. It is by the aid of ministerial acts and offices that matters are brought before the judiciary for judgment, and they are the hands by which the decrees of court are finally executed.

The duty, we conclude, imposed by the Act of 1855 is not one confided by the Constitution to the executive department.

Is the duty a ministerial or a judicial duty? If it is merely ministerial, although confided to the Judge of the District Court, there is no direct appeal from the act of the Judge to this court in any case, and, as a consequence, the application for a *mandamus* will not lie, because the *mandamus* is a process which issues from the court only as auxilliary to its appellate jurisdiction.

The Constitution, in the division of powers, was not intended to confine the judiciary exclusively to the examination of the classes of judicial questions which might arise under the laws as then in force, but it left to the Legislature the power of creating other classes of cases for the action of the court. The Legislature might compel the courts to take cognizance of new crimes and offenses. It might modify the modes of proceeding and the rules of evidence. It might submit new questions of law arising from civil proceedings for the consideration of the courts, and still there could be no ground for the charge, that the Legislature was conferring upon the courts any of the powers belonging to the executive department.

Let us now see what is the nature of the duties imposed by the Act of 1855. A proceeding may be a judicial proceeding without having all the formal parties required in a regular suit, as in the case of the naturalization of foreigners, and many matters entrusted to the probate court.

Powers have for a long time been conferred upon our courts to adjudicate upon questions of capacity and *status*. The statute of 1829 conferred on the District Courts the power of emancipating minors over the age of nineteen years; the court of probates had the power to appoint guardians and curators, which was conferred by statute as early as 1807. Power to interdict, to examine lunatics and send them to asylums is vested in the courts.

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Courts of justice had always exercised the power of decreeing a separation of goods between husband and wife. The Code of 1808 conferred upon the Judge power to authorize the wife to appear in a court of justice if the husband refused to give such authority. Moreover, if the husband refused to authorize his wife to pass an act respecting her separate estate, the Judge had power to cite or call her husband before him, and to authorize or refuse to empower the wife so to sign such act, and these provisions are retained in the Code of 1825. The statute of 1855, in question, is, therefore, but an extension of the powers already vested in the courts, and daily exercised by them. The Judge, by the last mentioned statute, is required to examine the wife separate and apart from her husband touching the object for which the money is to be borrowed or debt contracted. This examination is left to the discretion of the Judge, and he may conduct it under oath or not as he shall deem proper. It is not exclusive of other proofs which the wife may produce before him.

After such examination it is his duty, if he finds that the money to be borrowed or the debt to be contracted is intended for the advantage of the husband or the community, to refuse the authorization.

If on the other hand, the wife shall satisfy the Judge that the same is for the benefit of her separate estate, or of her dotal property it is made his duty to issue the certificate.

It appears to us from this examination of the statute, that the Legislature had the power to impose this duty upon any court of original jurisdiction, although, as the Judge *a quo* suggests, it might have been conferred upon the clerk, under Article 76 of the Constitution, and probably upon notaries and other ministerial officers, if it had pleased the Legislature to have clothed the proceeding with forms less solemn than the sanction of a judicial officer.

But we have already said that the writ of *mandamus* is only issued by this court in cases where it has appellate jurisdiction. It does not appear from the proceedings, that the refusal of the Judge to grant the certificate will occasion the applicant damage to the amount of three hundred dollars. Without, therefore, considering the question, whether this court would have power to revise the exercise of the discretion vested in the District Judges by the Act of 1855, we are of the opinion that there is no sufficient showing to authorize the writ of *mandamus* to issue in this case.

It is, therefore, ordered, adjudged and decreed by the court, that the petition for a *mandamus* in this case be dismissed, and that said *Mrs. Ann L. Webb* and husband pay the costs.

#### A. A. WILLIAMS v. W. F. TALBOT.

The redhibitory action cannot be maintained when the purchaser of a slave permitted many months to elapse, after the first development of disease, without resorting to medical aid.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*R. & H. Marr*, for plaintiff and appellant. *Moise & Randolph*, for defendant.

COLE, J. This is an action to rescind the sale of a slave, passed the 1st January, 1853, and to recover the price, on the ground that he was afflicted at

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that time with a redhibitory malady, which caused his death about the middle of June, 1854.

It is alleged that this disease was pulmonary consumption.

*Davis* was the overseer of plaintiff during the time the slave *Jack* was on his plantation, and testifies that he was apparently well at his arrival, but two or three weeks afterwards, witness discovered he was affected with a bad cough, particularly of nights; his health became gradually worse to the period of his decease.

He first noticed, in July or August, 1853, that *Jack* expectorated blood during his spells of coughing, and complained of fever and night sweats. He was employed at chopping wood up to the middle of October, 1853.

*Dr. Favrot* was first called to see him in July or August, 1853; he prescribed for him at that time, and afterwards in October of the same year.

*Dr. Vaughan* testifies he first examined *Jack* in December, 1853, and found him in an advanced stage of tubercular consumption.

*Drs. McKelvey and Picton* examined him in the spring of 1854, and the former testifies, he thinks, they found a cavity in one of the lobes of his lungs.

The neglect of plaintiff to send for medical aid for so many months after the first manifestation of symptoms of disease, constitutes, under the established jurisprudence of this court, a bar to his action of redhibition.

Plaintiff has sought to prove by scientific gentlemen, that the disease existed anterior to the sale; but the uncertainty which characterizes human speculations and hypothesis, renders such testimony nugatory, unless the witnesses had been called at the first opening of the malady, and had exerted their medical resources to a degree that they could reasonably testify the death did not result from neglect to apply scientific aid to the primary symptoms of disease.

He has also attempted to show that this slave was injured many years before the sale, and exhibited then some signs of the disease which subsequently terminated his existence; but evidence of this character cannot, as a general rule, prevail, unless a continuity of the malady is established from its inception to the death of the patient, with more or less violence; it may be, however, with brief periods of respite, according to the nature of the disease, and unless also within a reasonable time after the first signs of the disease medical assistance is invoked.

Even if it could be proved the malady was incurable *ab initio*, this would not be of itself sufficient to cancel a sale, for if a physician had been called at the primary manifestation of the disease, the life of the slave might have been extended for some years.

It would be unjust to coerce the vendor to return the price, when, if medical aid had been promptly summoned, the life of the slave might have been spared for years, and then even if he was obliged to take him back, he would have had the benefit of his services for a long period.

Humanity and a just regard to the rights of vendors require that parties should not recover, who have permitted many months to elapse, after the first development of disease, before invoking medical aid.

Vide 10 An. 263, 267, 302.

The judgment is therefore affirmed, with costs.

## GEORGE W. ROPER v. ELIZABETH MAGEE et al.

Plaintiff sued originally upon a *quantum meruit* for materials furnished and work done in building a house, and afterwards, by an amendment admitted by the court, set up a written contract. (10 An. 61.)

On the case being remanded, the defendants objected to the action being maintained against them, because they had not been put in default. *Held*: That this case does not come within the rule relied on by defendants.

The Act of 1839 repealed Article 554 C. P., and implies the allowance of interest on unliquidated demands.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
M. M. Cohen, for plaintiff. Alfred Hennen, for defendants and appellants.

VOORHIES, J. This case has already been before us. The report of the experts having been set aside, it was remanded to be proceeded in according to law. See 10 An. 61, 63.

The defendants are again appellants from a judgment rendered against them in favor of the plaintiff.

It appears from the judgment thus rendered that they were debited with the sum of \$1325, as the price stipulated for the work specified in the contract, and \$225 for extra work, deducting therefrom, as credits, the sum of \$1100, acknowledged to have been received by the plaintiff, and \$75 to complete some of the work shown to be defective. The result thus presented is, we think, justified by the evidence.

From a careful examination of the evidence, we are not enabled to say that the Judge erred in rejecting the claim for damages set up by the defendants in reconvention, alleged to have been sustained by them in consequence of the failure of the plaintiff to perform the work within the stipulated term.

The appellants have submitted several questions of law to our consideration.

1st. That the action cannot be maintained, as the defendants have not been put in default.

The case at bar does not come within the operation of the rule relied upon. See the case of *Loreau v. Declouet*, 3 L. R. 1.

2d. That the judgment should have been rendered against the defendants jointly and not *in solido*.

It is clear that the obligation of the defendants was joint and not *in solido*; hence the judgment is erroneous and must be reversed. C. C. 2075; 15 L. R. 588; 3 An. 162.

3d. That interest was improperly allowed the plaintiff on his claim, which was liquidated, from judicial demand.

The Article 554 of the Code of Practice, on which the appellants rely, was repealed by the Act of 1839, implying thereby that interest might be allowed on accounts or unliquidated demands.

It is, therefore, ordered, that the judgment of the court below be avoided and reversed; that the plaintiff recover of the defendants jointly the sum of three hundred and seventy-five dollars, with legal interest thereon from judicial demand until paid, and also the costs of the District Court, for the payment of which said defendants shall be bound *in solido*; and it is further ordered, that the costs of this appeal be paid by the plaintiff and appellee.

## SARAH JACOBS v. S. S. LEVY.

It is a sufficient compliance with Art. 72 of the Constitution, for the Judge to state in his decree that, "after hearing evidence and argument of counsel for the reasons assigned in open court, it is adjudged and decreed, &c."

**A** PPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*Wooldridge & Lemly*, for plaintiff. *B. C. Elliott*, for defendant and appellant.

**BUCHANAN, J.** The defendant is appellant from a judgment condemning him to pay one hundred and fifty dollars damages for a very gross slander of the chastity of plaintiff, who is a married woman, and whose behavior is proved to be correct.

The defendant relies in this court entirely on the want of a statement of reasons in the written judgment of the District Court.

The judgment reads as follows: "After hearing evidence and argument of counsel, for the reasons assigned in open court, it is adjudged and decreed," &c.

We think this satisfies the requirement of the Article 72 of the Constitution of the State, that Judges shall "in all cases adduce the reasons on which their judgment is founded."

Judgment affirmed, with costs.

## W. J. BLOCKER v. W. W. WHITTENBURG, Captain and Owner of Steamer B. E. Clarke.

The *lex fori* governs the admissibility and effect of evidence.

The principle as to the liability of common carriers laid down in the case of *Watts v. Steamer Susan*, 11 An. 43, re-affirmed.

**A** PPEAL from the Fourth District Court of New Orleans *Reynolds, J.*  
*H. B. Eggleston*, for plaintiff and appellant. *Charles B. Singleton*, for defendant.

**MERRICK, C. J.** The court did not err in excluding the deposition of *W. P. Blocker*, the son of the plaintiff. The admissibility of the testimony, as well as the sufficiency of the proof, are judged of by the laws of Louisiana, and not those of Texas where the plaintiff resides and the deposition was taken. The general rule, subject to several exceptions, is that the *lex fori* governs the admissibility and effect of evidence. 17 L. R. 458; 19 L. R. 214, 215.

Descendants are expressly prohibited from being witnesses in civil cases for or against their ascendants. This prohibition is not based exclusively upon the reason, that these relations are the forced heirs of each other, but because it has hitherto been the policy of the law to withdraw the witness from the necessity of testifying for or against those to whom he sustains such intimate and delicate relations, and to relieve the courts from the embarrassment of hearing and deciding upon this kind of proof. 5 L. R. 96; 7 Rob. 360. The present

case is not, therefore, within the exception to the general rule, and the testimony was properly rejected.

This suit is instituted to recover of the defendant \$1500, for damages alleged to have been done to plaintiff's cotton, which the defendant received at Swanson's Landing, on Lake Caddo, in the State of Texas, without instructions from the plaintiff, during its transportation to New Orleans.

The testimony is very conflicting, but we think the following facts are sufficiently established, viz: that the defendant took eighty-five bales of plaintiff's cotton at Swanson's Landing, on Lake Caddo, aboard of a flat made fast to the B. E. Clark; that he proceeded to Law's Landing and took more cotton on board the flat; that he moored the boat to a tree or stump about a quarter of a mile from the landing; that the flat sunk, in a rainstorm or a gale; that forty-five bales of plaintiff's cotton were at night thrown into the water by the sinking of the flat; that the captain and crew went into the water, which appears to have been shallow, and, by morning, secured the cotton upon the bank of the lake, and there placed the bales upon their edges, a little distance apart, in order that they might more readily dry; that the captain left the cotton in charge of the proprietor of Law's Landing; that he proceeded to New Orleans with the boat; that rainy weather intervened, and on the return of the boat the cotton was received aboard the boat saturated with water; that the captain collected \$135 salvage on the cotton, and paid \$35; that when the forty-five bales were delivered at New Orleans they were, with the exception of two bales, greatly damaged and rendered unmerchantable, and that the liability of the boat was admitted by the captain and owner.

On this statement of facts we do not think the inquiry important, whether or not the defendant took the cotton without authority. On the question how the injury occurred, one of the plaintiff's witnesses swears positively, that the flat was filled with water by the backing of one of the wheels of the boat, while the defendant's witnesses say it was occasioned by the waves. Some of the witnesses, those of the plaintiff, would lead us to think it was but a common rain accompanied with a little wind; others, officers and hands on the boat, describe it as a gale, so severe as to render it dangerous to remain near the pilot house. Again, on the subject of the stowage of the injured cotton, on the return of the boat, two of plaintiff's witnesses swear that it was stowed in the hold of the boat, and one of them, that it was so stowed against his remonstrances. On the other hand, some of the officers and hands swear, that it was stowed in the engine room, or in front of and near the boilers: where and how, they are not quite consistent among themselves. We shall not undertake to reconcile this testimony, nor decide which class of witnesses is entitled to be believed on this point.

We are of the opinion, from the testimony, that the short time the cotton was in the water in Lake Caddo was not the occasion of the damage to it. That if it had been immediately placed under cover, in a situation to dry, it would not have become injured to any great extent. That the injury was occasioned by exposure to the rain for several days following, and then being transported in this condition to the city, either in the engine room, by the boilers, or in the hold.

Whether, therefore, the captain had improperly obtained the cotton or not, is immaterial, because he was bound to that diligence, during the whole of the period of the transportation of the cotton, which the law exacts of the common

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carrier. He was wanting in that diligence in leaving the cotton upon the bank of the lake, exposed to the weather and the almost daily rains, often common at this season of the year. He should have left a tarpaulin to cover the cotton during the rains, or provided other means of shelter. In the case of *Watts v. Steamer Sazon* we said: "The common carrier is bound to the most exact diligence, as much to avoid danger which may be reasonably apprehended in the future, as to rescue the property from present and imminent peril." 11 An. 45. We conclude that the defendant is responsible. See 8 An. 298, *Bond v. Frost*, and 12 An., *Steamer Jean Webre v. H. Kendell Carter & Co*; *Parson's Mercantile Law*, 215; 12 Howard, 280.

We think the damages are proven to be \$1245 50.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and it is now ordered, adjudged and decreed, that the plaintiff do have and recover judgment against the said defendant, for said sum of twelve hundred and forty-five dollars and fifty cents, with five per cent. interest thereon from the first day of June, 1854, until paid, and costs of both courts, and that the plaintiff have a privilege upon said steamboat, to secure the payment of the same.

#### T. S. McCAY v. J. S. CHAMBLISS.

An action of redhibition to set aside the sale of a slave on the ground that the slave had no little mind or sense as to be utterly worthless, cannot be maintained.

Such a case falls within the Article 2497 of the Code as a defect apparent to any ordinary observer.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.* *McCay* and *Edwards*, for plaintiff. *J. B. & C. T. Bemiss*, for defendant and appellant.

VOORHIES, J. The defendant is sued on his promissory note, which he alleges was given in payment of the price of a slave named *Riley*, sold to him by *K. W. McKinney*, with full warranty. *James S. Person*, as holder of the note by blank endorsement from *McKinney*, the payee, caused the same to be protested for non-payment at maturity.

The failure of consideration is the ground of defence on which the payment of the note is resisted. The defendant avers, that after the sale the slave *Riley* proved to be unsound and worthless, and died of a disease under which he labored at the time of the sale; that, under the laws of Mississippi, the domicile of the parties where the contract was made, he has the right to avail himself of his defence against the plaintiff, as holder of the note.

Conceding his proposition to be true, on which we express no opinion, we do not feel ourselves authorized, after a careful perusal of the evidence, to say that the Judge *a quo* erred in his conclusion.

The alleged sale, it appears, took place on the 8th of March, 1852. One of the defendant's witnesses testifies, "that he was informed, and believes," that the negro is dead; that he died during the spring or summer after *Mr. Chambliss* bought him. He does not know of what disease he died; he saw him

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several times previous to the 15th of October, 1852, when he seemed to be in good health; but the last time he saw him, about a week or two before he died, he seemed to be in bad health, which he attributed to his exposure while runaway. The other witnesses, *Dennis* and *Lewis*, both testify that "*Riley* had no little mind or sense as to render him utterly worthless," the former adding that he was informed by *R. G. Brown*, the overseer of the defendant, that *Riley* died in August, 1852, but of what disease he did not know; neither did he know the state of his health between the 8th of March and 15th of October, 1852, except while under his charge, just after he had runaway, when he looked to be in bad health. There is nothing showing the nature of the disease of which the slave died, nor the date of its origin. No physician appears to have been called in. Neither does it appear that any attempt was ever made by the defendant to have the sale annulled on account of the alleged defects. But it is insisted by him that the proof of the defectiveness of the slave's mind is conclusive.

It is not pretended that the slave was afflicted with madness, one of the absolute vices of slaves giving rise to redhibition. In the case of *Briant v. Marsh*, 19 L. R., 392, it is said, that actual idiocy may, perhaps, be considered as one of the absolute vices, although not specially classed as such under Article 2502 of the Code. But the qualification which follows, clearly indicates, we think, that the court did not intend to sanction such an interpretation. On the contrary, the organ of the court remarked: "But such a defect as that would, we think, be so apparent to an ordinary observer, as to bring the case within the Article 2497 of the Code." So, in the present case, if the slave "*Riley* had so little mind or sense as to be utterly worthless," it appears to us that it must have been apparent to an ordinary observer at the date of the sale. Hence, we do not think the defendant can have any just or legal ground of complaint.

Judgment affirmed.

MERRICK, C. J. I concur in the decree in this case under Art. 2511 C. C., but I am not prepared to say there may not be cases of mental imbecility which would give rise to an action of redhibition, because not a vice discoverable on mere inspection by a person of ordinary experience.

#### J. L. POWERS v. W. E. HUBBELL—TURNBULL & Co., Intervenor.

The keeper of a livery stable has no privilege by law upon carriages and horses kept in his stable. When the vendee of a carriage covenanted with his vendor not to sell it to the prejudice of his vendor's right, and a subsequent purchaser assumed the payment of the price and received possession from the original vendor: *Held*, that the vendors privilege still existed.

APPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*J. J. Michel*, for plaintiff. *Semmes & Edwards* and *Budd & Lambert*, for intervenors and appellants.

MERRICK, C. J. This case presents the question, whether the keeper of a livery stable has a privilege upon the carriage and horses kept by him, and, if so, whether it is superior to that of the vendor of the carriage.

The plaintiff's counsel contends, that the privilege of the keeper of the livery stable for the keeping of the horses and the storage of the carriage is that of

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the lessor, and he cites the Articles 3185, 3223, 3224, 3225 of the Civil Code, and 5 An. p. 718, in support of this position.

The lessor, under the contract of letting and hiring, parts with the occupancy of the real estate, and the same goes into the occupation of the lessee.

Here the possession of the livery stable is in the keeper, who has never parted with the possession. The hack driver who takes his horses and carriage to the livery stable for keeping, has himself possession of no part of the building, and the reward which the owner exacts for such keeping is not rent of the stable.

The Articles of the Code cited do not confer upon the plaintiff a privilege, and we are not aware of any other Articles of the Code which gives the keeper of a livery stable a privilege upon the carriage sent there with the horses to be kept. Whether he has a privilege for preserving the horses by feeding them, it is not necessary to decide. The plaintiff contends that the intervenors have lost their privilege upon the carriage, because they sold it first to one *Madden*, who afterwards sold it to the defendant, and, therefore, the intervenors have, under Article 3194, lost their privilege.

We think the intervenors have not lost their privilege. *Madden*, in a written contract, covenanted not to convey the carriage to the prejudice of the rights of the intervenors.

Before the sale to the defendant, in pursuance of *Madden's* contract, the carriage was delivered to the intervenors, from whom the defendant received it. He, moreover, agreed by an entry on *Madden's* contract, to all the conditions of the sale to *Madden*, and assumed the payment of his notes to the intervenors, at the time they delivered him the carriage.

Thus, *Hubbell* placed himself in *Madden's* shoes as purchaser, and, as a consequence, the property was still bound for the payment of the vendor. The vendors had not allowed the carriage to be sold without making their claim and obliging the new vendee to receive possession of them, and to assume to them the payment of the price. As against the plaintiffs who had no privilege at all it must be held that the defendant stands in the relation of a vendee to the intervenors, and not having paid the price their privilege must be recognized.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court, upon said demand in intervention, be avoided and reversed, that the vendors' privilege in their favor be recognized upon the proceeds of said carriage and harness, for the payment of said sum of five hundred and eighty-five dollars and interest, as set forth in their petition of intervention, and it is further ordered, that the proceeds of said carriage and harness, after deducting the costs of sale, viz: the sum of five hundred and sixty-one dollars and sixty-five cents, be paid over to the said intervenors, in part satisfaction of the vendors' privilege, and that said plaintiff, *James S. Powers*, pay the costs of the appeal and the cost of the intervention in the lower court.

## M. A. CORNISH, f. w. c., v. L. N. SHELTON.

Where the disease of which a slave died manifested itself within three days after the sale, but death was caused by a relapse not attributable to negligence on the part of the purchaser, *held*, that the sale should be avoided.

The presumption of the existence of a disease at the time of the sale, from its manifestation within three days after the day, may be rebutted by evidence.

**A**PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*W. H. Hunt*, for plaintiff. *L. E. Simonds*, for defendant and appellant.

COLE, J. This suit is instituted for the recovery of the price paid for a slave, on the ground that she was affected with a redhibitory vice, which caused her death within three days after the sale.

It is proved that plaintiff purchased from defendant the slave *Diana* on a Saturday; she was taken sick very early on Sunday morning, and died of yellow fever within three days after the sale.

The vice having made its appearance within three days after the sale, is presumed to have existed before. C. C. 2508; *Landry v. Peterson*, 4 An. 96.

It is averred by defendant that yellow fever is not a redhibitory vice; that not only is the disease curable, but that in this case the patient was actually cured, and through some imprudence or negligence she was taken with a relapse, of which she died.

It appears that her attending physician was employed by defendant, and at one time he considered her out of danger. A person who has been sick with the yellow fever is not, however, free from the danger of a relapse for a considerable period after the disease has apparently departed. If this slave committed any imprudence in leaving her bed too soon, or in eating improper food, it may perhaps be attributed to the belief of the physician that she was out of danger, which may have prevented him from warning her sufficiently of the danger of such imprudence. As this physician was employed by defendant, the latter cannot take advantage of any want of prudence on his part.

It is established that plaintiff rendered good attention to the deceased, and that that the decease of *Diana* is not attributable to any negligence on her part.

As this slave died of a relapse of the yellow fever, which exhibited itself within three days of the sale, then her death was produced by the effects of a disease which the law presumes to have existed before the sale.

We admit that the presumption declared by Article 2508 C. C., to wit: that the appearance of the vice within three days after the sale is not conclusive, but may be rebutted by evidence; in this case, however, there is no testimony to rebut the presumption of law. See *Dugas v. Estillette*, 5 An. 559.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed, with costs.

## BENJAMIN MAY v. JOHN F. BALL.

When a party acknowledges service of a rule on him to set aside a judgment, and contests it on its merits, it has the effect of a waiver of all exceptions to the form of proceeding.

Where judgment was rendered without a hearing or consent of parties, *held*, that although rendered in favor of the plaintiff, he had a right to have it set aside if it was not such a judgment as he wanted.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Emerson & Huntington*, for plaintiff and appellant. *A. G. Semmes*, for defendant.

**SPOFFORD, J.** In this case it appears that a judgment was taken upon what purports to be a confession by the defendant *sous seing privé*, before the cause was at issue, and without the consent or knowledge of the plaintiff or his counsel.

It was erroneously stated upon the minutes of the lower court that this judgment was rendered upon motion of the plaintiff's counsel.

Upon discovering this error, the plaintiff took a rule upon the defendant to show cause why the judgment should not be set aside and annulled. The defendant's counsel acknowledged service, and contested the rule upon its merits, without taking any exception to the form of proceeding.

The facts stated above were proven, and no explanatory evidence was given by the defendant's counsel to show how such anomalous proceedings were brought about.

The District Judge dismissed the rule, because he thought he could not disturb a judgment which he had signed. We think this was an exception to the form of proceeding which had in effect been waived by the defendant.

When there is no reconventional demand, a party plaintiff is at liberty to discontinue his suit at any time. Judgment cannot be entered against his will unless due steps have been taken to put the cause at issue and have it fixed for trial, or unless he is in default himself.

The judgment in this case was improvidently rendered without a hearing or consent of parties, and when the plaintiff was not in default. Although the judgment is in his favor, he may have it set aside, if it was not such a judgment as he wanted. The plaintiff here asserts that he did not desire the judgment to be rendered, and that he is aggrieved by it.

It is, therefore, ordered, that the judgment on the rule be avoided and reversed, and that the prayer of the rule be granted, the judgment rendered on the 3d and signed on the 5th December, 1856, set aside and annulled, and the cause remanded for further proceedings, according to law; the costs of this appeal to be borne by the defendant and appellee.

## L. E. TURNER, Curator, v. C. D. SMITH et al.

An acknowledgment by the father of natural children by his own slave, besides being offensive to morals, is a mere nullity.

A slave can neither sue for alimony nor inherit.

The Act of the Legislature of the 6th March, 1857, which forbids the emancipation of slaves thereafter in this State, renders impossible the enfranchisement of slaves under a last will and testament, not carried into execution for that purpose prior to the passage of the Act of the Legislature.

The testator, after a disposition in favor of his slave *Rachel* and her children, of one-third of his estate, declared as follows: "I give and bequeath the remainder of my estate to my said executor, *Charles Dudley Smith*." Held: That as it was not the intention of the testator to give to his executor the portion of the estate previously devised to others, the legacy in favor of the slaves which lapsed in consequence of the impossibility of their enfranchisement, enured to the benefit of the heirs of law of the testator as in case of intestacy.

APPEAL from the District Court of West Feliciana, *Ratliff, J.*

*U. B. & E. Phillips*, for plaintiff. *S. J. Powell, Muse and Miller*, for the heirs, appellants.

BUCHANAN, J. *John Turnbull*, a resident of the parish of West Feliciana, made the following declaration in writing before a notary public and two witnesses of said parish, on the 19th day of December, 1855:

"That he does by these presents acknowledge *Mary*, a girl of mulatto color, aged about seven years; *Eliza*, a girl of mulatto color, aged about six years; *Dudley*, a boy of mulatto color, aged about four years; *Charles*, a boy of mulatto color, aged about two years; and *Minerva*, a girl of mulatto color, aged about five months, to be his children, by him begotten of their mother *Rachel*, a mulattress or griffe, aged about twenty-three years; said children and their mother being now his slaves."

On the same day that he made this declaration, (the 19th December, 1855,) *John Turnbull* made his olographic testament, containing the following (with other) clauses:

"I give and bequeath to my natural children, *Mary*, a girl of mulatto color, aged seven years; *Eliza*, a girl of mulatto color, aged six years; *Dudley*, a boy of mulatto color, aged four years; *Charley*, a boy of mulatto color, aged two years; *Minerva*, a girl of mulatto color, aged five months, (now my slaves,) their freedom, and direct my executor to take the steps necessary to obtain their emancipation according to the laws of this State, or to send them to some country or State, to be by them selected, where slavery is not recognized, if their emancipation with leave to remain in the State cannot be lawfully obtained; in either case, the costs and expenses of obtaining their emancipation and removal to be borne by the mass of my estate. I also give and bequeath her freedom to my slave woman *Rachel*, of mulatto color, aged about twenty three years, and I wish my executor to cause her to be emancipated with permission to remain in the State, or if this cannot be done, to remove her to some free State or country, all at the cost of my estate. I also give and bequeath to my said natural children, duly acknowledged by me by public act passed before *D. C. Jones*, notary public, on the 19th December, 1855, to wit, *Mary, Eliza, Dudley, Charley, Minerva*, and to their mother, *Rachel*, whom I have directed to be emancipated, one-third of my entire estate, to be divided equally among them, or as many of them as may be living at my death."

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*John Turnbull*, the testator, died on the 17th June, 1856; and his will was admitted to probate and execution on the 27th June, 1856. *Lewis E. Turner*, the plaintiff, was appointed by the court curator of the slave *Rachel* and her children, mentioned in the will, and has brought this suit against the executor, who is also universal legatee, as well as against the next of kin and heirs at law of the testator. His petition prays, that the last will and testament of *John Turnbull* be decreed to be good and valid, and be ordered to be carried into effect and executed in all its parts; and that the legacy to *Rachel* and her children be ordered to be set apart and paid over to petitioner in his capacity of curator. The executor answered, joining in the prayer of the petition, but praying that in case any of the legacies should lapse or be set aside, that the same might enure to his (the executor's) benefit as residuary legatee. The heirs at law also joined issue, pleading the nullity of the clauses of the will which we have copied above, and of the notarial declaration of paternity, as being contrary to law and good morals. They further pray that they may have judgment for the property devised to *Rachel* and her children, and that the emancipation of the devisees be declared null.

It is unnecessary for us to inquire how far the dispositions of *Turnbull's* will would have been susceptible of execution, previous to the passage of the Act of the Legislature of the 6th March, 1857, entitled an Act to prohibit the emancipation of slaves.

We consider it proper, however, to declare our conviction that the so called act of acknowledgment of the children of *Rachel* as the natural children of the testator, is a mere nullity. The object of an acknowledgment of a natural child, is to confer upon such child certain rights, such as alimony, or inheritance. But a slave can neither sue for alimony nor inherit. And the same notarial act which declares the individuals named to be *Turnbull's* children, declares at the same time that they are his slaves. Such an acknowledgment, besides being offensive to morality, is without any operation or effect in law. In the case of *Fletcher*, 11 An. 59, we gave effect to an acknowledgment of paternity by a free man in regard to his slave, but in that case, the acknowledgment was contained in an act of enfranchisement which had received full and entire execution.

In the present case, *Turnbull* took no steps towards emancipating the children of *Rachel* during his lifetime, although he lived for six months after the so called act of acknowledgment. His declaration, in his will, of an intention to enfranchise them, was only intended to be operative after his death; and could not produce any effect until after his death, because it was always in his power, up to the moment of his death, to revoke his will. C. C. 1455.

No steps had been taken by the executor of *Turnbull* towards manumitting these slaves, up to the institution of this suit, (3d September, 1856,) nor at any time subsequently, so far as we are informed by the pleadings and evidence. In the meantime, the Act of the Legislature of the 6th March, 1857, above alluded to, has been promulgated. It is as follows:

"Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened, That from and after the passage of this Act, no slave shall be emancipated in this State."

The enfranchisement of *Rachel* and her children having thus become legally impossible, the legacy made to them by the testator of one-third of his estate has lapsed.

The subject of enfranchisement of slaves is one over which the State has always exercised a controlling power. In the case of *Delphine v. Guillet*, 11 Ann. 425, we said: "The policy of the State has annexed conditions to the enfranchisement of slaves, which the court cannot permit to be disregarded." This language holds good of a legislative prohibition to enfranchise altogether.

The only question that remains is, to whom shall the lapsed legacy enure—to the residuary legatee, or to the heirs at law? Upon this point, the case of *Compton v. Prescott*, 12 Robinson, is conclusive in favor of the heirs at law.

The clause in *Compton's* will was: "I give and bequeath all the remainder of my estate, real and personal, to my four neices, (naming them,) to be equally divided among them."

This was held to exclude an intention on the part of the testator to give, in any event, to those neices, that portion of the estate previously devised to others; and those previous devises which were set aside, accordingly enured to the benefit of the heirs at law as in case of intestacy. The words of the residuary devise in *John Turnbull's* will, were similar. Immediately following the dispositions in favor of *Rachel* and her children, we read: "I give and bequeath the remainder of my estate to my said executor *Charles Dudley Smith*." 12 Rob. 63 to 67.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; that as to the bequest of freedom to *Rachel* and her five children, contained in the last will and testament of *John Turnbull*, the demand of plaintiff be rejected; that the legacy by universal title of one-third of the testator's entire estate to *Mary, Eliza, Dudley, Charley, Minerva*, and to their mother *Rachel*, to be equally divided among them, or as many of them as may be living at the testator's death, be annulled, avoided, and considered as not written; that *Charles C. McDermott, Anne E. Smith, Sarah Sterling, wife of Lewis Sterling, Sen., Isabella Semple, and Daniel Turnbull*, heirs at law of the deceased *John Turnbull* and appellants herein, recover of *Charles Dudley Smith*, testamentary executor of *John Turnbull*, one-third of the entire estate of the said *John Turnbull*, to be computed from the date of the opening of the succession; and that the plaintiff and appellee pay costs in both courts.

# JAMES D. HILL v. PASCALIS LABARRE et al.

The first section of the Act of the Legislature of 1855 (Session Acts, 477) merely prescribes the form of the writ of *hæc fuit*; the second section of that Act prescribes the period within which the writ may be returnable. Held: That when the writ was returnable on a fixed day, which was not less than thirty nor more than seventy days, it was not informal. Held, also, that the Sheriff's return, containing no mention of a call on the plaintiff to point out property, was clearly defective, and could not be made the legal basis of a proceeding for a surrender. The default of the Sheriff being established, it was incumbent on him, in order to avoid liability for the amount of the writ, to show a legal excuse, and the plaintiff was not bound to prove that he had been damaged.

APPEAL from the District Court of Jefferson, *Burthe, J.*  
*J. N. Brickell*, for plaintiff and appellant. *Purvis & Dugué*, for defendant.

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VOORHIES, J. This is a rule on *Pascal Labarre*, as Sheriff of the parish of Jefferson, to show cause why he should not be made liable for the full amount of an alias writ of *fi. facias*, directed to him from the Fourth District Court of New Orleans, in the suit of *Dick & Hill v. John P. Bemiss*, in consequence of his failure to return the same within the legal delay. His surety is also made a party defendant.

His answer is that there is no cause of action alleged by the plaintiff against him.

The writ was issued on the 18th of June, 1856, and made returnable on the fourth Monday of July following. The return thereon is as follows, to wit:

"Received June 18th, 1856. Made demand on defendant, who answered he had no money and no property in the parish. Returned 28th July, 1856.

JAS. C. WILSON, Deputy Sheriff."

The certificate of the Clerk of the 4th of September, 1856, shows that up to that time the writ had not yet been returned to his office.

*James C. Wilson*, the only witness examined on behalf of the defendants, testifies that "the first writ was returned nothing done, *Mr. Bemiss* not being in the parish at the time. *Mr. Estlin*, attorney for plaintiff, said he would issue an alias, and directed a demand to be made on *Bemiss*. *Mr. Estlin* said that he merely wanted a demand made on *Bemiss*, in order to force him to make a surrender under the new law of 1855. After the alias was placed in the Sheriff's hands he did not see *Mr. Estlin*. He had received instructions before the writ came in his hands. *Mr. Bemiss* resides in this parish. Saw *Mr. Bemiss* in the house he now occupies. Two years ago *Mr. Bienvenu*, Deputy Sheriff, was sent to the house of *Bemiss* to make a demand on the first *fi. fa.* The alias *fi. fa.* was returned into court after the return day." He further testified that he had carefully examined the registers of the conveyance office, and was unable to find any property standing in the name of *John B. Bemiss*.

The defence rests on three grounds: "1. That the writ itself was not in the form prescribed by the statute. 2. That the attorney for plaintiff was well apprised of the insolvency of *Bemiss*, and that the money could not be made, and had declared that he only wanted a demand made on *Bemiss*. 3. That the plaintiff had shown no damage."

None of the grounds thus urged, under the state of facts presented, appear to us sufficient to justify the Sheriff in failing to make a formal return of the writ within the legal delay.

We think the Judge *a quo* erred in considering the first ground tenable. The first section of the Act of 1855 merely prescribes the form of a writ of execution or *fi. facias*, whereas the second section prescribes the period within which the writ may be made returnable, to wit: "in not less than thirty nor more than seventy days." Construed with reference to each other, and to the object to which each applies, the provisions contained in both sections appear to us to be perfectly consistent. Hence the writ was formal, as it was not made returnable "in less than thirty nor more than seventy days."

If the object of the plaintiff was as stated in the second ground, it is certain that the Sheriff's neglect to make a formal and seasonable return of the writ had the effect of defeating instead of promoting such object. Making no mention of a call on the plaintiff to point out property, the return was clearly de-

fective, and could not, therefore, have been made the legal basis of such a proceeding.

Neither was the plaintiff bound to allege or prove that he had been damaged. The default of the Sheriff being established, it was incumbent on him to show a legal excuse. See the case of *Brand v. Wilkinson*, 11 An. 273, and the authorities there quoted.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed, that the rule herein taken be reinstated and made absolute, and that the defendants pay the costs of both courts.

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### BANK OF NEW ORLEANS v. CITY OF NEW ORLEANS.

Where payment has been made of a tax which might have been resisted at law, the money cannot be recovered :

1st. If the tax is on property, whether exempt from general taxation or not, and the assessment is rather a toll or contribution than a tax, and the party paying has derived a direct benefit from the improvements made by the imposition of the tax or assessment.

2d. Where the property was liable to taxation, and the illegality of the tax depends upon some informality in the passage of the law establishing the tax.

But where the tax is imposed, not for the direct benefit of the party who sues to recover it, as having been paid in error, but for the general support of the commonwealth, and it has been imposed upon property or a profession exempt by law from taxation, the money must be refunded.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J.*

*Elmore & King* and *J. B. Eustis*, for plaintiff. *J. Livingston*, for defendant and appellant.

COLE, J. Plaintiff claims of the city of New Orleans \$525 for this, to wit: that on the 19th day of January, 1855, the city of New Orleans exacted from petitioner \$500 as a tax on the profession he exercised during the year 1854, and \$25, amount of railroad tax; that this tax was not legally due, but was paid through mistake and error of law, without any consideration or obligation.

The answer is a general denial, and an averment that plaintiff was bound to contribute to the legal government for protection received. Judgment was rendered for plaintiff, and the city has appealed.

Plaintiff relies on the case of the *City of New Orleans v. Southern Bank*, 11 An. 41, to show the illegality of this tax.

In that case it was decided that its stock could be taxed at the same rate as other personal property, but not in any other manner, and therefore that the calling, business or profession of the Southern Bank could not be taxed.

The only question, then, is whether a tax paid on a profession exempt from taxation can be reclaimed as money paid in error.

We will refer to a few cases in which reclamations were made for money alleged to have been paid in error, and then deduce from them and the law in general the principles which govern suits for the recovery of money paid in error for taxes.

In the case of the *Catholic Society v. New Orleans*, 10 An. 75, it is decided that the exemption of the society by law from payment of taxes on its property, repels the idea of anything like a natural obligation on the part of the plaintiff for their payment, and this decision is based on Articles 2280 and 2281 of the Civil Code: "He who has paid through mistake, believing himself a

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debtor, may reclaim what he has paid. To acquire this right, it is necessary that the thing paid be not due in any manner, either civilly or naturally. A natural obligation to pay will be sufficient to prevent the recovery."

The court in this case also say: "If these institutions merited the protection and encouragement of the State government, it is difficult to perceive how any natural obligation could possibly exist on their part for the payment of taxes from which they were exempted. Vide *Ligon v. New Orleans Navigation Co.*, 2 L. R. 129.

In the case of *Worsley v. Second Municipality of New Orleans*, 9 Rob. 325, this court refused to compel defendant to refund money alleged to have been paid in error, on the ground that if the Act of 1808 did not authorize the Municipality to exact the wharfage dues, yet the corporation had, at their own expense, conferred upon the growing commerce of the country an immense advantage; that the money was voluntarily paid, and plaintiffs derived advantage and profit from those expenditures for the wharves and levees, which the city was under no legal obligation to furnish, to the extent, at least, that they now exist.

They knew when they paid that it was in the nature of a remuneration for the use of the wharves; there was a natural obligation to pay, and equity forbids that they should recover it back.

In the case of *Hills v. Kernion*, 7 Rob. 523, this court refused to cause defendant to refund money as paid in error, on the ground that equity forbidding that plaintiffs should profit by the labor of the defendants without remuneration, and the consideration for which the extra compensation was paid not being immoral or unjust, there was a natural obligation on the part of the plaintiffs to pay, and that no action will lie to recover back the amount.

In the case of *W. L. Campbell v. City of New Orleans*, ante, p. 84, the decision of this court, refusing to compel the city to refund a tax alleged to have been paid in error, was based on the ground that the obligation of plaintiff to pay the tax subsisted in conscience and according to natural justice, because it was neither immoral nor unjust, although informally contracted. In this case there was a mere informality in the imposition of the tax, but *Campbell* had derived benefit from the expenses incurred by the city for his benefit and protection, and it had the abstract prerogative to impose taxes upon the property assessed. Vide *City of New Orleans v. Phillippi*, 9 An. 44.

It was then just for him to pay it. There was a natural obligation on his part to assist in the support of the expenses of the city, and the latter could not then be condemned to refund the tax.

In this suit the court also say: "The case would present quite a different aspect if the tax had been paid upon property not subject to taxation at all."

In *Jamison v. City of New Orleans*, ante, p. 346, the plaintiff had been assessed \$400 for the opening of Benton street. In that case the city had been at expense in opening it for the benefit of the property holders contiguous to it. *Jamison* having paid the assessment without objection, and it being really just and equitable that he should contribute a part of the expenses, he was then under a natural obligation to pay it, and this court decided that he could not recover.

We deduce from the preceding cases and the law in general the following principles which ought to govern suits instituted for the recovery of money paid in error for taxes, to wit: Although a corporation could not enforce the

payment of a tax if resisted at law, yet if the party has paid it he cannot recover it back under the following circumstances:

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1st. Where the tax is on property, whether exempt from general taxation or not, and where the assessment may rather be considered a *toll* or contribution than a tax, and where the party derives a *direct* benefit from the improvements made by an imposition of a tax or assessment, as, for example, in the case of the opening of a street—the benefit to the property holders in its vicinity—the party cannot then recover back his money, because as he enjoys a direct advantage from its expenditure, it is not equitable that he should have both the benefit and the money. There is a natural obligation on him to pay, therefore he cannot recover it.

We have said above that the party cannot recover in the preceding state of facts, even if his property is exempt from general taxation, and this is just, for although his property may not be subject to general and public taxes to be assessed and collected for the benefit of the town, county or State at large, yet it is liable to such assessments as are intended and directed to be made upon the owners of lots and lands, or other property which may receive benefit and advantage by the improvement; and this distinction was held by the Supreme Court of the State of New York, in the case of a religious association which was there exempt from taxation under the general law exempting churches from taxation, and it was held liable for an assessment for the opening of a street. 11 Johnson, 80; *Worsley v. The Second Municipality of New Orleans*, 9 Rob. 335.

2d. The party cannot recover back his money where the property was liable to taxation, and the illegality of the tax depends upon some informality either as to the time of the enactment of the law imposing it, the mode of promulgation or any other error relative to its passage. This is also just, because there is a natural obligation on every citizen to contribute to the support of his government.

3d. When the tax is imposed, not for the direct benefit of the party who sues to recover it back as paid in error, but for the general support of the commonwealth; and when it is levied on property or on a profession exempt by law from taxation, then the money must be refunded, because as the legislative power did not deem it requisite to tax such property or profession for its support, then the taxation thereof was unnecessary for the purpose of defraying the expenses of the State. It would not then be just to force a party to pay what was not needed, and in this case, if a party has paid a tax he can recover it back, because there was no natural obligation on him to pay to the State what was not necessary to its support; in other words, he was under no obligation to make it donations.

As the Bank of New Orleans has paid a tax on its profession from which it was exempt by law, defendant is bound to refund the money.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed, with costs.

STOFFORD, J., recused himself, being a stockholder in the bank.

BUCHANAN, J., took no part in this decision.

VOORHIES, J., concurring. In the case of the *City of New Orleans v. The Southern Bank*, 11 An. 41, this court held the tax of \$500, levied under the city ordinances "on every bank organized and doing business under the free banking law of this State," to be illegal.

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The tax levied on the Bank of New Orleans under that ordinance was paid by the plaintiff. In the *Catholic Society v. City of New Orleans*, 10 An. 78, where the property assessed was exempted from taxation, it was held that the defendant was entitled to recover back the tax as illegally exacted, inasmuch as no natural obligation existed for its payment. In a case subsequently decided, (*W. L. Campbell v. City of New Orleans*, ante, p. 34,) where there was no law exempting the plaintiff's property from taxation, the court held that the action of repetition did not lie, as a natural obligation existed to pay the tax assessed. The distinction existing between those two cases is clearly defined in the latter.

Considering that the Bank of Orleans was exempted from the payment of the tax for which it was assessed, according to the decision in the case of the Southern Bank, I concur in Mr. Justice Cole's conclusion.

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CHARLES METCALFE v. J. S. CLARK.

Where an insolvent had neglected to make one of his creditors a party to the insolvent proceedings and being himself syndic, had, in violation of the Act of 1837, suffered nine years to elapse without filing a tableau of distribution, it was held, he was not in a condition to compel such creditor to become a party to his stale proceedings in surrender, but that the creditor might wholly disregard them.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J.*  
*A. A. Frazier*, for plaintiff. *Frank Haynes*, for defendant and appellant.

MERRICK, C. J. This suit is brought under the Act of 1853, to revive a judgment rendered in December, 1844. In September, 1845, the defendant made a voluntary surrender of his effects to his creditors, and placed the plaintiff on his bilan as a creditor for the amount of the judgment, but no citation was ever served upon the plaintiff, nor was he in any manner made a party to the proceedings.

The present suit was commenced in December, 1854. The defence to the action is, that there has as yet been no tableau of distribution filed, and under the authority of the cases of *Taylor v. Hollander*, 4 N. S. 535, and *Conery v. Heno et al.*, 9 An. 587, this case ought to be cumulated with the insolvent proceedings.

The decree of the lower court revived the judgment of 1844, but condemned the plaintiff to pay the costs. The defendant appealed; the plaintiff acquiescing in the decree of the lower court.

It has been held by this court, that where a creditor was not made a party to the insolvent proceedings in a reasonable time, he was not bound by the tableau of distribution and might disregard the same, and proceed upon his original demand. 3 N. S. 262; 6 L. R. 578; 18 L. R. 462.

Here the defendant, who was the syndic, having in the first instance neglected to cause the plaintiff to be made a party to the insolvent proceedings, and moreover having suffered nine years to elapse without filing a tableau of distribution in violation of the Act of 1837, is not in a condition to compel the plaintiff to become a party to his stale proceedings in surrender. *Leges vigilantes non dormientibus subseruiunt.*

Judgment affirmed.

## DENNIS D. BOYLE et al. v. FERRY and KNAPP.

In attaching a vacant lot of ground or tract of land, it is not necessary the Sheriff should take possession of the property attached by the actual and corporeal detention of the same. The execution of the writ has the legal effect of vesting in the Sheriff the civil possession of the defendant.

Where the defendant in the writ, or his tenant, held the natural possession of the property attached, it would be different.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*E. Rawle*, for plaintiffs and appellants. *O. Dorsey*, for defendant.

VOORHIES, J. This is an action of partition in which the plaintiffs claim the ownership of an undivided fourth of a certain lot of ground in the parish of Jefferson, as described in their petition. *Isaac Knapp*, one of the defendants, also claims the ownership of the same property. Both parties assert title under *Elnathan S. Hall*; the former by virtue of a forced alienation, and the latter, a sale executed in the State of Ohio on the 11th of March, 1850, and recorded in the parish of Jefferson on the 1st of June, 1850.

The plaintiff, it appears, instituted a suit by attachment against *Elnathan S. Hall*, whom he represented as residing permanently out of the State, for the recovery of \$4183 14, besides interest. The Sheriff's return on the writ of attachment is as follows:

"Received, July 21st, 1849; on the same day, attached the following property, to wit: the undivided fourth of a lot or lots in the city of Lafayette, square No. fifty-four, on the corner of Laurel and First streets, and running down from said corner of Laurel street one hundred and eighty-three feet and a half, thence back through the centre of the square, towards Live-Oak street, one hundred and sixty feet, thence up through the square to First street, towards the river, one hundred and sixty feet to the corner or place of beginning; and on the same day, posted a copy of the within attachment at the door of the District Court of this parish. Returned 21st July, 1849.

"F. ST. AMAND, Deputy-Sheriff parish of Jefferson."

On the 9th of February, 1850, a curator *ad hoc* was appointed by the court to represent the absent defendant *Hall*. Upwards of two months after his appointment, the curator *ad hoc* filed an answer pleading the general issue. On the 4th of June, 1850, a final judgment was rendered in favor of the plaintiffs for the amount claimed in their petition, with privilege on the property attached. On the 10th of August, 1850, the plaintiffs became the purchasers of said property at a judicial sale under the judgment thus obtained by them. The record in this case contains an admission, that the lot attached was not enclosed or built upon, and was vacant.

It is objected, under this state of facts, that the attachment is void, on the ground that the Sheriff did not seize and take into his possession the property attached. In attaching a vacant lot of ground or tract of land, we do not apprehend it to be the duty of the Sheriff to take natural possession of such property. The execution of the writ, as in the present case, has, of itself, the legal effect of vesting in the Sheriff the civil possession of the defendant. But where the defendant in the writ or his tenant held the natural possession of the property attached, we apprehend that it would be different, and the principle in-

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voked in the case of *Stockton v. Downey*, 6 An. 581, would then be clearly applicable. See 19 L. R. 254.

The signification of the word attach is to seize, to take by legal authority. The use of the word *seized* certainly would not have given more force and effect to the attachment than the use of the other word *attached*, for it appears to us both convey or express substantially the same sense or meaning. Giving a different construction to the law, or the one contended for by the defendant *Knapp*, would, it seems to us, give rise to a vain and idle ceremony, which we cannot presume was ever intended by the law-maker. Hence we conclude that the Judge *a quo* erred in considering as essential that the Sheriff should have taken possession of the property attached by the actual and corporeal detention of the same.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed, that a partition of the property described in the plaintiffs' petition, preceded by an inventory, be made between the parties, as prayed for, and according to the mode prescribed by law, the defendant and appellee *Isaac Knapp* to pay the costs of this appeal, those of the court below to abide the final result of the suit between the parties, and as regulated by law.

#### SARAH GREENWOOD et al. v. THE CITY OF NEW ORLEANS et al.

The family Bible being produced as evidence to show that a party to judicial proceedings was a minor when they took place, it appeared that a blank had been left for the date of his birth, which was filled up *in pencil*; it also appeared that the Bible, instead of being kept as a record of events at the time of their occurrence, contained several entries made with the same pen and ink, and apparently at the same time. *Held*: That as the witnesses, after a lapse of fifty-one years, could not refer to any distinct positive fact occurring at the time, by which the date could be satisfactorily fixed, the testimony was not sufficient to set aside proceedings which had been acted upon and tacitly acquiesced in for nearly thirty years.

The father and mother, while their children are under their authority, may appear for them in court in any kind of civil suit in which they may be interested.

The interest of the parents does not conflict with that of their children, on account of the usufructuary interest the parents have in the property of their children.

When the proper parties are before the court for the rendition of a decree, the parties to it can only take advantage of any irregularities in it by an appeal or action of nullity prosecuted in due time. A decree pronounced by a competent tribunal, with the proper parties before it, although rendered by consent, being followed by its immediate execution, is a judgment capable of acquiring the form of the thing adjudged, and will produce that effect if no appeal be taken from it, nor action of rescission or nullity instituted within the period allowed by law.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J. L. Janin & H. Griffon*, for plaintiffs. *C. Roselius, P. E. Bonford, G. Eustis & J. B. Eustis and J. J. Michel*, for defendants and appellants.

MERRICK, C. J. *Shepherd Brown*, who was a partner of *John McDonogh*, died in January, 1818, possessed of much real estate separate and in partnership with *McDonogh*. He left an olographic will, dated 8th November, 1815, which was admitted to probate in New Orleans on the 6th of February, 1818. He left several collateral relations to whom he bequeathed his estate.

Among others, he bequeathed to the heirs of his sister *Sarah*, wife of *William Eaty*, one part or one-eighth of his whole property, to be enjoyed by her during her natural life, as will appear from the following dispositions of the will:

"I will, that immediately after my death an inventory and estimate shall be made of all my property and effects in the State of Louisiana, by two or more persons whom my executors hereafter named shall appoint, the same to be done on oath, and such parts of my property as shall be thought by my executors necessary or beneficial to the succession to be sold, shall be disposed of; but as the interests of my friend and partner *John McDonogh* are generally the same, it is my desire that all sales of property in which he is concerned shall be made after taking his opinion, and that his remaining interest in such undivided joint property be not injured; further, that no sale of property be made until the debts of my aforesaid partner *John McDonogh* and myself, under the firm of *John McDonogh & Co.*, and *Shepherd Brown & Co.*, are paid, except for the purpose of paying such debts. After payment of these debts and debts due individually by myself, (which are small,) I will, that all my property and effects of every kind, except such as shall hereinafter be disposed of, shall be, and remain for ever, the property of those hereafter named, in the following proportions, either to be held by them jointly, and the profits enjoyed by them in said proportions, or sold and divided among them in said proportions, as a majority among them (counting by the amount or proportion) shall determine, viz: the whole of my property and effects remaining after the payment of all debts against it, shall be apportioned into eight undivided parts, one of which parts, or one-eighth of all my net property as above, I will and bequeath to the heirs of my brother *John Brown*, who died in Jonesborough, State of Tennessee, to be equally divided between his sons and daughters, and in case of the death of any of them, leaving heirs, such heirs to enjoy, in the same manner, the deceased father or mother's part."

"I will and bequeath to the heirs of my sister *Sarah*, wife of *William Eaty*, one part, or one-eighth of my whole property, in the same manner as the two foregoing, but the use or benefit of the same to be used and enjoyed by her for life."

He appointed *John McDonogh*, *William W. Montgomery* and *John Hiram Brown* his executors, giving to them, or any two of them, full powers without the interference of judicial or extra judicial authority.

On the 15th and 16th days of June, 1818, the executors caused the real estate, both separate and that in partnership with *McDonogh*, to be sold at public auction. *McDonogh* himself, although one of the executors, became the purchaser of many tracts and lots of land in different places. The titles however were, at that time, to most of the tracts of land, only inchoate.

The executors filed their account in 1822, in which the price of these purchases by *McDonogh* were carried to the credit of the legatees, and the balance in the hands of the executors, consisting of notes payable in one, two and three years, was set down at \$57,244 88.

On the 25th day of June, 1823, most of the heirs of *Shepherd Brown*, deceased, filed in the District Court a suit, among other things, attacking with great particularity the sales made by the executors to *McDonogh*, and praying that said sales be set aside and petitioners restored to their rights in said immovables, and for judgment against *McDonogh* and the other executors for the value of such immovables as were in a situation that a partition or return could not be awarded.

*Mrs. Sarah Eaty* was a party to this suit, but no mention was made that she was a married woman, neither in the petition or power of attorney.

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On the 24th day of January, 1824, *William Brown*, acting upon insufficient powers of attorney, entered into a compromise of this suit, and a final judgment was rendered therein. From this judgment, *Sarah Eaty* and all the other plaintiffs prosecuted their appeal to the Supreme Court. The judgment of the lower court was reversed and the cause remanded for a new trial. See case of *Brown et al. v. Brown*, 2 N. S. 441.

After the case was remanded, certain of the heirs in whose favor the judgment had been reversed, compromised with *McDonogh* a second time, this time upon sufficient powers, and a judgment was rendered to that effect in the Probate Court, in February, 1825, reserving to *Mrs. Eaty* and her heirs the right to make themselves parties to the judgment and to accept the same terms.

On the 26th day of May, 1825, *William Eaty* and wife, *Sarah Eaty*, and their children, *Elizabeth Greenwood* and husband, *Sarah B. Matilda Eaty* and *Shepherd B. Eaty*, as persons of full age, and *William Eaty* and *Sarah Eaty* as tutors to *Susan Eaty* and *Abraham S. Eaty*, executed a very full and formal power of attorney to *W. H. Eaty*, and authorized him to compromise with the executors. *Henry W. Eaty* was also a child of *William* and *Sarah Eaty*. In the power of attorney, the usufruct of *William* and *Sarah Eaty* to the property or money to be recovered or obtained in compromise is recognized and the right of property in the children.

On the 7th day of July, 1825, *Henry W. Eaty*, *Perigrine Greenwood* and *Elizabeth Eaty*, his wife; *Hannah Matilda Eaty* and *Shepherd B. Eaty*, describing themselves as majors, and *Susan Eaty* and *Abraham S. Eaty*, minors, by *William Eaty*, their father and natural guardian, *William Eaty*, as husband of *Sarah Eaty*, filed their petition in the Probate Court, reciting the former litigation and the compromise made with their co-heirs, praying that they be recognized as parties; that their petition be served on the defendants; that the legacy be decreed to belong to the petitioners, and the usufruct or life estate therein to said *Sarah* and *William Eaty*; and that said executors be decreed to pay petitioners \$9,803 80 stipulated to be paid for said legacy in said compromise. *McDonogh* acknowledged the capacity and accepted service of the petition of the plaintiffs.

The same day, a judgment was entered by consent, it being signed by *John McDonogh* and *John R. Grymes*, for defendants, *Henry W. Eaty*, for himself and as attorney in fact of all the other plaintiffs; *James Workman*, of counsel for plaintiffs, and *Watts & Lobdell*, of counsel for plaintiffs.

The judgment purports to be rendered on the calling of the cause by the consent of *William Eaty* and *Sarah Eaty*, his wife, *Henry Eaty*, *Perigrine Greenwood* and *Elizabeth*, his wife, *Hannah B. Eaty* and *Shepherd B. Eaty*, and *Susan Eaty* and *Abraham S. Eaty*, minors represented by their father and mother, their natural guardians and tutors represented by *William H. Eaty*, their attorney in fact, and by *James Workman* and *Watts & Lobdell*, for plaintiffs. It decrees to each of said children of *William* and *Sarah Eaty*, in full satisfaction of their portion of the succession of *Shepherd Brown*, \$1633 00, making in all \$9803 80, charged with the usufruct of said *William* and *Sarah Eaty*, and decreed the defendants to pay the costs, and that *John McDonogh* save the plaintiffs harmless as warrantors from all claims on account of the partnership of *Shepherd Brown & Co.* and *John McDonogh & Co.*, and that all the rights which the plaintiffs or any of them might or may have in the lands, tenements, debts, rights and credits belonging to said succession of *Shepherd Brown*, be ceded to *John McDonogh*, surviving partner.

The day the judgment was entered and signed by the *parties* in open court, viz, July 7, 1825, *W. H. Eaty*, as attorney in fact, acknowledged the receipt of the \$9808 80 awarded by the judgment.

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The judgment was signed by the Probate Judge on the 16th of July, 1825.

On the 2d day of July, 1855, within a few days of thirty years after the compromise and decree, the present plaintiffs, *Sarah Greenwood* and others, as heirs of *Shepherd B. Eaty* and *Abraham S. Eaty*, filed their petition attacking the judgment of 7th July, 1825, alleging that the same was not binding on *Shepherd B. Eaty*, *Abraham S. Eaty* and *Susan Eaty*, because they were not parties to the same, because the agent who undertook to represent them had no authority therefor, nor to compromise their claims, and because they were minors, and because no compromise could legally be made except under the authority of a competent tribunal. They attack the adjudications made to *McDonogh* for the same causes of nullity set up in the said action instituted by *Edward Livingston* on behalf of the heirs of *Shepherd Brown*, in 1823. They pray to be recognized as legatees of *Shepherd Brown*; that defendants be ordered to file an account; that petitioners be decreed to be the owners and put into possession of all the movables and immovables and slaves of *Shepherd Brown*, and that the court may order a partition thereof; that defendants be decreed to pay petitioners 11-192 parts of the fruits and revenues of said property; that for such property as has been alienated by said *McDonogh*, the defendants be decreed to pay petitioners the fruits and revenues up to the time of alienation, and the price received by him and interest, and for general relief.

The defendants, by their answer, put at issue the heirship of plaintiffs, plead the judgment of 1825 as *res judicata*, and the prescriptions of two, four, five, ten, twenty and thirty years.

From this sketch of the proceedings, it is evident the burden of the controversy rests upon the plaintiffs to show that the judgment of July, 1825, is not obligatory upon them, and they have addressed themselves to this argument with great research and array of authorities.

Their case must rest in effect on these propositions of fact and law which we extract from the voluminous briefs of the plaintiffs, viz:

1st. *Shepherd B. Eaty*, deceased, although described as a major in the proceedings, was really a minor in July, 1825, and consequently not bound by the decree.

2d. *Susan Eaty*, the plaintiff, and *Abraham S. Eaty*, deceased, as minors, were not properly represented by their father and mother in the compromise, and they are not therefore bound by the said consent decree.

We will consider these propositions in the order we have set them down.

I. To prove that *Shepherd B. Eaty* was a minor, a family Bible is produced, which purports to contain a record of the births and deaths of the children of *William* and *Sarah Eaty*. In the entry for *Shepherd Brown Eaty*, a blank appears to have been left for the date of his birth, and it is filled up in pencil as of the 25th of February, 1805. This would have made him 20 years of age at the time of the decree. The plaintiffs also produce sundry witnesses who swear they were acquainted with the parties; that the Bible was the family Bible, known by one witness for forty years, and that the entries therein correspond with their recollections. One witness swears to the ages of the children as corresponding to the entries in the Bible, but evidently testifies with reference to it.

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In our opinion, the testimony is entirely insufficient to set aside proceedings which have been acted upon and tacitly acquiesced in for nearly thirty years. *Shepherd B. Eaty* died in 1835, he therefore survived this judgment ten years. He does not appear to have complained of it.

The Bible produced, instead of being kept as a record of events at the time of their occurrence, appears to contain several entries made with the same pen and ink, and apparently at the same time; hence the blank left for the date of the birth of *Shepherd B. Eaty*.

The witnesses speak, after a lapse of fifty-one years, of general recollections, and not one of them refers to any distinct, positive fact occurring at the time, by which the date could be satisfactorily fixed.

On the other hand, we have the power of attorney made at a time when the fact of *Shepherd B. Eaty's* majority, whether it had arrived or was about to arrive, was, on account of its proximity, prominently in the mind of all the parties to that instrument, and when there was no interest to misrepresent the fact, and in which *Shepherd B. Eaty* takes upon himself, with the concurrence of his father and mother and major brothers and sisters, who all knew his age, the capacity of major. We think the plaintiffs have failed in their proof on this branch of their case. *Shepherd B. Eaty* must be held to have been a major, and bound by the decree of July, 1825.

II. *Susan Eaty* and *Abraham S. Eaty* appear as minors in the proceedings of 1825, and as represented by their father and mother.

It is provided by Art. 55, p. 54, of the Code of 1808, and by Art. 251 of the Code of 1825, that "Fathers and mothers owe protection to their children, and of course, as long as their children are under their authority, appear for them in court in every kind of civil suit in which they may be interested, and they may likewise accept any donation made to them." But it is said in this instance, the interest of the father and mother was in conflict with that of the minor. It is difficult to perceive in what respect; for the law gives to the father and mother of the minor the enjoyment of his estate as usufructuaries, without security, until his majority, and still authorizes them to appear for the minors in courts of justice. And in this instance, the will conferred the same right of usufruct for life upon the mother, and both father and mother, as well as the minors, were interested in acquiring as much as possible on which the usufruct could take effect. C. C. 553, 239; Old Code, p. 114, Art. 23.

But it is said the consent judgment is nothing but a contract of compromise, and the father and mother having only the power of tutors, could not enter into the same without the advice of a family meeting. We do not find that the power of the father and mother over the property of the minor entrusted to their administration is to be exercised under the advice of a family meeting; but if it were so, it would be one of those irregularities of which the parties could only avail themselves on appeal, or possibly by an action of nullity or rescission within the delay allowed by law, because the proper parties were before the court for the rendition of the decree. 2 Marcadé, cinquième ed. p. 181, No. 10.

Again it is said, that the judgment is a consent decree, and inasmuch as the forms of the law have not been observed, it is not obligatory upon the minors, and at most, it cannot be considered as anything more than a provisional partition which may be disregarded at any time within thirty years, and a suit for a definitive partition instituted.

The cases of *The Union Bank v. Marin*, 3 An. 35, and *Lecarpentier v. Lecarpentier*, 5 An. 499, are cited to show that consent judgments decide nothing; that they merely authenticate private agreements between the parties and render them executory, and as to third parties, have the effect of transactions made in authentic form, and that under a consent decree a partition has not the effect of a judicial partition.

We have already had occasion to limit the application of the principles so broadly announced in the case of *Hewitt, Heran & Co. v. Nolan Stewart's Executors*, 11 An. 100, where we held that a judicial mortgage results from a *bona fide* judgment, though rendered upon the confession of the defendant.

So too in the case before us, we think they are not applicable and that the Probate Court had before it the proper parties, and that the decree pronounced by that tribunal, although rendered by consent being followed by its immediate execution, was a judgment capable of acquiring the force of the thing adjudged, and inasmuch as no appeal was taken from it within the delay allowed by law, and no action of rescission or nullity having been brought within the period allowed by Article 615 of the Code of Practice, or even Article 3507 of the Civil Code, must be held as final and conclusive between the parties to the same, and consequently have the like effect upon their heirs. *Vaughan v. Christine*, 3 An. 328; *Porche v. Ledoux*, 12 An. 350.

This view being decisive of the controversy, it is unnecessary to consider the numerous questions presented by both the plaintiffs and defendants' counsel in their briefs and oral arguments.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the defendants and against the demand of the plaintiffs, and that the plaintiffs pay the costs of both courts.

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#### THE STATE v. CECILIA CLAY, f. w. c.

The repealing clause of the Act of the Legislature of 1855, relative to crimes and offences, repealed the second section of the Act of February 21st, 1828, which made it a crime, punishable with imprisonment at hard labor, "to prepare combustible materials, and to put them in any place, with an intention to set fire to a mansion house or other building."

**A** PPEAL from the First District Court of New Orleans, *Robertson, J.*

*M. A. Foute*, for the State, appellant. *Tappan & Holt*, for defendant.

MERRICK, C. J. The appeal in this case has been taken by the State from a judgment of the lower court quashing the indictment. The prosecution is based upon the second section of the Act of February 21st, 1828, which makes it a crime to prepare combustible materials, and to put them in any place with an intention to set fire to a mansion house or other building. The punishment imposed by the statute was not less than ten nor more than fifteen years' imprisonment at hard labor.

The defendant contends that this section of the statute was repealed by the Act of 1855, relative to crimes and offences. (See p. 130.)

The statute of 1855 treats *ex professo* of "offences against habitations," &c.

On this subject it has radically changed the previous law. By the first section of the Act of 1828, setting fire to other buildings besides mansion houses

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was punished with death. By the Act of 1855, the penalty is less than was the penalty for preparing combustibles to set fire to such buildings under the Act of 1828.

An examination of the Act of 1855, on this subject, and a comparison of it with the former laws, will show that it was the intention of the Legislature to arrange under the head "offences to habitations" all the laws which it intended to continue in force, on the subject of setting fire to buildings, vessels, &c. The repealing clause of the Act of 1855, therefore, repealed the second section of the Act of 1828. See Acts of 1855, p. 137, sec. 46, 47, 48, 49 and 50.

Judgment affirmed.

SPOFFORD, J., concurring. In addition to the reasons given by the Chief Justice, I observe that the specific "subject matter" of the second section of the Act of 21st February, 1828, would seem to come within the purview of section forty-eight of the crimes Act of 1855, which prescribes the punishment for all malicious attempts to set fire to buildings and vessels. The old law was, therefore, superseded by the new, and the indictment should have been framed under the new law.

### J. A. GUILLOTTE v. CITY OF NEW ORLEANS.

Such portions of the Act No. 71 of 1852, entitled "An Act to consolidate the city of New Orleans and provide for the government and administration of its affairs," as are not contrary to the Act No. 164 of 1856, entitled "An Act to amend an Act entitled 'An Act to consolidate the city of New Orleans and to provide for the government of the city of New Orleans and the administration of the affairs thereof,'" are not repealed by the latter Act.

The former city authorities having had the power "to regulate every thing which relates to bakers," the present city authorities have not been deprived of it by the Act of 1856.

There is nothing unconstitutional in those parts of the city ordinance which regulate the weight and inspection of bread.

The authority given by the ordinance to seize bread unstamped or deficient in weight, and to conduct the offender before the Recorder to be by him dealt with, is not a violation of Article 6 of the amendments to the Constitution of the United States.

Violations of the city ordinances may be prosecuted before the Recorders of New Orleans, where it is so directed by law or the ordinance.

The forfeiture, for the use of the city workhouse, of bread illegally baked is not a violation of Art. 105 of the Constitution.

The contract spoken of by Article 165 of the Constitution, the obligation of which the Legislature is prohibited from impairing, is a contract in existence at the time of the passage of the law.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J.*  
*C. Dufour*, for plaintiff and appellant. *J. J. Michel*, for defendant.

MERRICK, C. J. This suit, commenced by injunction, is brought to cause the ordinance of the city "Establishing the assize and regulating the weight and inspection of bread," to be decreed illegal.

The question to be decided is thus stated by the plaintiff's and appellant's counsel, viz:

"The issue submitted to this court is whether there is any such law as would authorize the defendant to pass and enforce the ordinance referred to above,—marking out the bakers of New Orleans as a peculiar set of traders, and holding that the bread manufactured by their skill and labor is not property, and its worth depends not on the market price. If no such law exists, the ordinance is an

oppressive municipal assumption of power. If a provision is designated, as a warrant for the action of the city, it must, like all legislation in derogation of common right, be strictly construed. And the duty would then arise for this court to see how far such an exceptional law could stand the test of the Constitution."

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The powers of the city of New Orleans are in part conferred by the Constitution of the State, and in part by legislative enactments. It can have no other powers, from those sole sources of power, than those conferred either expressly or by necessary implication.

Assuming the title of the ordinance to express clearly its objects, has the Constitution or the Legislature conferred upon the city of New Orleans the right to pass the ordinance?

We find by the Act of 1816, the Legislature conferred upon the city, among other things, the right "To establish one or more market places, and to determine the mode of inspection for all comestibles sold publicly, either in said markets or in other places; to regulate everything which relates to bakers, butchers, tavern keepers, or to grog shops, and other persons keeping public houses, draymen, horse drivers, water carriers, and slaves employed as day laborers; to fix the salaries of the said draymen, horse drivers, water carriers and day laborers, and to make any other regulation which may contribute to the better administration of the affairs of the said corporation, as well as for the maintenance of the police, tranquility and safety of said city." This power however was accompanied by a proviso, that the Mayor and council should not have the power of fixing the price of any article sold in market or other places. But in regard to butchers meat, and to the bakers of bread, the statutes of 1807 and 1814 seem to have expressly conferred the power to regulate the price, and by the 7th section of the Act of 1816 it was provided that no powers before granted were withdrawn from the Mayor and council by that Act.

When the city was divided into municipalities, in 1836, all the powers of the city government were conferred upon the respective municipalities, and these again were, by the twenty-second section of the Act of 1852, consolidating the city, conferred upon the new corporation. Acts, 1852, p. 48.

But the Act of 1856, which is entitled "An Act to amend An Act entitled 'An Act to consolidate the city of New Orleans, and to provide for the government of the city of New Orleans and the administration of the affairs thereof,'" has, while making, in many respects, the most minute provisions for the administration of the government of the city, only vested the Common Council with "all the powers, rights, privileges and immunities incident to municipal corporations and necessary to the proper government of the same," thus adopting the precise language of the commencement of the 22d section of the Act of 1852, but entirely omitting the most important portion of that section which conferred upon the city "all the powers, rights, privileges and immunities possessed and enjoyed," as already observed, by the First, Second and Third Municipalities of New Orleans, and which provided further, that the ordinances in force in said municipalities should remain in full rigor, until modified or repealed by the Common Council. Moreover, the 133d section of the Act of 1856 repeals all laws and parts of laws contrary to the provisions of the Act. The ordinance in question having been passed in October, 1856, two questions fairly arise, viz: Is the power to establish the assize and regulate the weight and inspection of bread, a power, right, privilege or immunity incident to a

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municipal corporation, and necessary for the proper government of the same? If not, were the powers conferred upon the city or rather continued in the city by the Act of 1852 repealed by the Act of 1856?

As it is the duty of municipal corporations, for the government of cities, to have regard to the health of the same, it is possible that the Act of 1856, considered as an original Act and only charter of the city, might be held to confer the power upon the city to prevent the sale of bread made out of unwholesome flour and materials, and, as a consequence, cause the same to be inspected; but we do not think it could be held, under any of the ordinary rules of construction, to have conferred the right to regulate the assize, that is the weight and price of bread, for this is a power not absolutely necessary for the proper government of the city, although it is a power we presume expressly conferred upon most cities by their charters.

It becomes important, therefore, to consider the second question, viz: whether the Act of 1856 has repealed so much of the former law as conferred the power upon the city to regulate the assize of bread?

It will be observed that the title of the Act of 1856, as recited, is to amend the Act of 1852. Under Article 115 of the Constitution it cannot, therefore, be held a total repeal of that statute, nor does it under Article 116 purport to reenact and publish at length any portion of the twenty-second section of the Act of 1852, although it has adopted a phrase from this section. We conclude that such portions of the Act of 1852 as are not contrary to the Act of 1856, are not repealed by it. The powers, therefore, conferred by the former Legislatures upon the city, and embraced in the 22d section of the Act of 1852, and not contrary to nor inconsistent with it, have not been repealed.

The city, and formerly the municipalities, having had the right "to regulate everything which relates to bakers," (provided they allowed them the proper profit upon a barrel of flour,) the Act of 1856 has not deprived the present city authorities of that power.

Coming now to examine the particular portions of the ordinance complained of, we see nothing unconstitutional or illegal in those parts of the ordinance requiring every baker to cause the bread to be marked with his initials or some other mark, nor in regulating the size of the loaves of bread to be sold. The fifth section which authorizes, between the rising and setting of the sun, certain police officers to enter any bake-house, shop, store-house, &c., where bread is kept, and stop and detain all bakers carrying bread for sale, to examine whether the same is marked, and ascertain the weight thereof, and in case it is unstamped, or wanting in weight, or not baked according to the ordinance, to conduct the offender before the Recorder, there to be dealt with, is no violation of Article 6 of the amendments to the Constitution of the United States.

That Article applies to process issued and searches made by officers of the United States Government, and has no application, as a shield, to persons who, by their employment, bind themselves to comply with certain police regulations of the individual States, or of particular cities deriving their powers from one of the States.

The Recorders of New Orleans, under the Constitution and laws of the State, have certain judicial powers. Offences for the violation of the city ordinances may be prosecuted before them where it is so directed by law or the ordinance, and we see nothing illegal in enforcing the penalties of the ordinance before the Recorder. The forfeiture of the bread illegally baked for the use of the city

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workhouse is no more a violation of Article 105 of the Constitution, which provides that vested rights shall not be divested unless for purposes of public utility and for adequate compensation previously made, than is the fine of a thousand dollars, or other sum, inflicted at the discretion of the court in the case of a conviction for an assault and battery, or other offence.

The illegal bread, if it can be considered as having any value, and the penalty in money denounced for crime, are *forfeited* to the State or city by reason of the crime, and the State or city in exacting the penalty is not taking that which is strictly the property of another in the sense of Article 105 of the Constitution.

Judgment affirmed.

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SAME CASE ON A RE-HEARING.

MERRICK, C. J. An application for a re-hearing has been made by the plaintiffs in this case, on the ground, that the argument of plaintiff's counsel on the constitutional question has been entirely overlooked.

We think we misapprehended the force of the plaintiff's argument on one branch of the case. As we understand it now, it is thus: that the Act of the Legislature allowing the city authorities to fix the price of bread as well as the size of the loaves to be sold, violates Articles one hundred and five and one hundred and twenty-three of the Constitution, because it enables the city to fix the price of bread below its market value, and thus take from the plaintiff, for the public use, the difference between the actual value and the price fixed without compensation, and also imposes upon him a tax or burden which is unequal, and not in proportion to the value of the property he sells with reference to other property.

The contract spoken of by Article 105 of the Constitution, the obligation of which the Legislature is prohibited from impairing, is a contract in existence at the time of the passage of the law. The Article 105 has never been supposed to infringe upon the power of the Legislature to regulate future contracts; a power exercised by every people and inherent to sovereignty. Thus, our Legislature has prescribed the forms and conditions of contracts, and, in the contract of sale has declared that unless certain forms be observed the sale shall be null as to third persons; that if the thing sold is affected by vices and defects the purchaser may rescind it, that if the owner of an immovable should sell the same for less than one-half of its true value, he may annul the same although in his contract he had expressly abandoned the right of claiming such rescission, and had declared that he gave to the purchaser the surplus of the value of the thing sold. In these and the like cases there is no pretence that the obligation of a contract had been impaired, because the law in force at the time enters into and forms a part of the contract. If the supposed contract is made in violation of the law, it has no valid existence as a contract.

Now, when the lawgiver says to the baker, "you shall not make and sell bread within certain boundaries unless you limit your profits to a certain sum for each barrel of flour which you make into bread, and unless you conform to certain regulations as to the size of the loaves, the places and times of sale," the obligation of no contract has been impaired, for none has been entered into; no vested right has been taken away, for no man has a vested right (un-

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less the same be expressly granted by a special Act of the Legislature) to furnish a certain portion of the population with bread, and no tax has been levied upon the baker, for no part of the price of the bread goes into the public treasury, and it is entirely optional with him whether he will sell his flour or make it into bread, or pursue some other vocation.

Re-hearing refused.

WM. REED et al. v. H. H. CROCKER et al.

Conventions by which it is agreed that rights to a future succession shall be sold for a particular consideration are prohibited by law, and consequently null.

The renunciation of a succession must be made by a public act before a notary, in presence of two witnesses.

A special transfer and assignment of rights to an estate, in favor of one person, cannot be viewed as a renunciation, and is not a ratification of a promise to renounce.

To determine the nature and effects of acts, the motives of the parties must be considered.

Collation is not obligatory on collaterals who inherit in default of forced heirs. It is only due by those who have received in advance of their legitimate portion as forced heirs. Special legacies to collaterals, when there are no forced heirs, belong exclusively to the legatees, and are not subject to collation.

A testator who has natural children complies with the law if he bequeaths three-fourths of his estate to one or more of his legitimate collateral relatives. They cannot be regarded as forced heirs.

**A**PPEAL from the Second District Court of New Orleans, *Morgan, J. Ogden & Leovy and P. E. Bonford*, for plaintiffs. *Purvis & Dugué, R. Hunt and L. Pierce*, for defendants and appellants.

COLE, J. *Elisha Crocker* died, leaving a large estate and no forced heirs.

By his will he appointed *H. H. Crocker*, one of his natural children, his executor, and distributed his property between his housekeeper, who is a colored woman and was once his slave, and his children whom he had by her, and who were legally acknowledged by him previous to his death.

The deceased left no father nor mother, and only one brother and one sister, (since dead,) and the descendants of brothers and sisters, who could only claim his succession as legal heirs.

To a number of these collaterals he gave, during his lifetime, considerable sums of money and other property.

*Reed*, claiming to be a legitimate nephew, brings this suit to annul the will, so far as it disposes of more than one-fourth of the property, asks to be recognized as an heir, and demands a partition of the estate. In this he is joined by others of the same relationship.

As all the parties are anxious to have this litigation terminated, we shall, therefore, express no opinion on the various preliminary questions raised by the learned and distinguished counsel on both sides, and proceed at once to the merits of the case.

The heirship of the plaintiffs to the deceased is satisfactorily established. The will is partially invalid. Art. 1473 C. C. provides that when the natural father has not left legitimate children or descendants, the natural child or children, acknowledged by him, may receive from him, by donation *inter vivos* or *mortis causa*, to the amount of the following proportions, to wit: one-fourth of his property, if he leaves legitimate ascendants or legitimate brothers or sisters,

or descendants from such brothers and sisters, and one-third if he leaves more remote collateral relations.

Art. 1474 declares that: "In all cases in which the father disposes in favor of his natural children of the portion permitted him by law to dispose of, he is bound to dispose of the rest of his property in favor of his legitimate relations; every other disposition shall be null, except those which he may make in favor of some public institution."

This will is then null, so far as it relates to three-fourths of the property.

The natural children are entitled to one-fourth of the property, and the legal heirs or their assignees take three-fourths thereof.

The most important question in this case is whether certain assignments are valid which were made by some of the heirs to said *H. H. Crocker*. Before determining this, it is proper to decide as to the validity of certain contracts made by said assignors with the deceased.

They are all of a similar form, and commence first with a receipt of a bond of the city of New Orleans, its description and amount, and interest that it bears. Then follows the important part thereof for this controversy, to wit: "Which bond I promise to keep carefully and faithfully, and not alienate or incumber to the prejudice of the said *Elisha Crocker*, who is the owner thereof, but it is the express understanding and agreement between the depositor and holder, that the said holder will collect the semi-annual interest as it becomes due according to the tenure of the bond, and apply the same to her own use and benefit, as she may think proper, without being obliged to refund the same to the said owner of the bond, for the interest thus made. And should the depositor hereafter think proper to donate the said bond to the holder, as a bequest, she, the said holder, agrees to accept the same in full satisfaction of all claims she might set up or urge against the property or effects which might be left at the decease of the donor."

These contracts are clearly invalid, and can have no binding force in law. They are conventions by which it was agreed that rights to a future succession should be sold for a particular consideration.

They are plainly prohibited by Art. 1881 C. C.: "Future things may be the object of an obligation. One cannot, however, renounce the succession of an estate not yet devolved, nor can any stipulation be made with regard to such a succession, even with the consent of him whose succession is in question."

The authority of Troplong, quoted by counsel of plaintiffs, goes only so far as to declare that a testator may impose on his heir the condition to renounce a succession; but this renunciation must be made *after the death* of the testator, and it is left to the discretion of the heir to determine if he will take his hereditary share or the substitute therefor contained in the will.

"Le testateur peut aussi imposer à son héritier la condition de renoncer à une succession.

"Cette proposition ne souffre pas de contradiction quand il s'agit d'une succession échue. Je n'y vois pas plus de difficulté quand il s'agit d'une succession non échue et que la renonciation ne doit avoir lieu que lorsque *cette succession s'ouvrira*. Par exemple, un père donne à sa fille dix mille francs si elle renonce à la succession paternelle quand elle s'ouvrira. Cette disposition est tout à fait valable, la fille aura à voir s'il est de son intérêt de préférer les dix mille francs à sa part héréditaire, ou sa part héréditaire, aux dix mille francs, et cette option ne se fera que *lorsque la succession sera ouverte*.

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"C'est le cas précis de l'Art. 843 du Code Napoleon, qui permet à l'héritier l'avantage de renoncer à la succession pour s'en tenir à son don; nul principe n'est blessé dans de telles circonstances.

"Il n'y a pas lieu à cet égard de distinguer si la succession à laquelle l'héritier est obligé de renoncer, est ou non la succession du testateur ou du donateur; dans tous les cas la cause n'a rien que de très licite et il suffira que le donataire ou légataire *fasse sa renonciation* à l'époque de l'ouverture de la succession," Troplong, Donations et Testaments, No. 269.

The whole doctrine contained in the preceding passages is that a testator may bequeath in his will a fixed sum of money, or other determined property, to an heir, on condition that he will, after the succession is opened, renounce his hereditary share; and the heir may or not, as he thinks his interest dictates, take the fixed sum and renounce.

Supposing this doctrine to be correct, still it has no direct bearing on the case at bar.

*Elisha Crocker* inserted no condition in his will by which these parties were to have the bonds as a consideration for renouncing his succession.

The whole part of his testament that refers to these bonds and other money donated to the heirs is the following:

"I have also several relatives, descendants of my deceased sisters. To all of these relatives I have heretofore given a considerable portion of the property I have acquired during my long residence in this city. Very recently I have distributed amongst them sums equal to one-third of what I possess, *reserving the right to recall* the whole or any part thereof.

"I now *release* all of them from the obligation to return any part thereof, and confirm them in the full possession and use thereof. I shall therefore make no further bequest to them, but shall proceed to divide the remainder of my property and effects as follows." He then divides his property between his concubine and his natural children.

Now if *Crocker* had put in his will that he left these bonds to these heirs on condition that they would renounce their hereditary shares in his estate, then if after his death they accepted the bonds they would be compelled to renounce. But he annexes no condition to his gift.

It is true that by the contracts, if he donated them the bonds, they were to be considered in full satisfaction of all claims they might urge against his estate. But these contracts cannot control his last will, for between the time that elapsed from the making of these contracts until the writing of his will he may have changed his intention, and therefore inserted no condition in his will, but left it free for his heirs to take the bonds and also to claim their hereditary shares.

It is clear that by Art. 1881 C. C. the heirs are not bound by the stipulations in the contracts as to a future succession; if, however, they thought proper to renounce their rights to the estate on account of having received those bonds, they could do it, as they have the right to renounce, even if they had never received any consideration therefor from the testator.

And this is what the counsel of plaintiffs maintain. They say that they have renounced, and we now will consider this point.

This renunciation of these heirs is based on certain acts, and as they are all the same, except as to names and places where they were passed, we will give one of them:

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"Know all man by these presents, that we, *David Crocker, Henrietta Crocker, Harriet Crocker and Warren Crocker*, of the county of Tompkins, and *Charles Crocker*, of the county of Cayuga, State of New York, do hereby bind and obligate ourselves in manner following, viz: That whereas the late *Elisha Crocker*, of the city of New Orleans, State of Louisiana, did, by last will and testament, dated the 15th February, 1854, and duly admitted to probate on the 12th July, 1854, nominate, constitute and appoint his acknowledged natural son, *Henry Hicks Crocker*, his sole executor and detainer of his estate; and whereas the right and capacity of the natural children of the said deceased and of their mother '*Sofa*,' legatees named in said will, to take and accept the whole amount of the legacies therein bequeathed, have been questioned by parties claiming an interest in said succession, although the said executor maintains that said will is good and valid in law and equity; and whereas the counsel for absent heirs, *Robert N. Ogden, Esq.*, has joined with one *William Reed* in a suit before the said honorable Second District Court of New Orleans, to attack said will and to set aside in part the dispositions contained therein in favor of the said natural children and of their mother '*Sofa*,' therein named; and whereas, any legal proceedings to defeat the benevolent intentions of the said testator, and to prevent the property by him left at his decease from being distributed or disposed of as the testator has desired and expressed in his said last will, is entirely contrary to our wishes, and can receive no countenance from us, we therefore protest against the further prosecution of the said suit, No. 8012, on the docket of the said Second District Court of New Orleans, wherein said *R. N. Ogden*, as counsel for absent heirs, assumes to join the said *William Reed* in opposing the execution of the provisions of the will aforesaid, and prays an order of sequestration of the moneys, movables, rights, &c., appertaining to the succession of the said *Elisha Crocker*, deceased; and whereas, in his lifetime, as is truly stated in the body of said will, the said *Elisha Crocker*, now deceased, in the distribution of his estate among his collateral relations, did advance to the undersigned property of considerable value and also moneys, for all which full acquittance and discharge is given to the undersigned in and by said will.

"Now in consideration of the premises, and from love and affection for the deceased, and from regard to the children of said deceased and of their mother '*Sofa*,' the legatees named in the said will, and in further consideration of the sum of five dollars, each to us in hand paid this day, at the sealing and delivery of these presents, by the said *Henry Hicks Crocker*, executor and legatee of the deceased *Elisha Crocker*, we do hereby relinquish and quit-claim in favor of *Henry Hicks Crocker*, executor and legatee of the deceased *Elisha Crocker*, to all and singular any rights, claims or demands whatsoever to which we may be entitled, under the laws of the State of Louisiana, as a legitimate relation of the said deceased *Elisha Crocker*, to any of his estate by him left at his decease, and do hereby expressly waive, in favor of the said *Henry Hicks Crocker*, the nullity, if any there be, pronounced by the Article No. 1474 of the Civil Code of Louisiana, in all cases in which the father disposes in favor of his natural children of the portion permitted him by law to dispose of, and which Article further prescribed that in such event he is bound to dispose of the rest of his property in favor of his legitimate relations; and we do further declare, that so far as we have any interest in the matter of said will, or are thereby affected in interest by the provisions thereof, we wish the same to be carried into effect

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in all its parts and clauses, and that the share in the succession of the said deceased *Elisha Crocker*, to which we might be entitled under the laws of Louisiana, shall enure to the benefit of said *Henry Hicks Crocker*, executor and legatee of the deceased. And the said *Henry Hicks Crocker*, being here personally present, accepts the said quit-claim and assignment, the same being considered by all parties as a compromise made with a view of avoiding litigation, and as a settlement by mutual consent of any and all differences or contradictory interests between the parties as heir or legatee of the deceased *Elisha Crocker*.

"In faith whereof, the parties to this act have signed the same in duplicate, at Lansingville, in the county of Tompkins, State of New York, on this 28th day of September, one thousand eight hundred and fifty-five." Then follows the signatures of the parties and authentication of the act.

The form of this act is a serious objection to it as an act of renunciation, for Art. 1010 C. C. declares: "The renunciation of a succession is not presumed, it must be made expressly by public act before a notary, in presence of two witnesses."

It is also evident that it was not the intention of the parties to these acts to make what is legally contemplated a renunciation of a succession; their manifest object was to transfer their hereditary rights in the property left by the will to *Henry Hicks Crocker*.

Their intention was not to make a general renunciation, which would have redounded in favor of their co-heirs who contested the will; on the contrary, they protest against any attempt to defeat it.

They knew that suit was commenced to annul a part of the provisions of the testament, on the ground that a part of this property must go to the collateral relations. They were also aware that the intention of the deceased in getting them to promise to consider the bonds as a substitute for their hereditary rights, was to give him a privilege of bequeathing the balance of his property principally, not to his collateral relations, but to his natural children, and that his object was not that they should renounce so as to benefit the former, but the latter.

It is also argued, that these assignments may be viewed as a ratification after the death of *Elisha Crocker* of the alleged promise of the assignors to renounce, made anterior to his decease; and that although a promise to renounce, made before the death of the testator, is illegal, yet that this promise may be ratified after his death.

These assignments cannot be regarded as a ratification, for the promises in the receipts by which some of the heirs agreed to consider the bonds, if they were bequeathed to them, as an equivalent for their rights in his estate, must be interpreted, that they would renounce all their rights to the estate, and neither claim nor exercise control over any part of it.

But these assignments do not contain a general renunciation; on the contrary, the assignors specially transfer their rights to one person, and thus pretend to control their portion of the estate, which establishes that they had no intention of executing a general renunciation, but, on the contrary, of claiming their shares and of assigning them to *Henry H. Crocker*.

A special transfer and assignment of rights to an estate in favor of one person cannot be viewed as a renunciation, and consequently is not a ratification of a promise to renounce.

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In order to determine the nature and effects of acts, the motives of the parties must be considered. A careful examination of these acts establishes that the assignors had no intention of renouncing the succession, but that their object was to transfer their portions to *H. H. Crocker*, who, being present, accepted the quit-claims and assignments.

They must then be considered not renunciations of the succession, but transfers and abandonments of these heirs to *H. H. Crocker* of their rights in the estate of the deceased. Vide C. C., Arts. 996, 997.

It is urged that if these assignments are decreed valid, the law will be evaded and the testator will be allowed to dispose of his property indirectly in a way he could not do directly.

This objection is invalid. The design of the Legislature in the prohibitory laws relative to the disposition of property to natural children, is to assure to the relatives of the testator a fixed portion of his estate, and to stamp its disapprobation on illicit intercourse, by depriving the natural parent, even in the absence of forced heirs, of the liberty of bequeathing his estate according to his volition.

When the rights of the heirs are secured, the law does not then pretend any more to regulate the disposition of the property, and the heirs have the prerogative of donating, selling or disposing of it as they wish.

The object of the law is accomplished. The heirs have received their legal share, and the parent has been punished, for he has been deprived in his death of the consolation of knowing that his fortune will be enjoyed by those who are still precious in his sight, notwithstanding they are the fruits of an unlawful connection.

The next question for our solution is, whether the amounts already received by the heirs must be considered in settling the estate and making a partition.

As the testator released in his will those who had received deposits or loans of property from the obligation to return them, they must be considered as donations *mortis causa*, and those heirs have the right to receive their share in the estate of the deceased, without any regard to what they have previously received as donations.

Collation is not obligatory on collaterals who inherit because there are no forced heirs. It is only due by those who have received in advance of their legitimate portion as forced heirs, but where an heir has no right to any particular part of the estate, unless the deceased died intestate, then he can only claim his portion out of the estate that remains at the decease, and cannot interfere with any action or donations made anterior to the opening of the succession.

Art. 1305 declares that "the collation of goods is the supposed or real return to the mass of the succession which an heir makes of property which he received in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession."

Art. 1313 declares that "the obligation of collating is confined to children or descendants succeeding to their father's and mother's or other ascendants, whether *ab intestato*, or by virtue of a testament."

"Therefore, this collation cannot be demanded by any other heir, nor even by the legatees or creditors of the succession to which the collation is due."

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Art. 1489 declares that "any disposal of property, whether *inter vivos* or *mortis causa*, exceeding the *quantum* of which a person may legally dispose to the prejudice of the forced heirs is not null, but only reducible to that *quantum*." Vide C. C., Art. 1314.

It is clear from these Articles, that collation is only obligatory on forced heirs, who are those that the donor cannot deprive of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them. C. C. 1482.

We would observe that the dispositions of the testament in favor of "*Sofa*," the concubine of the testator, are null and void; (C. C. Art. 1474) and that the dispositions of the the will in favor of *H. H. Crocker*, of *Mary Bonworth* and of *Susan Crocker*, the natural children of the testator, must be reduced to the one-fourth of the amount of the testator's estate.

The validity of the said assignments is also recognized, and the portions of the assignors in said estate must be given to said *Henry Hicks Crocker*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, so far as it deprives the said *Henry Hicks Crocker* of the benefit of said assignments, and gives the portions of the assignors to the co-heirs of the same degree.

It is further ordered, adjudged and decreed, that the judgment of the lower court be amended, so as to recognise the following persons as the heirs of the testator, *Elisha Crocker*, to wit:

1st. *Lucius Crocker*.

2d. *Charles, David, Warren, Henrietta, Harriet, Abby*, wife of *E. J. French*, and the children of *Nathaniel*, viz: *Jay, Frank* and *Charles*, the children of *David*, brother to the deceased.

3d. *Lucy M. Southworth*, wife of *Aug. C. French*, the child of *Sophia*, a sister.

4th. *William Reed, Laura Reed*, wife of *William Fitch, Elector Reed*, wife of *William Smith*, and a minor child of *Elkin Reed*, and also a minor child of *Lucius B. Reed*, both deceased, children of *Laura*, sister to deceased.

5th. The minor child of *Myra Griffith*, deceased, daughter of *Elector Crocker*, sister to *Elisha*.

6th. *Laura*, wife of *Whitcomb Francis Hurd*, and *Elizabeth*, wife of *J. E. Bruce*, children of *Lucy Crocker*, sister to *Elisha*.

That three-fourths of the estate shall be divided among the said heirs and the assignee of any of them, according to their respective rights.

And that the judgment be amended so as to recognize the validity of the assignments of a portion of the heirs of *Elisha Crocker*, to wit, of *Henrietta M. Crocker, Frances F. Hurd, Charles Crocker, Lucius Crocker, Elizabeth Bruce, David Crocker, Warren Crocker* and *Harriet Crocker*, of their shares in the estate of *Elisha Crocker*, to *Henry Hicks Crocker*.

And that three-fourths of the said estate be divided among those of the said heirs who have not transferred their rights, or their assignees; and *Henry Hicks Crocker*, as the assignee of the said portion of the heirs, who have transferred their shares to him, according to the respective rights of the parties.

That the judgment be amended, so as to declare the dispositions of the will in favor of "*Sofa*," the concubine of the deceased, null and void; and that the dispositions of the will in favor of the natural children of the deceased, to wit, of *H. H. Crocker, Mary Bonworth* and of *Susan Crocker*, be reduced to one-

fourth of the testator's estate, and that the said estate is to be distributed without any regard to collation; and the said heirs, assignees and legatees are to take their shares in the estate without being obliged to account for anything they may have received before the death of the said testator.

It is further ordered and decreed, that the judgment of the lower court, so far as not reversed and as thus amended, be affirmed; and that it be remanded to the lower court for the purpose of making a partition according to law among those entitled to the said estate, as aforesaid; and that the costs of appeal be paid by the appellees, and those of the lower court by the succession.

Vide *Creswell v. Seay et al.* 19 L. R. 521; 3 Marcadé, pp. 118, 168, No. 241; 1 Marcadé, 52; C. C. 912, 913; *Cole v. Executor*, 7 N. S. 422; 4 Marcadé, p. 375, No. 452; 5 Marcadé, 90.

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#### SAME CASE ON A RE-HEARING.

COLE, J. Appellees in their motion for a re-hearing, allege that "*Henry Hicks Crocker* being the testamentary executor at the time the several transfers were made to him, could not, under the provisions of the Code, acquire any portion of the property then under his administration."

"That the Act allowing executors and others, who are legatees, &c., to purchase, applies only to purchases made at the public sale which takes place of the effects of the succession in due course of law."

The provisions of law forbidding executors, except in certain cases, to purchase any part of estates under their care, do not apply to assignments of heirs to them of their rights in the estate.

Appellants have also asked for a re-hearing on the following point:

"There is error, we respectfully suggest, in the decree of this honorable court, ordering the partition of the estate of the testator without regard to the amount *bequeathed* to the collaterals, and excluding the natural children from participating in this important portion of the succession."

As appellants appear to have misconstrued a part of our judgment, we will add a few remarks in explanation, for the direction of those who shall make the partition.

Our judgment did not order the partition of the estate without regard to the amount *bequeathed* to the collaterals and exclude the natural children from participating in this part of the succession.

In our judgment we declared: "That the said estate is to be distributed without any regard to collation; and the said heirs, assignees and legatees, are to take their shares in the estate without being obliged to account for anything they may have received before the death of the said testator."

We did not explain the mode of partition, as the cause was remanded to the lower court for the purpose of making a partition.

We had been requested to decide if the collaterals were obliged to collate, and we decreed, they were not; but we did not detail what was to compose the estate to be divided, nor in what manner the quarter due to the natural children or the three-quarters of the collaterals, was to be determined, as this would be settled in the lower court.

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We think that the following principles, which, in our opinion, are not antagonistical to our judgment, ought to govern in the partition.

In order to fix the one-fourth of the estate, the succession should be considered as consisting not only of the effects in the testator's possession at the time of his decease and legal claims of the estate, but also of that which was donated in the will. Donations made by the testator during his life, are not to be included in the mass of the estate.

When the whole mass of the succession is thus formed, the estate is to be divided between the natural children and collaterals, according to their respective proportions, to wit, one-fourth to the former and three-fourths to the latter, and the collateral relations are to take their share in the three-fourths without any regard to donations to them in the will, or to gifts to them by the testator during his life.

For special legacies to collaterals, when there are no forced heirs, belong exclusively to the legatees, and are not subject to collation.

A testator who has natural children complies with the law, if he bequeaths three-fourths of his estate to *one* or more of his legitimate collateral relations, for they are not regarded as forced heirs.

Let us suppose the testator has bequeathed in his will \$20,000 to his collateral relations, and the entire estate, including these legacies, is \$100,000, the natural children would then have one-fourth of this amount, *i. e.* \$25,000, and the remaining three-fourths, *i. e.*, \$75,000, less the \$20,000, bequeathed to collaterals, that is to say \$55,000 would be divided among all the collateral relations without regard to collation. If, then, there were five collateral relations, heirs of the testator, each of them would receive \$11,000, and also retain the amount bequeathed to him in the testament and the donations to him by the testator during his life.

Before concluding, it should be observed, that the semi-annual interest on the bonds of the city of New Orleans, deposited with some of the heirs, is not to be included as a part of the estate, as it was given to them by the testator during his lifetime.

When the partition is made, the estate must be considered as consisting of:

- 1st. The amounts donated or bequeathed in the will.

- 2d. The property in the testator's possession at the opening of the succession, and all legal claims of the estate.

The partition must be made according to law, in accordance with the judgment in this case as thus explained.

It is, therefore, ordered, that the re-hearing prayed for by plaintiffs and defendants be refused.

## W. REED et al. v. H. H. CROCKER, Executor.

A suit to remove an executor from office may be maintained by a portion of the heirs named in the will.

The Act of the Legislature of March 18th, 1837, sec. 8d, reenacted 12th of March, 1855, imposing a penalty on executors, administrators, &c., for withdrawing the funds of the succession from bank without an order of court, is imperative and must be enforced when there are no peculiar circumstances which form an exception.

The statute is equally imperative that the executor must render a full account of his administration at least once in every twelve months, and the neglect of the counsel of absent heirs to compel an account, will not exonerate the executor.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*Ogden & Leovy* and *P. E. Bonford*, for plaintiffs. *Purvis & Dugué*, for defendant and appellant.

BUCHANAN, J. This is a suit to remove an executor on two grounds: 1st. That he has not deposited in a chartered bank paying interest on deposits, the funds which have come into his hands as executor, or having so deposited them, that he has withdrawn such funds without an order of court.

2d. That he has suffered more than a year to elapse from the date of his appointment, without rendering an account of his administration.

The defendant, first, excepts that the plaintiffs are without interest to institute this proceeding.

The plaintiffs assert themselves to be descendants of the brothers and sisters of the testator, and, as such, to be his heirs at law.

The evidence offered on the trial of the exception shows that the plaintiffs had instituted suit against the defendant and others, for three-fourths of the succession of *Elisha Crocker*; and the judicial admissions of defendant, contained in his pleadings in that suit, identify plaintiff, as constituting a portion the relatives, descendants of deceased sisters, spoken of in the last will of *Elisha Crocker*. The exception was, therefore, properly overruled.

Upon the merits, it was shown that defendant kept an account in bank as executor. The bank did not pay interest on his deposits it is true. But it is proved that the defendant made inquiries, and was informed that there was no bank in the city paying interest on deposits. Although, therefore, the plaintiffs have proved that several of the chartered banks in New Orleans do pay to certain of their customers interest on deposits under special agreements, yet these appear to be deviations from the general practice of the institutions in question, which were unknown to the defendant and to the officers of the bank in which he kept his account.

The court below has held the defendant liable to the penalty, imposed by the Act of March 13th, 1837, section 3d, reenacted on the 12th March, 1855, (Session Acts, page 78, section 2,) for such sums as the executor withdrew from the bank without an order of court; and we find no error in that ruling. The cases are numerous in which the penalty has been enforced. Indeed the law is imperative.

Cases might possibly arise, whose peculiar circumstances would form an exception, as for instance, if the administrator held the power of attorney from

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the very heirs who claimed to make him liable for the penalty of the statutes in question.

The requirement of both those statutes is no less imperative, that the executor must render a full account of his administration at least once in every twelve months. The defendant qualified as executor on the 12th July, 1854. This suit was brought on the 31st December, 1855, up to which time no account had been rendered. The defendant's counsel argues, that by the 1183d Article of the Civil Code, (which is expressly kept in force by the concluding section of the Act of 1855, page 79,) the executor is only required to render an account *at the instance of the counsel of the absent heirs*. But we do not consider this to be a correct interpretation of the meaning of the Legislator in the Article quoted. The preceding Articles had ordained, that the term of administration was one year; that the duties of administrators ceased, even before the expiration of that time, when the heirs present themselves or send their powers of attorney to claim the succession. Then follows the provision (in the Article quoted) that, *when the heirs do not present themselves or send their powers, &c.*, an account must be rendered at the expiration of the year, *at the instance of the counsel for absent heirs*. This can only be taken as recognizing the authority of the counsel appointed by the court to demand the account, even should he receive no special mandate to that effect from the heirs. In that case he has a mandate derived from the law. But it cannot be supposed that it was intended the neglect of the counsel of absent heirs to compel an account, should have the effect of allowing the administrator to go out of office without rendering any account. Besides, the Article 1183 is found in the chapter of the administration of vacant estates.

The Article 1666 is more directly applicable to testamentary executors; and that Article is without even the apparent qualification which terminates Article 1183. It reads thus: "He (the executor) must render an account of his administration at the expiration of the year, commencing from the moment in which he had the seizin."

Judgment affirmed, with costs.

#### STEAMER JEAN WEBRE v. H. KENDALL CARTER & Co.

It is not for the carrier to render it probable that the injury to freight was occasioned by one of the natural dangers incident to the navigation. It is incumbent upon him to show that he has used diligence and proper skill to avoid the accident, and that it was unavoidable.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Coze & Breaux*, for plaintiff. *Steele, Hamner & Hays*, for defendants and appellants.

MERRICK, C. J. This suit is brought to recover \$1092 freight and charges on the transportation of 157 bales of cotton from Alexandria, in this State, to this city, in the month of July, 1855, the freight being at the extraordinary rate of six dollars per bale.

The claim is resisted by the defendants as to \$611 35, on the ground that the eighty-one bales of cotton were delivered in a damaged and unmerchantable condition.

The District Judge was of the opinion that the cotton was damaged before it was received by the plaintiff, and that the larger portion of the loss to the planter was occasioned by the factors adhering to what he calls the unjust rule adopted by the pickeries of this city.

The bills of lading affirm the cotton to have been in good order and condition when received, and the obligation assumed by the plaintiff was to deliver the same in like good order and condition at New Orleans, (the dangers of the river and fire only excepted,) the privilege of lighterage and stowage in flats and barges being also reserved to the plaintiff.

The testimony is insufficient in our opinion to rebut the acknowledgment contained in the bill of lading, that the cotton was received on board in good condition.

From the admissions of the master of the boat, and the testimony of plaintiff's witnesses, there can be but little doubt that the cotton was damaged while being transported by the plaintiff. The flat-boat on which it was stowed struck something which occasioned a leak, and thirty-two bales were landed upon the beach, covered with tarpaulins and left in charge of a watch, and the residue brought to the city. That which was landed and left in charge of a watch, was brought to the city in about two weeks afterwards.

It is not sufficient for the plaintiff to render it probable that the injury to the cotton was occasioned by one of the natural damages incident to river navigation; to relieve himself from responsibility, it was incumbent on him to prove that he used due diligence and proper skill to avoid the accident, and that it was unavoidable. Angell on Carriers, sec. 168; *Bond v. Frost*, 6 An. 801; same case, 8 An. 297.

It is objected, that the mode adopted to ascertain the damage done was illegal, oppressive and unjust; that, as the damaged cotton is left with the owner of the pickery, there is every inducement to find and appropriate the largest possible amount of damaged cotton. This subject was considered in the 8 An. 297. The custom of merchants in this city of sending cotton to the pickeries is again proven. It is also shown that the damaged cotton is allowed as a partial compensation. The custom is certainly objectionable, but so long as it is generally adopted and no better mode can be pointed out, we are not prepared to say that the party sending damaged cotton to a pickery shall not be entitled to recover for such damage as he has really sustained. Much is entrusted to the owner of the pickery, but it is the same with the cotton factor and many other agents. In this case, the owner of the pickery was placed on the stand as a witness, and the plaintiff could have had the benefit of a cross examination, had it been desirable to ascertain whether there had been a breach of the confidence reposed in him.

We do not think the delivery of the cotton without objection a bar to the defendants' right to claim a deduction for the damage done, it having been discovered after the delivery. *Oakey v. Russell*, 6 N. S. 60.

The damages claimed appear to be proven to the amount stated in defendants' brief, viz, \$545 60, which should be allowed as a deduction upon the plaintiff's demand.

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CARTER.

The tender was not made in such a form and amount as to relieve the defendants from the payment of costs.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court in this case be avoided and reversed, and now, pronouncing such judgment as ought to have been rendered, it is ordered, adjudged and decreed, that the plaintiff do have and recover judgment against the defendants for the sum of five hundred and forty-seven dollars and forty cents, with five per cent. interest thereon from the first day of September, 1855, until paid, the defendants' reconventional demand having been consumed in reducing the plaintiff's demand to the amount herein awarded; and it is further ordered, that the plaintiff and appellee pay the costs of the appeal and the defendants the costs of the lower court.

#### MARY A. GOODIN AND HUSBAND v. MRS. ALICE ALLEN.

When the husband and wife both appear as plaintiffs in an action in revendication of the paraphernal property of the wife, the real plaintiff is the wife, authorized and assisted by her husband. When in such case the affidavit to obtain a sequestration was made by the husband only, and he alone signed the sequestration bond, *held*, that the sequestration was properly dissolved.

**A**PPEAL from the Fourth District Court of New Orleans, *Reynolds, J. R. & H. Marr*, for plaintiffs and appellants. *H. B. Eggleston*, for defendant.

**SPOFFORD, J.** The plaintiffs have appealed from a judgment dissolving an order of sequestration.

The suit is declared to be in revendication of the paraphernal property of the wife claimed by a third person. It results from the allegations of the petition, that the property in dispute was under the administration of the wife.

The husband and wife both appear as plaintiffs. The affidavit for the sequestration was made by the husband only, he alone signed the necessary bond.

On this ground the sequestration was dissolved.

The court did not err. The real plaintiff is the wife, authorized and assisted by her husband. "Actions relating to the ownership of the dotal or paraphernal property of the wife, or of some real rights belonging to her, must be brought by the wife, duly authorized by her husband, or by the Judge, if he fails to do it." C. P. 107.

The defendant had a right to require indemnity from the wife against the effects of a wrongful sequestration.

Judgment affirmed.

## WILLIAM WOOTERS v. ELLEN FEENY, wife of HOGAN.

When a husband had voluntarily lived separate and apart, and the wife during that time had purchased real estate, the title to which, being on record in the name of the wife, as a donation made to her individually, was subsequently acquired by an innocent third person in good faith, under a chain of title from the wife, it was held that the husband could not, after the wife's death, recover the property, as having belonged to the community, and having been sold by the wife without authority.

The husband, by parol evidence, could not thus despoil the purchaser of immovable property, acquired under a chain of recorded titles apparently perfect, without notice, actual or constructive, of the husband's latent claim, which has no basis in equity.

**A** PPEAL from the Second District Court of New Orleans, *Cotton*, Judge of the Sixth District Court, presiding. *J. N. Brickell*, for plaintiff and appellant. *Benjamin, Bradford & Finney* and *Durant & Horner*, for defendant.

**SPOFFORD, J.** The plaintiff seeks to recover a piece of immovable property from the defendant, upon the ground that it formed a part of the community between himself and his deceased wife, and was disposed of by his wife in fraud of his rights.

The defendant bought in entire good faith, under a chain of title apparently perfect, and without notice of any right or claim of the plaintiff. She paid a valuable consideration, which the plaintiff does not offer to restore.

For a great many years the plaintiff and his wife lived in a state of voluntary separation, although the community was not dissolved. She pursued a separate industry, and thereby acquired some means. It seems that she invested them in the real property now in dispute, but to avoid being interfered with by her husband, she did not buy it in her own name, but induced one *Becan* to purchase it for her benefit.

*Becan* afterwards sold the property to *Chamberlain*. *Chamberlain* transferred it to *Mrs. Wooters*, wife of the plaintiff, by donation *inter vivos*, which she was authorized by a competent court to accept. She afterwards sold it to *Chamberlain*, describing herself in the act of sale as the widow of plaintiff. *Chamberlain* sold to *Bradford*, and *Bradford* sold to the present defendant, *Mrs. Feeny*.

These titles were duly registered. It will thus be seen that on the records of the country the property once stood as the separate property of *Mrs. Wooters*. It is only donations made jointly to both spouses that become community property. C. C. 2371.

The plaintiff rests his case upon the allegation that the original purchase, ostensibly made in the name of *Becan*, being really made by his wife, the property thereby fell into the community, and can be reclaimed by him in the hands of an innocent purchaser without notice, because his wife was incapable of alienating the community estate pending the marriage without his assent, and because, further, she was, at the time of the alienation to *Chamberlain*, imbecile in mind.

It is obvious, from the statement already given, that the plaintiff is seeking to make out a title to immovable property by parol, in contradiction to written and recorded conveyances, and against an innocent purchaser for value.

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PRENY.

Considering the position in which the plaintiff stands, this is insufferable. He brought about the present condition of things by his own conduct. He lived apart from his wife, and unknown to the world as her husband; permitted her to manage her affairs as a *femme sole*, contributed nothing to the common fund, and during her lifetime did not pretend to have any interest in her affairs. He now produces no written title. The written titles which exist do not show that he had an interest in the property which he claims. He has no counter-letters. He complains that his wife, who made everything she had by her personal industry and thrift, defrauded him of his half of her earnings by a series of simulations. If she did, his only remedy is against her heirs for a settlement of the community, or against those who confederated with her to defraud him. He cannot, by parol evidence, succeed in despoiling the defendant, who is a purchaser for a valuable consideration, of immovable property under a chain of recorded titles apparently perfect, without notice, actual or constructive, of the plaintiff's latent claim, which has no basis in equity, and is the result of his own negligence or misconduct.

The District Judge rendered a judgment of nonsuit. Both parties agree that the judgment should be either for the plaintiff or defendant. The appellee's prayer for an amendment must be allowed.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that there be judgment for the defendant, with costs in both courts.

MERRICK, C. J. It is undoubtedly true that property acquired by the wife by her own industry and labor during the existence of the marriage (where there is no separation of property) falls into the community. The idea of community is based on the reciprocal industry of the spouses. But if the husband, who is the head and master of the community, suffers the title to be taken in the name of an agent, or to be made to the wife in the form of a donation to her individually, he must be presumed to have been willing to incur the risk of the faithlessness of the agent or the risk of loss of title by the death or disobedience of the wife. If he claims the property as that of the community, he ratifies the form in which it has been acquired. So here *Wooters* cannot claim that the property belonged to the community without ratifying the machinery by which it was effected.

But it is said that the property, having once vested in his wife or the community, could not be alienated without his authorization or that of the Judge, and the sale by *Mrs. Wooters* to *Chamberlain*, being without such authorization, conveyed no title. This objection to my mind presents the real difficulty in the case. But I think so long as *Wooters* suffered the title to remain in this form, third persons treating with the wife as owner (in virtue of the donation) in good faith and for a valuable consideration, must be considered as having acquired all the interest they could have acquired had the property really been the paraphernal property of the wife. The sale of the wife, under such circumstances, is not an absolute nullity. If the property had really been paraphernal, her heirs, and not the husband, after her decease could attack the sale. And they could not rescind the sale without restoring to the purchaser so much as her estate had been benefited by the purchase. So, too, the husband, if he would rescind such a sale on the ground that the property really belonged to the community, must restore so much as the community had been benefited by the transaction, and must not only make the purchaser and the possessor of the property a party to the suit, but also the heirs of the wife, who alone

appear from the face of the papers to be interested in rescinding or ratifying the sale made by the deceased.

The plaintiff, therefore, has not placed himself properly before the court, in order to avail himself of any supposed irregularity in the transfer.

For the foregoing reasons I concur in the decree pronounced in this case.

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JAMES H. RIGGIN v. BERNARD KENDIG.

When the death of a slave is necessarily connected with and a direct sequence of the vice of character, it can then be no more regarded as a fortuitous event than a death which results from a vice of body.

*Held:* That value of a slave could be recovered where the slave was a notorious runaway, and died of a disease contracted while a runaway, and which was a consequence of exposure in the woods and the eating of indigestible food.

APPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
A. J. J. Michel, for plaintiff and appellant. Thomas J. Semmes, for defendant.

COLE, J. This suit is instituted to recover the price of a slave and damages, on the ground that he died of a disease acquired while a runaway, and which was the consequence of exposure in the woods and eating indigestible food.

The evidence establishes that the slave *Dick* was a notorious runaway previous to the sale from defendant to plaintiff; that *Kendig* is a negro trader, and bought *Dick* of one *Loupe*, also of the same calling, who knew him to be a runaway.

We think that *Kendig* was cognisant of this vice of *Dick* when he sold him, fully guaranteed to plaintiff. They were both negro traders of the city, and that class of society is not easily imposed upon. Plaintiff charges him in the petition with a knowledge of the fact, and in support of the charge avers that he bought *Dick* from *Loupe* without warranty and with full knowledge of the existing vice.

When this cause was fixed for trial, the plaintiff, in order to prove the averment, notified *Kendig* to bring into court his bill of sale from *Loupe*. On the day of trial he produced a deed of sale from *Loupe* with full warranty, but on examination it was found to be a sale of a different slave, whereupon *Kendig* made an affidavit, in which he states that he delivered the bill of sale to his counsel supposing it to be the bill of sale for *Dick*; that when his counsel pointed out the error he carefully examined his papers, and could not find it. He believes it to be lost or mislaid, and that he generally gives up his private bills of sale to the notary when he sells.

Now in this affidavit he does not pretend to have ever bought the slave with warranty, yet that was the point in controversy, and one which his own interest made it his duty to declare upon.

As the sale from *Loupe* to *Kendig* was a private act, and as he swears he was accustomed to give his private bills of sale to his notary, why did he not make a search among the records of that officer in the city of New Orleans?

Defendant did not cause *Loupe* to be cited to defend the warranty, which he pretends to have received from him. He prays in his answer that he be cited in warranty, but this is all that was done.

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Kendro.

It is not natural to suppose defendant would incur the risk of losing upwards of one thousand dollars if he had a warrantor to protect him.

Defendant was aware at the time of the sale of *Dick* to plaintiff that he was affected with the redhibitory vice of being a runaway, and is liable to plaintiff in the event the death of *Dick* was caused by exposure and bad food from being a runaway.

Before alluding to the testimony as to the cause of his decease, we will dispose of the following bill of exceptions taken by defendant to the ruling of the lower court: "Be it remembered, that on the trial of this cause the defendant's counsel having asked *Dr. Browning*, on cross-examination, how long the boy had been sick when he was called upon to attend him, replied that he did not know except from what the boy told him: on then being asked how long the boy told him he had been sick, said that the boy informed him he had been sick two or three weeks; then, on re-examination, plaintiff asked the witness to what cause the boy ascribed his sickness, to which question defendant objected, on the grounds that the declarations of the slave were not evidence, and that the question propounded had no reference to an explanation of the question propounded by defendant, which was merely directed to the length of time the boy had been sick, and not as to the nature or origin of his disease. The court overruled the defendant's objection, because of the question asked on cross-examination, and admitted the testimony, thereupon the defendant objected, and tendered this his bill of exceptions, which is signed this 29th May, 1856."

We consider that the objections in this bill are not well taken, for the following reasons:

When an illegal interrogatory is propounded to a witness as to what a third party said, if the answer thereto will have a direct effect on the decision of the suit, then it is lawful for the opposite party to propound interrogatories, not only with reference to an explanation of the question already presented, but also as to anything else that this third party said, which would have the effect of rebutting the conclusion that might be drawn from the response to the first illegal interrogatory, provided the questions allude to the same conversation.

If in this case the answer to the interrogatory of defendant was allowed to stand alone, then as the boy said he had been sick two or three weeks, his death might be ascribed to a fortuitous event, (C. C. 2511,) and defendant would not be responsible. As defendant thought proper to propound a question, the answer to which affects the principal issue in this case, the adverse party had the right to ask any questions relative to the same conversation, which might destroy the effect of the first illegal interrogatory.

The answer of witness to the question: "to what cause the boy ascribed his sickness?" was as follows: "At the same time *Dick* told him how long he had been sick, he informed him that he had been laying exposed in a shanty in the woods for three or four weeks, and sick in that shanty. He did not say where that shanty was, but said it was back in the woods."

In this case then it appears that the slave informed *Dr. Browning* that he had been lying exposed in the woods at the same time that he told him he had been sick. Notwithstanding then the illegality of the testimony of slaves when used against white persons, and also that of hear-say testimony, as defendant first propounded the illegal interrogatory, the effect of the answer to

which affected the main issue, we consider plaintiff had the right to rebut the effect of that answer by questions as to other parts of the same conversation, the answers to which would have such effect.

The lower court then properly overruled the objections to the interrogatory set forth in the bill of exceptions.

Having shown that defendant must have been aware of the existence in the slave of the redhibitory vice of running away at the time he sold him to plaintiff, and having disposed of the bill of exceptions, the sole question that remains for our consideration is, whether the death of *Dick* was produced by a disease contracted from exposure and bad food from being a runaway.

The evidence establishes that *Dick* was absent as a runaway for three or four months previous to the period of his death, to wit: from March to July, 1855, when he was brought in a dying condition to the house of *Mrs. Emanuel*; that *Dr. Browning* was sent for, and he died in about three days of inflammation of the bowels.

*Dr. Browning* testifies that "inflammation of the bowels is caused from exposure to dampness, cold, eating indigestible food, and various other causes. Should think that a negro, having run away from his master and gone into the back of the woods, living in dampness, would be very likely to contract such disease, as well as many others."

Although this slave may have died of a disease not produced from being a runaway, still as it is established that he was a runaway for a long time previous to the sale to the plaintiff—that defendant must have been aware of this redhibitory vice, and concealed it from plaintiff—that he was a runaway for three or four months previous to his death—that he died of inflammation of the bowels, which is sometimes caused by exposure to dampness, cold and eating indigestible food; and as this slave had been lying sick and exposed in a shanty in the woods for three or four weeks, we conclude that under this state of facts this slave must be considered as having died of a disease contracted by exposure and want of proper food whilst a runaway—that as this disease was a direct consequence of a vice existing before and at the time of the sale, that plaintiff has the right to recover in this suit.

A sufficient cause for the death from a disease, which may be considered a direct consequence of a redhibitory vice, having been established by plaintiff, it is reasonable, under the circumstances of this case, to attribute the disease to causes known to be adequate, such as exposure and want of digestible food, rather than to some imaginary cause which might make his death a fortuitous event.

The case of *Kiper v. Nuttall*, 1 Rob. 46, does not conflict with our view in the present suit. In that action it was not proved that the death resulted from a disease which either existed or was the consequence of one existing at the time of the sale, and therefore the decease of the slave was a fortuitous event within the meaning of Art. 2511 of the Civil Code.

We consider that whenever the death may be viewed as a direct sequence of the redhibitory vice, then the death cannot be deemed a fortuitous event. For example, if a slave is sold who is unsound of mind, and in a fit of insanity kills himself, his death is a direct result of the redhibitory vice, and cannot be viewed as a fortuitous event in the sense of the statute.

If a slave has the redhibitory vice of running away, and whilst in the act attempts to swim a river and is drowned, his death is not a fortuitous event

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within the meaning of Article 2511 C. C., but is a direct consequence of the vice of running away.

Article 2500 C. C. divides the latent defects of slaves into two classes: vices of body and vices of character. Now if death, resulting from a disease existing at the time of the sale, is not a fortuitous event, why should a death which is the direct consequence of a vice of character be considered a fortuitous event? We think that whenever the death of the slave is necessarily connected with and a direct sequence of the vice of character, it can then be no more regarded as a fortuitous event than a death which results from a vice of body.

It is established that a slave like *Dick*, having no vices and defects, was worth a thousand dollars and upwards in July, 1855. We consider that plaintiff is entitled to recover of defendant \$1000, with legal interest from judicial demand, August 8th, 1855.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and proceeding to render such judgment as ought to have been rendered by the lower court: It is ordered, adjudged and decreed, that plaintiff recover of defendant one thousand dollars, with five per cent, interest from the eighth day of August, eighteen hundred and fifty-five, and costs of both courts.

BUCHANAN, J. I concur in the decree reversing the judgment of the District Court, on the ground that the evidence convinces me that the slave *Dick* was addicted to the vice of running away, to the knowledge of defendant, at the time of his sale to plaintiff, and that the defendant concealed this vice of the slave from plaintiff.

The death of the slave *Dick* before the institution of the action has not, in my opinion, exonerated the defendant from liability. The slave was brought home to his master in a dying condition, from a disorder contracted and aggravated to an incurable degree by exposure to the inclemency of the weather in the woods while runaway. I think it may be fairly said that the slave, in the words of Article 2510 of the Code, has perished through the badness of his quality.

The French text of the Article is, "si la chose vendue a péri par suite de sa mauvaise qualité." By *bad quality* in this Article I understand to be meant *redhibitory vice*. If, then, the death can be traced to a redhibitory vice with which the slave was affected at the time of the sale—if the death was the consequence (la suite) of such vice—the loss must fall upon the seller.

I think the evidence in this case clearly shows the death of *Dick* to have been the consequence of the redhibitory vice of running away. In this respect the case differs from that of *Kiper v. Nuttall*, 1 Rob. 46, where the disease of which the slave died could not be traced to and had no connection with that under which she was laboring at the time of her sale—the only redhibitory malady.

SPOFFORD, J., dissenting. "If the thing affected with the vices has perished through the badness of its quality, the seller must sustain the loss." C. C., Art. 2510.

"If it has perished by a fortuitous event, before the purchaser has instituted his redhibitory action, the loss must be borne by him." C. C. 2511.

The slave in this case perished before the action was brought. He died of an inflammation of the bowels, an acute disease, which attacked him for the first time.

The cause of the disease rests upon conjecture. And the law looks not to remote possible or conjectural causes more than eight months after the sale, but to those which are proximate and certain.

It seems to me that this slave did not die of the habit of running away, or "through the badness of his quality," but perished by a fortuitous event in the sense of the Code, and therefore I think the purchaser should bear the loss.

*Kiper v. Nuttall*, 1 Rob. 46.

VOORHIES, J., concurring.

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KERRIN.

### THE STATE v. THE JUDGE OF THE FIFTH DISTRICT COURT—Ex rel. S. M. PERKINS.

Interlocutory orders made in the progress of a cause have their effect without being signed by the Judge.

When in a redhibitory action an interlocutory order was made, authorizing the delivery of the slave into the custody of the defendant, upon the execution of a bond in favor of the plaintiff, it was held that the order was one which was calculated to produce, or which might occasion an irreparable injury, and that an appeal from such an order should be allowed.

ON application for a *mandamus* to the Judge of the Fifth District Court of New Orleans, *Eggleston, J. Collins & Wooldridge*, for relator.

MERRICK, C. J. It appears by the answer of the Judge of the Fifth District Court to the rule issued in this case, that "*Perkins* instituted in that court, the 1st of May, 1857, his redhibitory action against *Shelton* to recover the price of a female slave named *Jane*, which the former purchased of the latter on the 5th of March, 1857, and guaranteed against the vices and maladies prescribed by law. In his petition, he charges that the slave was afflicted with a chronic disease of the heart and lungs, and the disease called Tonsils, to such an extent as to render her services useless to him. On the 16th May, 1857, *Ar. Miltenberger*, the agent of *Perkins*, the plaintiff, addressed a letter to *Shelton*," notifying him that the slave was left with one *Screnea*, in this city, where she was kept at a charge of 40 cents per day; that the plaintiff looked to him for the return of the price, interest thereon, expenses and damages, and that the slave was at his disposal whenever the same should be refunded.

"The plaintiff, in his petition, demands \$500 as damages for medical services, counsel fees and charges. On the 20th of May, 1857, *Shelton* took a rule on *Perkins* to show cause why he should not be allowed to bond said slave, on giving such bond and security as the court might require, for the forthcoming of said slave, suggesting in his rule, 'that since the institution of this suit, the plaintiff has made a tender and consignment of the slave forming the subject matter of this litigation, and that said slave is now in the slave-yard of one *Screnea*, at a heavy expense, and that her health may be injured by her being there confined.'"

The District Judge in his answer further states that "this rule came up for trial, and the facts were duly proved. Several witnesses testified to the danger the slave would incur by remaining in the slave-yard, and the bad condition and structure of the place."

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v.  
JUDGE 5TH D. C.

The Judge permitted the defendant to bond the slave, but "required a bond with good security in the sum of two thousand dollars, for the forthcoming of the slave, in the event of there being a judgment in favor of *Perkins*."

He further states that three applications were made to him for an appeal from the judgment making the rule absolute, before it was signed, and not considering *Perkins* entitled to an appeal, he declined to allow one.

To establish the correctness of his ruling on the application for an appeal, the Judge submits the following reasons, viz:

"1st. Because it is not an appealable case, at all events, before the judgment is signed.

"2d. Because the life of the slave was put in jeopardy by the act of *Perkins*, in placing her, ill as he charges she was, in an unhealthy place, as it was proved to be on the trial of the rule.

"3d. That *Perkins* had made a real tender and consignment of the slave to *Shelton*, and he had a legal right to take her into his possession to cure her if possible, and to protect himself against loss by the execution of a bond and security in a sum exceeding the principal, interest, damages and costs claimed by *Perkins*."

The second and third of these reasons relate more particularly to the correctness of the decision of the District Judge on the merits of the rule taken before him, than to the question whether the plaintiff is entitled to the appeal prayed for. We will, therefore, consider the first reason assigned.

It is not usual to sign the interlocutory orders made in the progress of a cause, and as they have their effect without the signature of the Judge, the plaintiff was not obliged to wait until the Judge should sign such interlocutory decree before applying for an appeal. See *Van Winckle v. Flechaux*, 12 L. R. 150.

As interlocutory orders are always subject to revision on appeal, it is certainly not desirable that the administration of justice should be burdened by a multiplicity of appeals. But it is well settled that where the interlocutory order is calculated to work or may occasion the party an irreparable injury, a direct appeal from such order is allowed the party. The only remaining question then is, whether the order of the Judge, authorizing the delivery of the slave into the custody of the defendant, is one calculated to produce, or which may occasion, an irreparable injury? Aside from the question of the solvency of the parties to the bond, the delivery of the slave to the defendant upon the execution of the bond may have the effect to compel the plaintiff to institute a new action upon the bond after the determination of this suit. It may so change the condition of parties to the present suit, that the final judgment in that case will not end the controversy between *Perkins* and *Shelton*. Orders producing such effects are considered as working irreparable injuries. C. P. 566; *Hyde v. Jenkins*, 6 L. R. 435; *Gossett v. Cashell*, 14 L. R. 245; *Taylor v. Penrose*, 12 L. R. 137; *ibid.* 148; *Comstock v. Paie*, 15 L. R. 481; 2 Rob. 342. As a question of law merely, it seems to us to result from the authorities cited, that the plaintiff is entitled to his appeal.

That appeal will suspend the order of the District Judge, which it is said that humanity requires should be executed. In reply to this argument, we can only say we have not seen the testimony which the District Judge considers so convincing. Should it produce the same conclusions in our minds when it reaches us, the defendant will be fully protected by the appeal bond and the

unfavorable effect which the conduct of the plaintiff will produce upon his cause, and the slave herself by the penal laws made for her protection. Bullard and Curry Dig. 56, sec. 39.

It is ordered, &c., that the rule be made absolute, and that a peremptory *mandamus* issue in this case, commanding said Judge to make such statements and allow an appeal as prayed for by the applicant in his petition.

ESTATE  
OF  
JUDGE OTIS D. C

### SUCCESSION OF SARGENT PRATT.

At the decease of husband or wife, all the property possessed by them is presumed to be community property until the contrary is shown.

If the surviving wife expresses her willingness to pay all the debts, and no creditors desire it, an administration on the husband's estate, so far as it concerns the community, is unnecessary.

When it is not alleged or shown that any part of the estate was the separate property of the husband, the surviving wife has the right to be put in possession of all the property left by him, on complying with the obligations of the usufructuary, as explained in the Civil Code. Her usufruct of the share of her deceased husband commences from the moment of his death.

The heirs of the husband should be protected against the debts of the estate by requiring the wife to advance the money to pay them, or procure the release of the heirs from all liability for them.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*Durant & Hornor* and *W. H. Paxton*, for opponent and appellant. *P. E. Bonford*, for administratrix. *R. W. Gurley*, for absent heirs.

*COLE, J.* *Aphra Pratt*, sister of the deceased *Sargent Pratt*, petitioned to be appointed administratrix of the estate of her said brother, which is valued in the inventory at \$23,757 25.

An opposition was filed to her appointment by *Ann O'Brien Pratt*, on the ground that she was surviving widow in community of said *Sargent Pratt*; that he died intestate, left neither ascendants nor descendants; that his property was entirely community property; that she is entitled to one half of her husband's property in full ownership, and to the usufruct of the remaining half; that the succession owes no debts, and that she is willing to accept his succession unconditionally.

The attorney of absent heirs joined issue, demanding proof of the widow's marriage.

Judgment was rendered against her on account of the exclusion of important legal testimony; it was reversed by this court, and the cause was remanded for further proceedings.

At the second trial, an immense amount of testimony was introduced to establish her *status* as widow of said *Sargent Pratt*.

We are of opinion that it is satisfactorily proved that she was his wife: her *status* as wife was recognized by *Sargent Pratt* in every possible way, up to the period of his decease; their marriage was also proved.

We think there is no necessity for the appointment of an administrator to the estate.

It would only be needlessly creating expenses for the succession to appoint an administrator, when no creditor desires it, so far as the record shows; when the debts are not heavy, and the widow expresses her willingness to pay them.

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There was a large amount of testimony offered to show that the property of the estate, or a large part thereof, is community property. We consider that the pleadings did not justify the introduction of such testimony, and that it cannot be considered in the issues made up by the parties.

It is true that opponent alleged in her opposition that the property of her husband's estate is community property, but the answer of the attorney of absent heirs was a general denial, and only required special proof of the marriage.

If the heirs claimed the whole or any part of the estate as the separate property of the deceased, it was their duty to have alleged it.

We suppose, then, that it was the intention of the parties not to have in the present suit the character of the property determined, but to have two points decided, to wit:

Whether *Aphra Pratt* is entitled to the administratorship, and if she is not, whether opponent has the right to be put in possession of the estate.

The first point has been already decided in the negative; the second point must be given in favor of opponent for the following reasons:

The Act of the Legislature, approved March 25th, 1844, enacts: "That in all cases hereafter, when either husband or wife shall die, leaving no ascendants or descendants, and without having disposed by last will and testament of his or her share in the community property, such share shall be held by the survivor in *usufruct* during his or her natural life."

Two questions now arise: first, what part of the estate is community property, and secondly, when does the usufruct commence?

As to the first point, we would remark that the law presumes the whole estate is community property, until the contrary is proved. In this case, no proper pleadings were made so as to decide against the presumption of law.

As to the second point, we are of opinion that the usufruct commences from the moment of the decease of the husband or wife, for as the surviving partner is entitled to the usufruct of the share of his spouse in the community property, and as the title of that share vests directly after the death of the spouse in his heirs, the right to the usufruct begins at the same moment that the title of the property attaches to the heirs; otherwise there would be property without any one being entitled to the usufruct, for by the Act of 1844, the heirs in the cases contemplated by that law are divested of the usufruct, and if the surviving partner did not have the right to the usufruct of the property at the moment of the decease of her spouse, then there would be no one who could claim it.

We are then of opinion that opponent is entitled to be put in possession of the effects of the succession of her husband, on complying with the obligations of the usufructuary, as explained in the Civil Code.

We do not think it necessary to put the parties to unnecessary expense and trouble in remanding the cause to have a new inventory made.

There has been no question raised as to the necessity of a new one, and the old one appears to be a reasonable basis for the security to be given, inasmuch as Art. 552 C. C. directs that the security shall be estimated according to the inventory, and such further sum as shall be fixed by the Judge, according to the nature of the real property subject to the usufruct, to answer for the damages which the usufructuary, or those for whom he is responsible, may commit thereon.

It appears to us that no injury can be suffered by the heirs by our views, for they can bring a direct action against the widow for that part of the property which did not belong to the community.

We will also protect the heirs against the debts of the estate, by obliging the widow to either advance a sufficient sum to pay the debts of the deceased, or to furnish, as she avers she can, the consent of the creditors that she shall assume and furnish security for the payment of the debts due to them; this assumption must also be accompanied with a release of the heirs from all liability.

In order to prevent future difficulty, we would observe that the security should only be exacted for the debts of those creditors who may have presented themselves previous to the application of the widow to furnish the security, the release and assumption, or to advance a sufficient sum to pay the debts.

It is, therefore, ordered, adjudged and decreed that the part of the judgment which maintains the opposition of *Ann O'Brien Pratt* so far as to have her recognized as the surviving widow of *Sargent Pratt*, be affirmed; and it is further ordered, adjudged and decreed, that the rest of the judgment be avoided and reversed; and it is further ordered, adjudged and decreed, that the application of *Aphra Pratt* to be appointed administratrix be rejected; that *Ann O'Brien Pratt*, the surviving widow, be put into possession of the estate of her deceased husband, *Sargent Pratt*, by the lower court, after she shall have given good security, conditioned according to the obligations of the usufructuary in Art. 551 of the Civil Code, in an amount equal to one-half of the estimated value of the movables and slaves of the estate of said *Sargent Pratt*, according to the inventory of said estate made on the thirteenth day of September, of the year eighteen hundred and fifty-five, and according to any supplemental inventory of such estate, if any such has been already made; and after the said widow shall have given security in such further sum as shall be fixed by the Judge of the lower court, according to Art. 552 of the Civil Code, unless said widow prefers giving a special mortgage, as provided by Art. 555 of the Civil Code; and after the said widow *Pratt* shall have advanced a sufficient sum to pay the debts of her deceased husband's estate or furnished the consent of the creditors of said estate, that she shall assume and furnish security for the payment of the debts due to them; this assumption must be accompanied with a release of the heirs from all responsibility for said debts; the said widow is only to guaranty, as aforesaid, the rights of such creditors who may have presented themselves previous to the application of said widow to furnish security, as aforesaid, for the benefit of the creditors of said estate, reserving the rights of the heirs to sue for the separate estate of said *Sargent Pratt*.

It is further ordered, adjudged and decreed, that said *Aphra Pratt* pay the costs in the lower court, of her application to be administratrix of said estate and of the opposition of *Ann O'Brien Pratt*, and also the costs of appeal.

Vide: Act of 1844, p. 99; *Succession of Fitzwilliam*, 3 An. 489; *Succession of Bringier*, 4 An. 389.

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## C. YALE, JR., &amp; Co. v. P. HOOPES—SEAMAN, PECK &amp; Co., Intervenor.

A party intervening in an attachment suit and claiming a privilege on the property attached, is bound to see that his intervention is properly put at issue and brought to trial.

When no default is taken and no issue joined on the petition in intervention, the plaintiff may proceed to render his judgment by default against the defendant final, without the cause being set for trial.

The intervention falls with the decision of the main suit.

The proper mode of testing the rights of one claiming the vendor's privilege on property attached is not by way of intervention but by third opposition.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Emerson & Huntington*, for plaintiffs. *C. B. Singleton*, for intervenors and appellants.

**SPOFFORD, J.** The plaintiffs upon a money demand against *Hoopes*, a non-resident, attached certain merchandize, and brought suit praying for judgment against him, with the right of selling the property attached to pay their claim by preference.

*Seaman, Peck & Co.* intervened, and, alleging that they had sold the merchandize attached to the defendant on a credit, he having promised to furnish them collateral security, which he had failed to do, they prayed: 1st, that the sale from them to *Hoopes* be avoided, and the goods restored to them; and, 2d, that they be decreed to have the first privilege on the goods as vendors.

The counsel for plaintiffs accepted service of this petition in intervention and waived citation on the 28th April, 1855. On the 8th May, 1855, they took a judgment by default against their debtor *Hoopes*, who had been personally cited on the 25th April, which was duly confirmed (after proof of their demand) on the 15th May, and signed on the 19th May.

The intervenors never took any default against the plaintiffs, although they might have done so before the default was taken by plaintiffs against the defendant. There never was any issue joined on the demand in intervention with any party. Indeed, the intervenors seem to have slept over their claim for more than six months without having made any attempt to put it at issue, or to bring it to a trial.

It is only cases where issue is joined by answer filed that are required to be fixed for trial; C. P. 463. As there never was any issue joined in that mode here, the plaintiffs, who could not be retarded in their suit by intervention, had a right to proceed to the proof of their demand, and thus make the default against their debtor final.

With the decision of the main suit the intervention falls. As no issue was joined upon it, the question of the right of the intervenors to a vendor's privilege has not been passed upon. The proper mode of testing such a question is not by way of intervention but by third opposition. C. P. 395 *et seq.*

The cases of *Jones v. Lawrence*, 4 An. 279, and *Thompson, executor, v. Miles*, 4 An. 208, are decisions against the appellants. They have suffered no injury by the conduct of the appellees, who have not taken any advantage, and were not compelled to intervene.

Judgment affirmed.

BUCHANAN, J., concurring. I concur in the decree affirming the judgment,

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dismissing the intervention and third opposition, because I am of opinion that the Article 394 of the Code of Practice does not mean that the Judge cannot proceed to try and determine the issue between plaintiff and defendant without also at the same time hearing and deciding the intervention; but simply that he is bound to do so if the parties require it, and if they have put themselves in a situation to try the intervention. The Article says "The Judge cannot refuse to admit an intervention, but he must pronounce on its merits at the same time that he decides the principal action."

I understand the last clause of this quotation to be a qualification of the first, in aid of the provision of Article 391 "one may intervene either before or after issue joined in the cause, *provided* the intervention do not retard the principal suit." The other construction of Article 394 (that the plaintiff cannot try his cause unless the intervention is tried at the same time), is inconsistent with Article 391, because the intervention might be filed after the principal cause was assigned for trial, and the defendant might neglect to join issue upon it, for the purpose of retarding the trial, or the plaintiff might be unprepared to do so; in either of which cases the cause would have to be continued. In the present case there was another very sufficient reason for dismissing the intervention. It prayed for two inconsistent remedies, the annulling of the sale and a preference, as vendor, upon the proceeds of the things attached; and was bad pleading.

Lastly, the intervenor has not been injured by the dismissal of his intervention. He may renew his suit for the annulment of the sale by a separate action, or, if he prefer to claim the privilege of vendor, he may renew his claim by motion, as well after judgment on the principal demand as before it. C. P. 401. In either case the appellant is secure, for he has the property attached in his own hands, having bonded it.

In conclusion, I would remark, that the appellant's plea is styled an "intervention and third opposition." Properly speaking, it is not an intervention but a third opposition; and a third opposition of both the classes mentioned in Article 396 of the Code of Practice. And neither class of third opposition, in contemplation of law, is to be heard and decided at the same time with the case of plaintiff, as against the defendant. The third opposition does not concern the person of the defendant but only the thing seized. It asserts either a *jus in re*, or a *jus ad rem*.

MERRICK, C. J., dissenting. This suit being for \$700, was commenced by an attachment which was levied April 23d, 1855, on three boxes of merchandize marked in the name of the defendant, an absentee, directed to Port Gibson, Mississippi. Citation was served by posting on the door of the St. Louis Church and the door of the court-house, on the 25th day of April, also personally the same day.

On the 25th day of April, 1855, *Seaman, Peck & Co.* intervened in the suit, and claimed to be the vendors of the goods attached; and alleged that the defendant at the time of the purchase agreed to furnish certain collaterals in order to secure the payment of the price, and, that by reason of his non-compliance, intervenors have a right to annul said sale and to take back said goods. They pray that the goods be provisionally delivered to them, that said sale be annulled, or, if the court should be of the opinion that said sale ought not to be annulled, then that they be decreed to have the vendor's privilege upon the same for \$1179 97, the price, and a preference over the plaintiff. A formal

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order was made by the Judge allowing the intervention and service, which was accepted the same day by plaintiff's attorney, in these words :

"Service accepted and copy of petition and citation waived."

"New Orleans, April 28th, 1855.

[Signed]

EMERSON & HUNTINGTON,

*Attorneys for Yale, Jr., & Co."*

The intervention and citation was also served on *R. W. Gurley*, curator *ad hoc*, and the Sheriff, on the 30th of the same month.

The same day, viz: the 30th of April, the intervenors took a rule upon the plaintiff to show cause why the merchandize should not be delivered to them upon their bond. Service of this rule was also accepted by the same attorneys. Counsel were heard on the rule on the first day of May, and it was continued and made absolute on the ninth day of May. On the second day of May the curator *ad hoc*, who had been appointed on the 30th of April, was first notified of his appointment.

In six days after the curator *ad hoc* was notified of his appointment, viz: May 8th, 1855, and eight days after the appointment on the minutes of the court and the service of the intervention, the plaintiffs took a judgment by default on showing that the defendant had failed to answer. This default was made final, not only against the defendant but also against *Hoopes & Co.*, on the fifteenth day of May, 1855, on the proof of the plaintiff's demand, *and without setting the case for trial.*

The intervenors do not appear to have had any knowledge of the default taken against the defendant on the 8th of May, for the judgment on the rule was pronounced in their favor on the 9th, and the property was bonded for by them on the 14th day of the same month. The judgment by default having been made final on the fifteenth, the day after the property was bonded under the rule, was signed on the 19th of May.

The same day the judgment was signed, the plaintiffs again appear by counsel and represent to the court that the defendant resides out of the State and *has no known agent here*, and move the appointment of *Samuel T. Meyers*, curator *ad hoc*, to represent defendant, which was done.

Thereupon, notice of judgment was served on the new curator *ad hoc* on the 22d day of May.

Execution issued on this judgment on the 9th day of June, and was returned no property found on the 23d day of July. An *alias fi. fa.* was issued in November, which was returned in like manner in December, 1855.

On the 12th day of January, 1856, the plaintiffs filed their exceptions and answer to the intervention and third opposition for the first time. They except to the intervention and third opposition, and pray that the same may be dismissed, because final judgment has been rendered and the intervenors have taken no steps to bring their claim to trial.

The answer, in the event the exception should be overruled, was a general denial.

On the 18th day of January the plaintiffs filed a supplemental petition, issued a *fi. fa.*, and propounded interrogatories to *John Wall & Co.*, as debtors of the defendant.

On the 19th of February, 1856, they filed a similar proceeding against *Curry & Person*.

On the 23d of February, 1856, on motion of plaintiffs counsel *another curator ad hoc* (J. B. Eustis) was appointed for these proceedings, of which notice was given on the 25th.

After sundry continuances, the intervention or opposition came up for trial in November, 1856, when the exception filed on the 12th day of February, 1856, was sustained and the intervention dismissed. The intervenors have appealed.

From this statement of the case it appears that at the time the default was taken by the plaintiff against the defendant it was not possible for the intervenors to do more than they had done. Service of their petition had been accepted by the plaintiff, and citation waived.

They had caused their petition to be served on the Sheriff and on the curator *ad hoc*, and the delay for answering had not elapsed.

It is true, they might have taken a judgment by default against the plaintiff on the demand in intervention by the fifteenth of May, but it does not appear that the judicial days for making it final would have elapsed, and no answer was filed by the curator *ad hoc*.

As the summer months intervened and the courts adjourned shortly after the order of the Judge decreeing the delivery of the property to the intervenors, and as the plaintiffs wholly neglected to answer the intervention, no laches, in my opinion, are imputable to the intervenors. It was the duty of the plaintiffs to answer the demand in intervention and third opposition, the service of which they had acknowledged. They were themselves in fault for not answering, and the intervenor was no more bound to take judgment by default against the plaintiff than the plaintiff is in any other case bound to take a default against the defendant. See *May v. Ball*, 12 An., just decided. The mandate of the citation in both cases (to the defendant to the original petition and intervention) is to comply with the demand contained in the petition, or deliver the answer to the petition in the office of the clerk of the court. C. P. 393, 179.

How, therefore, can a party who has disobeyed the injunction of the court complain of the opposite party for not having had him adjudged to be in default? His complaint amounts to this: It is true it was my duty to answer your demand in intervention, for I have been so ordered by the court, but as you have had the good nature to wait on me when you might have had me declared to be in default, now, therefore, you are greatly in the wrong yourself, and it is the duty of the court to dismiss your demand for your negligence.

When the intervention is once allowed by the Judge and served, it forms, in my opinion, a part of the suit, which can only be got rid of by the plaintiff by some action of the court, either on an exception or motion to strike out. If the intervenors cross swords with the plaintiff by demanding anything in their petition of intervention adverse to the plaintiffs' demand, or if they oppose anything in the plaintiffs' petition, as they do in this case, the intervention and opposition becomes so far an answer, and presents an issue for trial which the intervenors are entitled under all circumstances to have assigned for trial.

From the time the intervention is served upon the plaintiff he is as much bound, as I think, to take notice of it as he is of the defendant's answer, and he must regard the intervenors as parties to the suit having rights as such. He must prepare himself to meet the intervention and do what is required to be done on his part, viz: file his answer.

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As in the case of an answer the plaintiff cannot obtain judgment against the defendant, without setting the cause down for trial, so on the intervention; the cause must be put at issue and set for trial, for the Judge is peremptorily required to pronounce on the merits of the intervention at the same time he does the original demand. C. P. 394. An injunction which appears to have been wholly disregarded in the present case.

It is not made the duty of the intervenor to force the other parties to trial, nor is he in general less favored than other suitors. For the proceeding by intervention is one well calculated to avoid circuitry and multiplicity of actions, which the law abhors, and to prevent the collusive and fraudulent use of the forms of judicial proceedings.

There are only two things which require greater diligence on the part of the intervenors than on the part of other suitors, they are prescribed by Article 391 C. P.: 1st, He must always be ready to plead; 2d, He must be ready to exhibit his testimony. But even in these respects the Code of Practice is so construed as to give the intervenor time to cite the parties, and a reasonable delay to procure the testimony. 16 L. R. 268.

But it is said that the cases of *Thompson v. Milne*, 4 An. 208, and *Jones v. Lawrence*, *ibid* 279, are decisive of the case at bar. They do not appear to me to sustain the view for which they were cited. In the first case it appears that the plaintiffs had done their duty and answered the intervention, and were not in default, and it was held that the intervenors were bound to take notice of an order made in open court. The plaintiffs were appellees, and the cause was remanded for a new trial at their instance.

In the case of *Jones v. Lawrence* it is stated that the intervenors employed the defendant's counsel. That on the trial of the cause they (the counsel) absented themselves from the court-house, and not being found in the court-house buildings the plaintiff proved his claim and submitted the case. Afterwards, when the intervenors attempted to annex a supplemental petition to their former one and so proceed upon both, their proceedings were very properly dismissed.

In the case of *Durocher v. her husband*, the intervenors expressly consented that the principal action should be first tried and the court say: "The waiver by the intervenors of their right to oppose the progress of the cause, and their consent that it should proceed to judgment, was equivalent to a withdrawal of the intervention. The Judge, under the express renunciation by the intervenors of their right to be heard, was dispensed from pronouncing upon their intervention at the only time when legally he could have pronounced upon it, to wit: when declaring upon the principal action." 3 An. 332. The fair inference is, that had it not been for the consent of the intervenors the Judge, in obedience to Article 394, would have been obliged to pass upon the intervention when he decided the principal action, and his failure so to do would have been error.

Holding these views, I am unable to concur in the decree in this case which seems to me to destroy the usefulness of the intervention, and open the door to surprises.

In my opinion, the Judgment of the District court ought to be reversed, and the cause remanded for further proceedings.

Mr. Justice COLE concurs in this opinion.

## MARGARET TOMPKINS at al. v. HORACE PRENTICE et al.

A testator having no descendants living, devised his whole estate to his mother, brother and sister, omitting entirely his father who survived him. The father made a notarial act of renunciation of all his right and interest in the estate of his deceased son. Creditors of the father claimed the right to have the renunciation set aside on the ground that it was made by their debtor in fraud of their rights as judgment creditors, and to have the portion of the estate for which they alleged the father was the forced heir of his son, subjected to the payment of their claims against the father.

*Held*: That such an action could not be maintained.

There are rights of the debtor which the creditors cannot exercise, even should he refuse to avail himself of them.

The debtor in this case would only have the right to demand the reduction of the donation *mortis causa* to the disposable portion.

By Art. 1491 Civil Code, this reduction can be sued for only by *forced heirs* or by *their heirs* or *assigns*; the word "assigns" is defined to mean those whose rights have been transmitted by particular title, such as sale, donation, legacy, transfer and cession. C. C. 3522.

The creditors of the forced heir are not embraced within the definition, and cannot sue for the reduction.

**A** PPEAL from the District Court of Carroll, *Farrar, J.*

*Short & Parham*, for plaintiffs and appellants. *L. Selby*, for defendants.

MERRICK, C. J. The action of the creditors in avoidance of the contracts of their debtors, is allowed by the Code for the purpose of annulling some fraudulent act of the debtor himself.

But in this case the principal act complained of, is that of *Joseph Prentice* in making a will, by which he conveyed his whole estate to his mother, brother and sister. Had he given one-sixth of his estate to his father, *Horace Prentice*, there would have been no pretence for the institution of this action.

But *Joseph Prentice* was not the debtor of the plaintiffs. He owed them nothing.

By Article 1491 C. C. it is provided that on the death of the donor or testator, the reduction of the donation, whether *inter vivos* or *mortis causa*, can be sued for only by *forced heirs* or by *their heirs* or *assigns*.

By Article 3522, the term "assigns" is defined to mean those whose rights have been transmitted by particular title, such as sale, donation legacy, transfer and cession. The French word *ayant-cause* is defined in the same language. Moreover, the Article declares that whenever the terms of law employed in the Code have not been particularly defined therein, they *shall* be understood as defined in said Article. See 8 Toul., No. 245.

Now the law-giver must be understood to have used the word in the sense defined, because in the concluding portion of the Article the word "creditor" is used in contrast with the word "assigns."

Possibly the law-giver may have preferred to give effect to the *wishes of the testator* and allow *his* estate to take the direction he had indicated, rather than subject it to the seizure of creditors of an heir who did not feel himself aggrieved by the universal legacy to another.

In another place the Code says, that there are rights of the debtor which the creditors cannot exercise, even should he refuse to avail himself of them. They cannot require the separation of property between husband and wife, nor can they oblige their debtor to accept a donation *inter vivos* made to him, nor accept it in his stead. Neither can they call on a co-heir to collate when such

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debtor has not exercised that right. C. C. 1986, 1987. Article No. 1491 has but added another case of like nature to the list.

Had this very case been in the mind of the law-giver, it is not unreasonable to suppose that in the controversy to the estate of the testator between the mother, brother and sister of the deceased, and the creditors of the father, that the former would have been preferred. The letter of the law protects them in their possession under the will so long as the father of the deceased does not choose to disturb the dispositions of the will.

In our opinion what was in the mind of the compilers of the Napoleon Code, or what has been said by the French commentators, ought not to preponderate against the express definition of a term given by the compilers of our own Code, and sanctioned by the law-making power.

Judgment affirmed.

BUCHANAN, J., concurring. The petition has a double aspect: one against *Horace Prentice*, in relation to whom it is a revocatory action; and the other against his two co-defendants, *Minerea L. Prentice* and *Horace D. Prentice*, in relation to whom it is an action for the reduction of a donation *mortis causa*.

From the manner in which the plaintiffs state their case in the petition, as well as from the objection made by them to the admission of *Joseph Prentice's* will in evidence, it is apparent that they would have preferred to treat the succession of *Joseph Prentice* as an intestate estate. But this cannot be done; and their objection to the introduction of the will was properly overruled.

*Joseph Prentice* has disposed of all his estate by his will, in favor of three persons: 1st, his mother, as legatee by universal title, for one-half; 2d, his brother *Horace Prentice*, as legatee by universal title, for one-fourth; and, 3d, his sister, *Celia Maria Prentice*, as legatee by universal title, for one-fourth.

*Joseph Prentice's* father has, therefore, no interest whatever in the succession of his son, unless the will is set aside partially, by reducing the legacies to the testator's mother, brother and sister to the disposable portion; for note, that by Article 1489 of the Code, a disposition *mortis causa* exceeding the disposable portion, is not null, but only reducible to that portion.

The renunciation by *Horace Prentice*, the father, of all interest in his son's estate, can only be viewed as significant of his intention not to contest his son's will. The creditors have sustained no prejudice by such renunciation, so long as the will is not attacked. Their right to attack the will is, therefore, the vital point in plaintiffs' case; and I am of opinion with the Chief Justice, that we are bound to interpret the word *assigns* in Article 1491 according to the definition contained in Article 3522. The latter Article is, as far as it goes, a legislative glossary of the Code. It commences thus: "Whenever the terms of law, employed in this Code, have not been particularly defined therein, they shall be understood as follows."

The Code Napoleon contains no glossary of this kind. Had it done so, the comments of Coin-Deislé and others upon the expression *ayans-cause* in Article 921 of that Code, would have been superfluous.

Although it may be going further than the subject requires, I will venture to observe, that I am not at all clear that *Horace Prentice*, the father, could have successfully combatted the will of his son, had he been so inclined. *Joseph Prentice* has only disposed of *one-half* of his estate to the prejudice of his parents, instead of two-thirds, as he might have done legally. It is true, the

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other half is or given to one parent. But does not this fulfil the law? Or was he bound to mention both his parents? The question does not seem to me free from difficulty.

I will also observe, that the plaintiffs have not made all the necessary parties to their action for the reduction of the donation, supposing they have the right to maintain such an action. The testator's sister is not mentioned in the petition.

SPOFFORD, J., dissenting. The plaintiffs have been for many years judgment creditors of *Horace Prentice*, one of the defendants, but have been unable to enforce a collection of their claims, because he held no property in his own name.

It appears, however, that after *Horace Prentice* ceased to hold property in his own name, *Maunsel White* made a donation of some fifteen slaves and several promissory notes to *Joseph Prentice* and *Horace D. Prentice*, minor children of *Horace Prentice*, who accepted the donation for them in his quality of tutor. *Joseph Prentice* also made other acquisitions. The father, *Horace Prentice*, seems to have had the management of this property of his children which was situated in the parish of Carroll, where he resided.

It appears that in the spring of 1854, *Joseph Prentice*, being of age, came to New Orleans to reside. He lived here something more than a year, and in August, 1855, was accidentally killed during a temporary absence from the city.

He left an olographic will bequeathing one-half of his property to his mother, *Minerva S. Prentice*, and the other half in equal portions to his brother *Horace D.* and his sister, *Celia Maria Prentice*.

On the 8th December, 1855, upon the application of *Horace Prentice*, the father, this will was admitted to probate in the District Court of New Orleans.

On the 12th of November, 1855, however, *Horace Prentice* had made a notarial act of renunciation of all his right and interest in the succession of his deceased son *Joseph*. This act was passed before the recorder of the parish of Carroll.

The present suit has a two-fold object; 1st, to set aside this renunciation on the ground that it was made by the debtor in fraud of the right of the plaintiffs as judgment creditors of *Horace Prentice*; and, 2ndly, to have the amount of the interest of said *Horace* in the succession of his son *Joseph* determined and subjected *pro rata* to the payment of their claims.

There was judgment for the defendants and the plaintiffs have appealed.

The defendants, *Horace Prentice*, for himself and as tutor of the minors, and *Mrs. Prentice*, rely upon the will and upon a plea of prescription of ten years against the judgments of the plaintiffs.

The judgments are not barred by the prescription established in the Act of April 30th, 1853 (Sess. Acts, p. 250), as contended for by the appellees. Laws concerning prescription, like laws in general, are prospective in their operation. The rule is well settled in our jurisprudence, that when a statutory change is made in the term of prescription against any particular class of actions or demands, the time that elapses previous to the change is reckoned according to the old law, and that subsequent to the change according to the new law. *Kellar v. Parish & Thompson*, 11 An. 112, and cases there cited. If then it was conceded that, before the Act of April 30th, 1853, domestic judgments were prescriptible in thirty years, only about ten years of the time had run and about twenty years remained to run when the change was made, which re-

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duced the time to one-third of the old period. That would leave nearly seven years to run before the judgments could be prescribed against under the new law, and less than three years had expired when this suit was brought.

*Horace Prentice* was heir to one-fourth of his son *Joseph's* succession. C. C. 899; *Cole's Heirs v. Cole's Executors*, 7 N. S. 417; *Grover v. Clack*, 7 An. 174. Under these decisions, if he had been the sole surviving parent, he would have been forced heir for one-fourth. But, as the mother survived also, each of them was forced heir for one-sixth only of their son's succession, for "donations *inter vivos* or *mortis causa* cannot exceed two-thirds of the property, if the dispositive, having no children, leave a father or mother, or both." C. C. 1481. He could dispose to the prejudice of both father and mother of two-thirds of the estate, leaving one-third as the *legitime* to be equally divided between them according to the principle announced in the Article 899.

It is contended by the appellants that the will was null as to the father, because he was not expressly disinherited according to the forms prescribed by the Code, and the inference seems to have been drawn that he was, therefore, entitled to one-fourth of the succession. But the only effect of this preterition was to leave him seized of his *legitime* at the opening of the succession, that is of the one-sixth for which he was forced heir, and of which he could not be deprived except by a disinherison in due form and for just cause. C. C. 1608. See *Johnson v. Davidson*, 6 M. 506.

His renunciation of his right to this one-sixth was a gift of all the property he had, to the prejudice of his creditors, and it was, therefore, in legal contemplation a fraud upon them. Every man is bound to do justice before he can be permitted to be generous. The debtor's property is the common pledge of his creditors. And the law has guarded in express terms against such a liberality as was displayed by this insolvent debtor, who would rather decline the bounty which Providence casts upon him, than suffer it to enure to the discharge of his legal engagements. "Every act done by a debtor with the intent of depriving his creditor of the eventual right he has upon the property of such debtor is illegal, and ought, as respects such creditor, to be avoided." C. C. 1964. "Not only contracts which dispose of property, but all others which are made in fraud of creditors, and deprive them of their recourse to the property of their debtor, come within the provisions of this section. *The renunciation of a succession* or other right to property, the release of a debt without payment, or any other act of this kind, may be avoided by creditors, when done to their prejudice, under the rules above established." C. C. 1984.

The renunciation made by the defendant, *Horace Prentice*, should then, so far as the complainants are concerned, have been set aside. This disposes of the first branch of the plaintiff's demand.

The second question presents more difficulty. What will be the effect of the revocation of this renunciation, and what rights can those plaintiffs claim in the succession of *Joseph Prentice*?

The Code is clear and positive upon the first of these points. The creditors who have procured the fraudulent renunciation of the heir to be set aside, are, until paid the amount of their claims, put in his place and stead. In the eye of the law, they become beneficiary heirs themselves to the extent of their claims upon the heir. Thus: "The creditors of the heir who refuses to accept, or who renounces an inheritance to the prejudice of their rights, can be authorized by the Judge to accept it, in the name of the debtor and in his

stead, according to the forms prescribed on this subject in the following section:

"In case of this acceptance, if there be renunciation on the part of the debtor, the renunciation is annulled only in favor of the creditors *for as much as their claims amount to*; but it remains valid against the heir who has renounced.

"If, therefore, after the payment of the creditors, any balance remains, it belongs to his co-heirs, who may have accepted it, or if the heir who has renounced be the only one of his degree, it goes to the heirs who come after him.

"If, on the contrary, the heir has only refused to accept and has not renounced, he can claim the surplus on accepting the succession, provided his right of acceptance be not prescribed against." C. C. 1014.

"When the creditors wish to be authorized to accept a succession, which their debtor refuses to accept, or which he has renounced to their prejudice, they must present a petition to the Judge of the place where the succession is opened, to obtain the authorization necessary for that purpose, after the debtor or his representative has been duly cited, or a counsel appointed for him, if he is absent, by the Judge." C. C. 1064.

"If, on this demand, it is proved to the Judge that the debtor *refuses* to accept the succession, or has renounced it to the prejudice of his creditors, he is bound to authorize *the creditors to accept it in his stead*; and it is the duty of the Judge to cause immediately to be made an inventory of the effects of the succession, to appoint an administrator to manage them, sell them and pay the creditors, on his giving good and sufficient security for the fidelity of his administration, as in the case of acceptance with benefit of inventory." C. C. 1065.

"The creditors, who thus accept a succession *in the name of their debtor*, are considered as accepting it under benefit of inventory." C. C. 1067.

But, in this case, it appears that the property is in the parish of Carroll, not administered, but held in possession, as owners, by the legatees under universal title. It does not appear that the succession owes any debts. By instituting this suit, the creditors of the renouncing heir have signified their acceptance in his stead. The instituted heirs have met the issue without taking any exception to the form of the proceeding, and I am of opinion that the whole merits of the controversy may be now decided.

The District Judge seems to have thought that the Article 1746 of the Civil Code and the doctrine laid down in the case of *Cook v. Doremus*, 10 An. 679, formed a barrier to the claim of the plaintiffs. There is no such state of facts presented as would authorize this conclusion. Even if the right of *Horace Prentice* in this succession were defeasible by a condition subsequent, no such condition has been fulfilled, and his creditors may take whatever interest he has, unless there is some other bar to the action. Moreover, the property did not descend to *Joseph Prentice*, or come by donation from either of his ascendants. The greater part of it came to him as a donation from a stranger, and he acquired the rest by purchase.

But it is contended that the action is in effect an action in reduction of an excessive donation *mortis causa*, and that the Article 1491 of the Louisiana Code, forms a peremptory bar to the demand on the part of the creditors of the heir. "On the death of the donor or testator, the reduction of the dona-

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tion, whether *inter vivos* or *mortis causa*, can be sued for only by forced heirs, or by their heirs or assigns; neither the donees, legatees, nor creditors of the deceased, can require that reduction nor avail themselves of it." C. C. 1491.

The argument is that the creditors, plaintiffs in this cause, are not forced heirs themselves, nor heirs, nor assigns of the forced heir; and, therefore, that they cannot demand a reduction of the excessive legacies to the mother, brother and sister of the deceased in derogation of the *légitime* reserved by law to the father as forced heir.

It will be observed that the word "assigns" is "*ayants-cause*" in the French text, and that, in this particular, the Article is literally taken from Article 921 of the Code Napoleon. It will also be observed that the word *ayants-cause* in Article 921 of the latter Code, is held by the French authorities, with entire unanimity, to embrace personal creditors of the heir. See Grenier, No. 595; Delvincourt, t. 2, note 4, p. 66; Toullier, t. 5, No. 125; Coin-Delisle, Art. 921, No. 2; Marcadé, t. 3, No. 583. Indeed, Coin-Delisle justly remarks that this word is a generic term and was chosen by the *rédacteurs* of the Code for its extensive signification. "Le tribunal avait demandé de substituer les mots *cessionnaires* et *créanciers* à ceux d'*ayants-cause*, mais le Conseil d'État a dû conserver la première rédaction comme présentant un sens *plus étendu*." Donations et Testaments, Art. 921, No. 2.

In the English law, *assigns* means those persons to whom some right or property is transferred, whether by deed, or *by operation of law*. Burrill's Law Dic. The definition of the term in Art. 3522, No. 5, of the Louisiana Code, appears to be somewhat more restricted.

The turn of the phrase in the concluding part of Article 1491, seems to indicate that creditors are intended to be embraced in the word "assigns"; the Article declares that the reduction can be sued for only by forced heirs and *their* heirs or assigns; neither the donees, legatees nor creditors of the deceased can require it, &c. Here the "assigns" of the forced heir are placed in antithesis to the "donees, legatees and creditors" of the deceased. The leading intention obviously was not to limit the right of action as to those who claimed through and under the forced heir or in his right, but to shut out those only who wished to exercise this action by reason of some claim they had under or against the deceased testator, other than that of forced heirship to him.

But it matters little what definition be given to the word assigns in Article 1491; for the creditors in this action having accepted the succession which the heir fraudulently renounced, act in *his name and stead*; as already remarked, they take the place of the forced heir until their claims are satisfied, and their right to demand the reduction of the legacies in the name of the heir, seems to have been recognized by the tenor of the Code in treating of this subject, and especially by the Article 1985, which is in these words: "In case the debtor refuse or neglect to accept an inheritance to the prejudice of his creditors, they may accept the same, and exercise all his rights in the manner provided for in the title of successions, and they are authorized, by virtue of the action given by this section, to exercise all the rights which the debtor could do for recovering the possession of the property to which he is entitled, in order to make the same available to the payment of their debts."

The present case comes within none of the exceptions to this rule, which are enumerated in the following Articles 1986 and 1987:

And in *Lynch v. Kitchen*, 2 An. 844, it was held, that "creditors can exer-

cise all the rights and actions of their debtors, except those reserved in Articles 1986 and 1987 of the Civil Code."

Passing from this review of the case, I would remark, that if we give the word "assigns" in Article 1491 the narrowest meaning, it does not seem to follow that the creditors of the heir assuming his place, may not attack an excessive donation *mortis causa*. Marcadé has judiciously observed, that if the Article of the Code Napoleon (921), from which we have taken our Article 1491, had said that the reduction might be sued for only by forced heirs, and had omitted the phrase "and their heirs or assigns," still the right of the creditors of the forced heir to take his place, and sue for the reduction, would have resulted from other provisions of the Code.

"Enfin, sans que le réservataire ait transmis son droit à personne, il est clair que les créanciers qui ont pour gage légal tous les biens de leur débiteur, (Art. 2092, 2093,) auront droit à sa réserve comme à tous les autres biens lui appartenant, et pourront intenter l'action en réduction en son nom, pour se faire payer sur les valeurs qu'elle produira. Ce droit est formellement écrit dans l'Art. 1166, qui, déduisant la conséquence de l'Art. 2093, déclare que les créanciers peuvent exercer toutes les actions appartenant à leur débiteur. On en excepte, il est vrai, et avec raison, les actions qui reposent sur un intérêt plutôt moral que pécuniaire (comme une nullité de mariage, une séparation de corps, &c.); mais l'action en réduction ne tendant qu'à obtenir une part de succession, des biens, de l'argent, et se trouvant purement pécuniaire, il est clair que cette exception ne saurait l'atteindre.

"En un mot, l'action en réduction peut être intentée par tous représentants ou ayants-cause du réservataire, et nous n'avions nul besoin des termes de notre Article pour comprendre ce résultat." 3<sup>e</sup> Marcadé, No. 583.

I am accordingly of opinion that the present action can be maintained.

VOORHIES, J., concurred in this opinion.

#### THE STATE v. COLE and WILLIAMS—JOHN A. BURK, Security.

Even after a motion to dismiss an appeal has been filed, the certificate of the Clerk of the lower court to the transcript may be amended.

The Act of 20th March, 1839, §19, enlarged the discretionary power of the Supreme Court contained in Art. 898 C. P., and made it imperative, not to dismiss appeals for clerical errors not attributable to the appellant.

In a bond requiring the accused to appear "when notified," when the Sheriff returns that he could not find the accused after diligent search, and his surety, who was personally notified in time, failed to produce him as he bound himself to do, this was sufficient to put the parties in default, and the bond was properly forfeited against both principal and surety.

An objection that the bond only required the accused to appear and answer the charge of robbery, whereas an information was filed against him for the crime of larceny alone, is sufficiently answered by the fact that the accused bound himself, not only to appear at court to answer that specific charge, but also not to depart thence without leave of the court first obtained.

**A** PPEAL from the First District Court of New Orleans, *Robertson, J.*  
*M. A. Foute*, for the State. *A. P. Field* and *E. Wooldridge*, for defendants and appellants.

**SPOFFORD, J.** This appeal was taken by the surety on a forfeited appearance bond.

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The Attorney General has moved to dismiss the appeal.

The only ground urged in support of this motion, is that the record contains no bill of exceptions nor statement of facts, and no assignment of errors has been filed.

But the appellant has produced a corrected certificate by the Clerk of the District Court, showing that all the evidence adduced on the trial is contained in the transcript. The Attorney General suggests that the certificate of the Clerk cannot be amended in this particular after a motion to dismiss has been filed. But the Code of Practice declares the contrary: "If, at the time of argument or before, the appellant perceives that the copy of the record is incomplete, either through mistakes or omissions, or from the Clerk having failed to certify the copy as containing all the testimony produced in the cause, or from any similar irregularities not arising from any act of the appellant, the court may grant him a reasonable time to correct such errors or omissions, during which time judgment on the appeal shall be suspended." C. P. 898. The Act of 20th March, 1839, § 19, enlarged this discretionary power of the Supreme Court, and made it imperative not to dismiss appeals for clerical errors not attributable to the appellant. ●

The motion to dismiss is therefore overruled.

The accused was arrested and brought before one of the city Recorders, upon an affidavit charging him in substance with being party to a robbery and larceny. The affidavit being submitted to the Judge of the First District Court of New Orleans, he endorsed thereupon an order authorizing the accused to be admitted to bail, on giving security in the sum of \$800, to the satisfaction of the Recorder.

Thereupon he gave a bond with the appellant as his surety, which was accepted by the Recorder, and was discharged. This bond was conditioned for his appearance before the First District Court of New Orleans, "to answer to the complaints brought against him for robbery, and not to depart thence without leave of said court."

The bond required the accused to appear "when notified." Upon the day fixed, he did not appear, and the bond was duly forfeited against both principal and surety.

The appellant objects that the notice of trial was not served at the domicile of the accused, as indicated on the bond which was signed some months before the appearance day. But the Sheriff returns that he could not find the accused after diligent search, and his surety, who was personally notified in time, failed to produce him as he bound himself to do. This was sufficient to put the parties in default.

A clerical error in the date of the notice made out by the Clerk, is of no consequence. The date of the return was anterior to the day fixed for the party's appearance.

It is also objected that the bond only required the accused to appear and answer the charge of robbery, whereas an information was filed against him for the crime of larceny alone.

It is a sufficient answer to this objection, that the accused bound himself not only to appear at court to answer that specific charge, but also not to depart thence without leave of the court first obtained. Having departed without leave, his bond was justly forfeited under the authority of the case of *The State v. Ridging*, 8 An. 79. See also 1 Chitty's Crim. Law, p. 105.

It is admitted by the appellant, in his motion for a new trial, that the bail bond was executed before *George Y. Bright*, the committing magistrate, who, as we have seen, was authorized by the District Judge to take it. In the lower court he treated the bond as filed.

We do not think that the appellant can now avail himself of an objection that the bond was not *endorsed* as filed of record. It forms a part of the record.

Judgment affirmed.

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GEORGE GOTTSCHALK, BERTRAND SALOY, Subrogated, v. B. DE SANTOS et al.—P. A. LANAUZE, Third Opponent.

By Art. 763 of the Code, which declares: "The use which the owner has intentionally established on a particular part of his property in favor of another part, is equal to a title with respect to perpetual and apparent servitudes thereon, is meant the disposition which the owner of two or more estates has made for their respective use.

The intention to create a servitude for the respective estates, will not suffice, nor will it suffice that it was partially established, it must have been perfected in such a manner as to be useful to the adjacent lots.

Where a party is present at a sale of property by the Sheriff, and does not notify the persons present, nor the purchaser, of his rights, he cannot afterwards set up a claim to the property.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*G. & C. E. Schmidt*, for plaintiff and appellant. *J. L. Tissot*, for defendants.

COLE, J. *Bernard De Santos* was formerly the proprietor of four contiguous lots, numbered on the plan 1, 2, 3 and 4, having each an equal depth, and all of them fronting on St. Ann street, and No. 1 running parallel with St. Claude street.

During the time of his ownership of said property, he sold to *A. Roger* lot No. 1, less 5 feet, 6 inches and 6 lines in the rear of said lot, which he reserved, but he conceded to his purchaser a perpetual servitude of passage.

Afterwards he mortgaged lots 2, 3 and 4, and in default of payment of the mortgaged debt, they were sold and adjudicated to *P. A. Lanauze*.

*G. Gottschalk* and *B. Saloy* being creditors of *Bernard De Santos*, caused the said alley-way to be seized; *Lanauze* intervened and opposed the sale, claiming it as his own.

*Lanauze* bases his title on the ground that the reservation of this alley-way in the sale to *Roger*, whilst he was proprietor of the four lots, was *la destination du père de famille*, or a use which *De Santos* intentionally established on lot 1 for the respective use of the four lots; that lots 2, 3 and 4 had been mortgaged with all their privileges and appendages, sold judicially to satisfy the mortgage, and adjudicated to him with all their privileges and appendages; that this alley-way being of that character, was consequently adjudicated to him with the lots, and is his property, with the reservation however of the right of passage to *Roger*.

The question in this case is whether this passage or alley-way was intentionally established by *De Santos* for the respective use of the four lots.

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It is probable that his intention in creating this alley-way was originally for the benefit of his three adjoining lots, or at least for one of them, to wit, lot 2, because he had no property in the vicinity, and in selling the lot in front of the alley to *Roger*, he did not sell it to him, but only gave him the right of passage. What other use could he have had for it then, except for the use and convenience of the whole or a part of his other three lots?

This is not called a servitude, but "*destination du père de famille*," or the use which the owner has intentionally established on a particular part of his property in favor of another part, and which is equal to a title with respect to perpetual and apparent servitude thereon, and by this "*destination du père de famille*," is meant the disposition which the owner of two or more estates has made for their respective use. C. C. 645, 763.

But the question now arises, whether the intention of a proprietor of contiguous lots, to make some convenience for their respective use, can be considered as a "*destination du père de famille*," when such intention is not carried into complete execution.

In order to determine this question, the nature and effect of this "*destination du père de famille*" must be examined:

1st. This disposition of the owner for the advantage of his contiguous lots is equal to an alienation, for the Civil Code, Art. 727, says, "the creation of a servitude is an alienation of a part of the property," and although Art. 645 C. C. says that the application which the owner makes of one estate to the advantage of another, is not called a servitude, but a disposition of the owner, still it is in reality a servitude.

For Art. 763 C. C. says: "The use which the owner has intentionally established on a particular part of his property in favor of another part, is equal to a title with respect to perpetual and apparent servitudes thereon. By this is meant the disposition which the owner of two or more estates has made for their respective use."

Art. 765 C. C. says: "If the proprietor of two estates between which there exists an apparent sign of servitude, sell one of those estates, and if the deed of sale be silent respecting the servitude, the same shall continue to exist actively or passively in favor or upon the estate which has been sold."

From these Articles of the Civil Code, it is clear that the "*destination du père de famille*" is equal to an alienation of property, and as the rule is that he who claims the property of another, must show a title, so he who claims a servitude of the character now under consideration, must show a title to the same; that is, he must establish clearly that, not only was it once the intention of the proprietor of several contiguous lots to establish a servitude for their respective use, but that he actually executed his purpose by making such changes in his property, that this servitude could be beneficial to all the lots.

As this servitude is an abandonment of property, an alienation, and equal to a title, it must not then be *intended* only or partially established, but must be perfected in such a manner that it can be useful to the adjacent lots.

It is true that Art. 646 C. C. says that it is not necessary that the benefit from the servitude exist at the time of the contract, "a mere possible convenience or remote advantage is sufficient to support a servitude;" but this does not militate against our view, because this Article takes it for granted that the servitude has been established, and this is what is denied in the case at bar.

Now, in the case at bar, the alley-way extended only in the rear of lot 1. If

it had been intended for the use of the other three lots, would not *De Santos* have continued it the whole length in the rear of lots 2, 3 and 4?

If *De Santos* had built houses on those lots, and had extended the alley-way their whole length, and if there had been doors or gates communicating from each of the houses into this alley-way, then the servitude would have been clearly established; but nothing of this kind was done. It may be that such was his intention, in whole or in part, in the event he had continued the proprietor of lots 2, 3 and 4; but as he was deprived of them by a forced sale, before his intention had been carried into execution, it would be unjust to consider this intention, which was conditional, depending on his continued ownership of the remaining lots, as an alienation and equal to a title, and thus to deprive him of this alley-way. It should also be observed that this passage was not necessarily an apparent servitude for the three other lots, because often one house has an alley-way restricted entirely to its own use, and not extended so as to benefit the adjacent lots.

We could also remark that, unless this alley was extended, it could only benefit lot 2, in the event it had a door opening into it, but could not be of utility to lots 3 and 4, unless they belonged to the same proprietor. Now it may be if *De Santos* had remained owner of lots 2, 3 and 4, he would have had a door opening from his house on lot 2, into this alley, which he might have done without extending it, but would have made no communication between the houses he might erect on lots 3 and 4. How then can this alley be considered a servitude for the use of lots 2, 3 and 4, when it may be he would only have made it useful to lot 2, or if his intention had changed, he might not even have had any communication between the house on lot 2 and this passage?

It should also be remembered that this alley-way was not necessary to lots 2, 3 and 4, because they front on St. Ann street, and *Lanauze*, the opponent in this suit, would have bought these lots, even if the servitude of the alley did not appertain to them, because the testimony establishes that for some time after his purchase, he was under the impression that he had no right to this alley. Neither was there anything said expressly about this servitude in the mortgage of these three lots, nor in the Sheriff's sale to *Lanauze*, when a title was made to him, after they had been sold to satisfy the mortgage, and adjudicated to him.

As then the alley-way was not expressly mentioned in the mortgage, unless it is considered an apparent servitude, it was not necessarily one of the dependencies or appendages of the lots, and could not then have been mortgaged with them, and consequently it was not sold by the Sheriff to *Lanauze*, for the latter could have no greater rights than *Lambert*, the mortgagee.

We are of opinion then that this passage cannot be considered as established for the common benefit of these four lots, nor as a "destination du père de famille," and that it was not adjudicated to *Lanauze* at the Sheriff's sale. But even if it is considered a servitude established for the use of the four lots, and was purchased by *Lanauze* at the Sheriff's sale of the three lots, as *Lanauze* was present at the Sheriff's sale of this alley-way, and did not notify the persons present, nor the purchaser, of his rights, he cannot now succeed in his present claim. 5 An. 67, *Moore v. Lambeth*; ib. 367.

Vide 7 An. 652, *Fisk v. Haber*; 11 L. *Broussard v. Etie*; 8 An. 145, *Parish et al. v. Municipality No. 2 et al.*; 1st An. 407, *Durel, Adm. v. Boisblanc et*

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al.; C. C. Arts. 645, 646, 725, 727, 764, 765; 4 L. R. 812, *Alexander v. Dehel*; 5 R. 16, *Barton v. Kirkman*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and it is ordered, adjudged and decreed, that the third opposition of *P. A. Lanauze* and his demand be rejected, and that he pay the costs of both courts.

JOSEPH L. MILLER et al. v. J. C. McELWEE and WARRANTORS.

The plaintiffs in a petitory action claimed to have derived their title by inheritance from their grandmother, who they alleged inherited the property from her husband, *Thomas Bally*, who died intestate. The instructions to the jury were: "That it was sufficient for the plaintiffs, in default of affirmative proof, showing that *Thomas Bally* died without leaving any ascendants, to show that one hundred years had elapsed between the birth of the nearest ascendant of said *Thomas Bally* and the institution of this suit. That in order to ascertain whether one hundred years had elapsed from the birth of such ascendant to the time of the institution of this suit, it was sufficient for the jury to take into consideration the age of the witness, the length of time since the death of *Thomas Bally*, his age when he died, and the age that his father must necessarily have been at the time of the birth of *Thomas Bally*, and that no direct proof of the time of the birth of the father or other ascendant of *Thomas Bally* was required."

It was held that the charge was substantially correct. It suffices to deny that there are heirs in the descending line, and this being a negative, no proof need be given of it. But collaterals must always prove the death of ascendants by evidence, or show that one hundred years had elapsed since the death, in which case death is presumed, and not before.

It was also held that the lapse of one hundred years from the birth of *Thomas Bally's* ascendants to the date of the institution of the suit, was sufficient presumptive evidence to establish that they were not in existence at the death of *Thomas Bally*, controversy being one between the heirs of *Thomas Bally's* wife and the defendant claiming without any title whatever.

**A** PPEAL from the District Court of West Feliciana, *Ratliff, J.* Tried by a Jury. *H. C. Hudson*, for plaintiffs. *McVea* and *Brewer & Collins*, for defendants and appellants.

*COLE, J.* This is a petitory action. The plaintiffs claim to be owners of a tract of land in the possession of the defendant.

The answer is a general denial and a call in warranty. The prescription of one, three, ten, twenty and thirty years is also pleaded.

The case was submitted to a jury, who rendered a verdict for the plaintiff, and from a judgment thereon defendant appealed.

Defendant seems to rely on the inability of plaintiff to make out a title, rather than on any one in himself.

The plaintiffs claim to have derived their title by inheritance from their grandmother, who was the wife of *Thomas Bally*, who, they allege, derived title by inheritance from her said husband, who died intestate.

The land claimed by plaintiffs appears to be in the "*Thomas Bally claim*," and is not embraced in the titles of defendant.

There were conflicts between the *Bally claim* and other claims contiguous to it. These have been adjusted by the Register and Receiver of the *Greensburg Land District*, sitting as a Board of Commissioners.

The title to the land covered by the "*Bally claim*" for 640 acres, was in the government of the United States, until confirmed by the Act of Congress of August 6th, 1846.

The survey of these claims, and the settlement of the conflict of boundaries,

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were under the exclusive control of the officers of the general government. The survey which they have made and the shape which they have given to the Bally claim are conclusive upon the parties.

As the land claimed by plaintiffs is in the Bally claim, if then they can establish their title by inheritance from *Thomas Bally* they are entitled to recover, unless the plea of prescription can prevail.

The validity of plaintiffs' title depends principally on the solution of a question set forth in a bill of exceptions of defendant to the ruling of the lower court, which is as follows:

"Be it remembered, that on the trial of this cause the counsel for the defendant moved the court to charge the jury as follows:

"If you find that there is no evidence to show that *Thomas Bally* left no ascendants, and no proof that one hundred years have elapsed between the date of the birth of the nearest ascendant and the time of the death of said *Thomas Bally*, then and in that case you should bring in a verdict against the plaintiffs.

"That the plaintiffs claiming to have derived title by inheritance from their grandmother, who was the wife of *Thomas Bally*, and claiming that she derived title by inheritance from her said husband, who died intestate, the burden of proof was on the plaintiffs to show that *Thomas Bally* died without leaving any ascendants, or to show that one hundred years had elapsed between the birth of said ascendants and the death of said *Thomas Bally*."

Which the court refused, and proceeded to charge the jury: "That it was sufficient for the plaintiffs, in default of affirmative proof, showing that *Thomas Bally* died without leaving any ascendants, to show that one hundred years had elapsed between the birth of the nearest ascendant of said *Thomas Bally* and the institution of this suit. That in order to ascertain whether one hundred years had elapsed from the birth of such ascendant to the time of the institution of this suit, it was sufficient for the jury to take into consideration the age of the witnesses, the length of time since the death of *Thomas Bally*, his age when he died, and the age that his father must necessarily have been at the time of the birth of *Thomas Bally*, and that no direct proof of the time of the birth of the father or other ascendant of *Thomas Bally* was required."

We are of opinion that the ruling of the Judge *a quo* was substantially correct.

The doctrine of this court, as established in several cases, is that "it suffices to deny that there are heirs in the descending line; and this being a negative fact, no proof need be given of it. It is for the adverse party to show that there were some, and then their death must be proved by the claimants. But collaterals must always prove the death of ascendants by evidence, or show that one hundred years elapsed since the birth; in which case death is presumed, and not before." Vide C. C. 71, 77; *Bernardine v. L'Espinasse*, 5 N. S. 715.

In this case, as plaintiffs claim this land by inheritance from their grandmother, who was the wife of *Thomas Bally*, and who, they allege, derived title by inheritance from her said husband, who died intestate, it is incumbent on them to establish that their grandmother had a title to this land. If she was suing for it, she would be obliged to show not only the death of her husband, but also of his ascendants; plaintiffs claiming under her must make the same proof, and also establish her death.

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The death of ascendants may not only be proved by direct testimony, but also by showing that one hundred years have elapsed since their birth. 5 N. S. 715.

Plaintiffs had then the right to show the length of time since the death of *Thomas Bally*, his age when he died, and the age that his father must necessarily have had at the time of the birth of *Thomas Bally*, and thus establish whether or not a hundred years had elapsed since the birth of the first one in the ascending line from *Thomas Bally*.

Defendant urges that if a hundred years had not elapsed at the time of the death of *Thomas Bally*, then that the grandmother of plaintiffs could not have inherited, for if, at the time of *Bally's* death, his ancestor was living, then such ancestor was called to the inheritance to the exclusion of the wife.

They further declare that plaintiff must either show affirmatively that at the time of the death of *Bally* his ascendants were not living, or that at the time of his death a sufficient length of time had elapsed from the birth of the ascendant to raise the presumption of death, for if his ascendants were living at the period of his decease, they would inherit to the exclusion of the wife, and if she was not the heir at the time of her husband's death, she could not become the heir by the length of time that had elapsed between the date of his death and the institution of this suit, or by any other matter subsequent to the opening of the succession.

We cannot coincide entirely with the argument of defendant. It is clear if an ascendant of *Bally* was living at the time of his death, his wife could never inherit. But we are of opinion if a hundred years had elapsed between the birth of the ascendant of *Bally* and the time when the heirs of his wife claim his estate, that this is sufficient, for it is presumptive evidence that no ascendant of *Bally* was living at the time of his death, else this ascendant would have claimed the estate.

Defendant wishes to keep possession of property for which he has no title, by forcing plaintiff to prove that at the time of *Bally's* death his ascendants were not living. We think that the lapse of one hundred years from the birth of his ascendants to the institution of this suit ought to be sufficient presumptive evidence to establish they were not in existence at his death, when the controversy is between the heirs of his wife and one claiming the property without any title whatever, for if such ascendants had been in existence, it is reasonable to suppose they would already have claimed it.

We are of opinion that plaintiffs have established *prima facie* a right to inherit from *Bally* through their father and grandmother, and that their *prima facie* title, accompanied with the fact that their grandmother lived upon the land until she removed from the State, must prevail against defendant, who has no title whatever.

The plea of prescription cannot prevail, as no possession sufficient to be the basis of prescription is shown.

The defendants have no claim against those called in warranty: the land sold by them is not the same that is claimed by plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed, with costs.

## HEIRS OF GUILLOTTE v. CITY OF NEW ORLEANS.

The plaintiffs being joint owners with the city of the land on which the Magazine street market is erected, and having recovered a judgment against the city fixing their right to a certain proportion of the revenues of the market, the city obtained an order for a sale of the property to effect a partition, and the Council passed a resolution to discontinue the market as a public market. *Held*: That the plaintiffs are entitled to enjoin the execution of the ordinance as an invasion of their right of property and a violation of the tenure and contrary to the title by which the city holds an interest in the the property, as established by the judgments between the parties.

**A** PPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*R. N. Ogden and F. Buisson*, for plaintiffs. *J. J. Michel*, for defendant and appellant.

BUCHANAN, J. Plaintiffs having sued the city of Lafayette, to whose rights and obligations the defendant has succeeded, in a petitory action, claiming certain land on which the city had erected a market-house; that suit was terminated by a judgment of the Supreme Court in May, 1850, decreeing that plaintiffs recover of defendant one undivided half of the said land. See the case reported in 5 An. 382.

Plaintiffs afterwards sued the city for the fruits and revenues of the property thus recovered, and by final judgment of the Sixth District Court of New Orleans, rendered in December, 1853, it was decreed, "that plaintiffs recover of defendant the sum of \$2982 15, and further that plaintiffs recover of defendant in the proportion of one to two sixty-hundredths of the revenues of the property mentioned in the petition hereafter at such times as the revenues may be received."

Plaintiffs and defendant have continued ever since the last mentioned judgment to occupy the property and divide its fruits and revenues in the proportion fixed by the judgment. But the city of New Orleans, having become tired of this joint ownership and occupation, brought suit against the heirs of *Guillotte*, on the 10th of May, 1855, for a partition of the property (described in their petition as consisting of the land, a large and valuable market-house, known as the Magazine street market, and the rents, profits and revenues derived from said market,) by licitation; alleging that the same cannot be divided in kind.

In that suit a judgment of nonsuit having been rendered against the city in the District Court, the city appealed, and succeeded in obtaining (in November, 1856,) a decree of this court, reversing the judgment of the District Court, and ordering that there be a partition of the property held in common, by public sale to the highest bidder, after legal advertisements, and upon such terms as the parties shall agree upon, or in case they cannot agree, the terms of sale to be fixed by the District Court.

Thereupon the City Council of New Orleans passed the following resolution, which was approved by the Mayor:

"Whereas, the property now occupied by the Magazine street market, corner of Magazine street and St. Mary street, is to be sold in order to effect a partition under a decree of the Supreme Court, rendered in the case of *The City of New Orleans v. The Heirs of Guillotte*—

"Therefore be it resolved, that from and after the first day of March, 1857,

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the said Magazine street market shall be discontinued as a public market of this city."

The plaintiffs have enjoined the execution of this ordinance or resolution of the City Council, as being calculated greatly to injure plaintiffs' rights. They allege, with reason, that the principal value of the property sought to be partitioned consists in its character of a market. It is shown that the revenue derived from this market is steadily and rapidly increasing from year to year, having augmented from seventeen hundred and fifty dollars in 1848 to thirteen thousand three hundred and fifty dollars in 1856. Of this revenue five-eighths belong to plaintiffs by the terms of the judgment which has fixed the rights of the parties, a proportion which in 1856 amounted to \$3708 23, while the share of the defendant for the same year was \$9641 67. And note that there is a certainty of this income becoming larger, based on the experience of the past, as contained in the Comptroller's reports in evidence.

The resolution of the City Council, of which the plaintiffs complain, at once cuts off this large and increasing revenue, for the market-house is of no value as a means of revenue if the market kept there be discontinued, it being nothing more than a roof supported by columns, and open at all sides.

So far as the interests of the city are concerned, it might be conceded that the Council, as the administrator of the city finances, had the right to do this, however injurious to the city pecuniarily, and however inconvenient and vexatious to the inhabitants of the populous district which resorts to this market for its daily supply of provisions.

But there are other parties which have a vested right in this market and its revenues which the City Council will not be allowed to disregard or to sacrifice. Those parties are the plaintiffs, who have sued out this injunction against the execution of the resolution in question.

It appears to us that the resolution of the 7th January, 1857, copied above, is a direct and palpable invasion of the plaintiffs' right of property; that it is violative of the tenure and contrary to the title by which alone the city holds an interest in this property. That tenure and that title are found in the judgments of May, 1850, and December, 1853, above recited.

The resolution is likewise contrary to the intent and meaning of the judgment of this court, rendered in November last, in the partition suit, and will, if carried out, render the licitation, which has been decreed on the prayer of the city itself, nothing but a mockery and a delusion.

Judgment affirmed, with costs.

Mr. Justice COLE took no part in this decision.

MERRICK, C. J. I do not think the City Council ought to be permitted to change the destination of the common property during the progress of the proceedings for partition, for this would be especially injurious to both parties. I understand the law to be the same in regard to partners and to property held in common. The courts will not permit a partner to withdraw at an improper time, nor a co-proprietor to change the destination of property when it will occasion one or both parties great damage unless a reasonable notice of such intention has been previously given. On this ground I concur in the decree.

But if the doctrine of the opinion is to be understood to be that the city is not the absolute owner of whatever property it may own in fee simple in the market, as fully as any other co-proprietor, and that the city cannot regulate the times and places where markets shall be held, and discontinue old and

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establish new ones, and that the purchaser of the common property of these parties, sold to effect a partition, can continue it as a market in spite of the city, after the same shall have given a reasonable notice, then I dissent from the doctrine asserted by the majority of the court. For it is not in the power of the courts to impress upon property a particular character, and declare that a place shall remain a market, or a plantation now cultivated in cane shall remain a sugar plantation forever, or the like. The purchaser of the market in my opinion will only acquire the fee simple in the soil and buildings, with the right to do whatever he pleases with his property not prohibited by law and the legal ordinances of the City Council.

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MRS. LUCY ANN HOWE v. CITY OF NEW ORLEANS et al.

A judgment rendered against two or more parties for damages, arising from the fault or negligence of the defendants, cannot be for different amounts; for they are bound *in solido* for the injury under the Act of 1844, (p. 14,) and the amount of damages for which one party is bound is the measure of damages for the other also. The payment of the damages by the one is the discharge of the other from the same obligation. C. C. 2130.

Nuisances may exist in the city without rendering the same liable for the consequences.

The city is no general warrantor against the acts of individuals.

The city at large cannot be held responsible for acts of third persons, which, under a more sagacious and efficient police, might possibly have been prevented.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*—Tried by a jury. *Waples & Eustis*, for plaintiff. *J. Livingston*, for defendants and appellants.

MERRICK, C. J. This suit is brought by the plaintiff against the city of New Orleans, *Charles Mason* and *Mrs. Grailhe*, to recover of them *in solido* the sum of \$15,000 damages occasioned the minor son of the plaintiff, by the falling of a wall upon the minor, who was walking along St. Charles street, in this city.

The case was tried by a jury, who found a verdict against *Mrs. Grailhe* of \$2500, and against the city of New Orleans for \$7500, and in favor of *Mason*. It is difficult to sustain this verdict as it stands, for if the falling of the wall of the burnt building is attributable to the fault or negligence of both defendants, then they are bound *in solido* for the injury under the Act of 1844, (p. 14,) and the amount of damages for which one party is bound, is the measure of damages for the other also. The payment of the damages by the one is the discharge of the other from the same obligation. C. C. 2130. If, therefore, the measure of damages for the injury occasioned by *Mrs. Grailhe*, the owner of the property is \$2500, the city is not bound for a sum beyond that amount. Assuming the more lenient verdict against *Mrs. Grailhe* to be just, the verdict against the city is manifestly erroneous. We will consider whether it can be maintained for any amount upon the evidence in the record.

The testimony shows that the City Surveyor, who had the power to cause the wall after the fire to be taken down, was aware of the fire; that he observed the condition of the wall from the street repeatedly, and was of the opinion that the public were in no danger from its falling, but he never entered upon the premises in order particularly to ascertain its condition.

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The liability of the city is argued by the learned counsel for plaintiff, from these propositions, viz:

1st. The walls of the building after the fire were a nuisance, and as deductions therefrom—

2d. That it was the duty of the city to remove the nuisance.

3d. That the city ought to have fenced off the sidewalk.

4th. That it is no excuse for the city that its officials thought the wall would not fall.

The first proposition, we think, may be admitted without giving rise to the deductions drawn therefrom by the counsel.

Nuisances may exist in the city without rendering the same liable for the consequences. The city is no general warrantor against the acts of individuals. Its police may be applied to for the purpose of preventing injuries, but if such police err in their judgment, or if injuries are occasioned because they are inefficient in the exercise of the powers with which they are invested, the city at large cannot be held responsible for acts of third persons which, under a more sagacious and efficient police, might possibly have been prevented.

The case at bar has no analogy to the case of injuries done to individuals by the negligent manner in which work to public streets is done, or the want of repair in the same, for the possession of the servitude of the streets is in the city, and on the same principle that a private person is responsible for an injury done by a falling structure upon his property, it is possible that the city in such case may be held liable.

But in the case at bar there is no statute nor principle of law of which we are aware upon which a recovery can be maintained against the city for the error of judgment of the City Surveyor.

In regard to the defendant, *Mrs. Grailhe*, we do not think we can disturb the verdict of the jury.

By Article 2302 of the Civil Code it is provided that "the owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

The jury evidently did not consider the opinion of the workman who examined the wall in May and fastened the doors, a sufficient excuse for the accident which happened on the 1st day of July, after the wind and rain which had weakened the support of the remaining portions of the building, besides increasing the weight which rested upon them. See 5 Marcadé, p. 273, Art. 1386, No. 2; 11 Toul. 317.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court as to the said *Mrs. Celeste Destrehan*, wife of *Alexander Grailhe*, and husband, and said *Charles Mason*, be affirmed; and it is further ordered, adjudged and decreed by the court, that the judgment against the city of New Orleans be avoided and reversed, and that there be judgment in favor of the said city of New Orleans and against the demand of the plaintiff against said city, and that said city recover its cost in the lower court; the said *Grailhe* and wife paying one half and the plaintiff and appellee the other half of the costs of appeal.

McCUTCHON, HOWELL & Co. v. J. B. WILKINSON—M. U. PAYNE, Intervenor.

The privilege awarded by Art. 3184 of the Code to furnishers of necessary supplies to a plantation, does not extend to a crop entirely cultivated and gathered after the supplies were furnished, so as to take effect after the plantation has been sold.

The privilege under that Article "on the product of the last crop and the crop at present in the ground," must be confined to the crop cultivated, standing or being gathered and taken off at the time the supplies were furnished, it cannot be extended to the crop subsequently planted and sold with the plantation to a third party.

**A** PPEAL from the District Court of Plaquemines, *Rousseau, J.*  
C. De Choiseul, for plaintiffs. C. B. Penrose, for intervenor and appellant.

MERRICK, C. J. The plaintiffs instituted their action to recover \$531 93 as plantation supplies.

They were furnished principally between the first day of September, 1854, and January 1st, 1855, when, as it appears by plaintiffs' account, the items were added up, and they made \$506 95, less a credit of \$29 02. In January, two other items were added to the account. The first on the 12th, being 42½ gallons of solar oil, \$42 75, and the second, January 25th, two kegs of nails, \$11 25; total, \$54. The suit was commenced on the ninth day of January, 1856, by a sequestration, the plaintiffs claiming a privilege upon the last year's crop and the crop then in the ground. Under the writ, the Sheriff seized in the sugar-house on the plantation nine hogsheads of sugar.

Moses U. Payne having bought the plantation and slaves at Sheriff's sale, on the 7th day of July, 1855, intervened in the suit and claimed the sugar as owner, it having been made upon the plantation, as it must be presumed, after his purchase.

The plaintiffs having proved their demand against the defendant, and the District Court being of opinion that it operated as a privilege on the crop, maintained it against the intervenor also, and decreed a privilege on the property sequestered.

The intervenor appealed.

Although Article 3184 of the Civil Code awards to the furnishers of necessary supplies to a plantation a privilege upon the product of the last crop and the crop at present in the ground, there is no reason to suppose that the Legislature intended this privilege to extend to a crop entirely cultivated and gathered after the supplies were furnished and to take effect after the plantation had been sold.

There must be a point at which the old crop terminates and the new one commences. It is important to ascertain this period.

The law gives a privilege for the salaries of overseers and for debts due for necessary supplies furnished to any farm or plantation, on the product of the last crop and the crop at present in the ground. C. C. 3184, Acts 1843, p. 44.

In the French text, it is "sur le produit de la dernière récolte et sur les fruits pendans." (See also 2376 C. C.) What is meant by the crop in the ground and *les fruits pendans*? Certainly not the roots of the cane which

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has not yet been cut, for if that be the case, the overseer who has planted the cane is sure of his privilege on the crops for two or three years to come. For we could, with the same propriety, say that his privilege should extend to the second or third year's crop from the stubble cane, as to say that he has a privilege upon the stubble of the hundred acres of cane cut in November or December of the year of his engagement.

The day before the owner commenced to cut the cane, the overseer's privilege and the privilege of the furnisher of supplies rested on the last year's sugar and molasses in the sugar-house, and that unsold in the hands of the merchant, and the standing crop which he had cultivated. When he had cut fifty acres of cane, and as fast as he continued to cut, did the privilege also extend to the cane roots left in the ground by the operation?

By this arrangement, if the overseer and furnisher of supplies have a privilege only upon two crops for their security, it would shift as fast as the cane should be cut from one crop to the next.

The Legislature, therefore, by the term crop in the ground, did not mean the uncultivated root of the cane in the ground, the vine or the fruit tree to which nothing had been done. The words were more likely used in their natural sense, and the words crop in the ground mean no more than the "fruits pendans." That is, the vine and the root of the cane, when it has been cultivated or has put forth its shoots; the cotton and corn, when the seed has been committed to the earth. Thus crop is defined by Webster to be "That which is gathered; the corn or fruits of the earth collected; harvest. The word includes every species of fruit gathered for man or beast." Also, "*corn or other cultivated plants while growing*, a popular use of the word."

Conceding, therefore, that the solar oil and the nails furnished in January, 1855, were necessary supplies, it is shown that the debtor was not through grinding the cane of 1854 until in February, 1855, and that he did not commence planting and cultivating the new crop until the grinding was finished.

There was therefore, properly speaking, no crop in the ground belonging to the debtor at the time the necessities were furnished, except the crop of 1854, which the debtor was then taking off. For there were no plants growing, none had been cultivated and there were no new fruits hanging by their roots. The privilege could not extend to the crop subsequently planted and sold with the plantation to a third party.

For the crop of 1855 was not, with reference to the supplies, the *present* crop contemplated by the Code. *Welsh v. Shields*, 12 Rob. 527.

It is more reasonable to confine the privilege to the crop cultivated, standing or being gathered, and taken off at the time the supplies were furnished. The tests then are, were the supplies furnished for cultivating or taking off the crop? Had the planter commenced cultivating the new crop?

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court, so far as the same affects the rights of said intervenor *Moses U. Payne*, be avoided and reversed, and that said sequestration be set aside, and that said nine hogsheads of sugar sequestered be restored the said *Moses U. Payne*, who is hereby decreed to be the owner of the same, and that said *Payne* recover the costs of his intervention, the said *McCutcheon, Howell & Co.* paying the costs of the appeal.

SPOFFORD, J., dissenting. I think the Article 3184 of the Civil Code, as amended by the Act of March 23d, 1843, (p. 44) gives the furnisher of neces-

ary supplies to a farm or plantation, a privilege upon two consecutive crops, where the account (as in this case) extends over a portion of two years.

The account is conceded to be for "plantation supplies;" it runs from September 1st, 1854, to January 25th, 1855.

The sugar seized is of the crop of 1855; that crop grew mainly from ratoons which were in the ground on the 25th January, 1855. It is conceded and perfectly settled by authority, that if there was a privilege on the growing crop in favor of the plaintiffs, at the date of the sale from *Wilkinson* to the intervenor *Payne*, then the sale did not oust the privilege. The sole question, therefore, is, was there, in July, 1855, a privilege on *Wilkinson's* then growing crop for the account sued upon?

I think it was the intention of the law-giver that the plaintiffs, as furnishers of plantation supplies to *Wilkinson*, for the latter part of 1854 and the early part of 1855, should have a privilege for the whole account, both upon the crop of 1854 and the crop of 1855, and that the judgment should be affirmed.

VOORHIES, J., concurring.

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#### CHRISTOVAL MOREL v. CITY OF NEW ORLEANS.

An attorney-at-law is entitled to claim commissions upon judgments obtained through his agency as well as upon moneys actually collected on executions and accounted for to his clients, although he be superseded by the appointment of another attorney.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*G. Legardeur*, for plaintiff. *J. J. Michel*, for defendant and appellant.

VOORHIES, J. The plaintiff claims the sum of \$3666 84, for professional services alleged to have been rendered by him as attorney to the late First Municipality, in bringing upwards of 1800 suits on bills placed in his hands for collection, as shown by exhibits annexed to and made part of his petition, which exhibits occupy nearly 60 pages of the record.

Under an ordinance of the First Municipality, the right to institute suits for the recovery of its claims for taxes, fines, &c., was conferred exclusively on the attorney or assistant attorney employed by it, whose compensation for such services was fixed at five per cent. by the ordinance of the 6th of January, 1845. It was made the duty of the attorney thus appointed, on the institution of such suits, to submit to the treasury department a statement showing the title, amount and object of each of said suits, and, when finally determined, a statement of the judgment in each of them. The claim of the plaintiff arising from such a multiplicity of suits, was referred by the court below to an auditor, who thereupon reported that the plaintiff had instituted suits for the recovery of claims amounting to \$102,398 09, of which \$36,228 49 had ripened into judgments; that \$14,825 96 had been paid into court on account thereof, as appeared from the records; and that taking into consideration the receipts on file, the testimony of the various collectors, showing that the plaintiff had regularly settled with them, and the fact that a portion of the claims put in suit by the plaintiff had been collected by his successors, he concluded that said plaintiff was entitled to claim commission on the whole amount of said

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claims in suit, less \$246 11 as his commission on claims which he had himself collected and accounted for. The defendant having opposed this report on certain grounds, not necessary to be mentioned, the court ordered another to be made, restricting the plaintiff's commission to all such claims as had ripened into judgments previous to his removal, and also on all those which he had collected on executions and accounted for to the defendant, and to confine said commission to the claims set forth in the exhibits annexed to his petition. The auditor accordingly reported, awarding to the plaintiff the sum of \$1565 37, which formed the basis of the judgment of the court below, from which the present appeal is taken by the defendant.

It is not pretended that the services were not rendered as alleged by the plaintiff. The evidence shows that the sum of \$14,825 96, resulting from judgments obtained through the agency of the plaintiff, has already been paid into court. It is neither alleged nor shown that the other judgment debtors are insolvent. The plaintiff having been superseded by the appointment of another attorney, we think it comes with exceedingly bad grace on the part of the defendant to object, that he is not entitled to claim any commission on the judgments thus obtained by him, as he has not collected the same.

Judgment affirmed.

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G. CURRIE DUNCAN, President, &c. for the use and benefit of GEORGE WINGFIELD & Co. v. SUN MUTUAL INSURANCE COMPANY.

If, upon a general survey of the provisions of the policy and the circumstances under which it was procured, it appears that the intention of the company was to insure for the benefit of any person in interest, although not named, the common interest of the parties shall not be defeated for the want of technical or even customary phrases. If, on the other hand, the most natural construction of the policy is, that the party named as the assured only sought to protect his own interest, the contract is not to be extended so as to cover the interest of a third person.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Hamner & Hays and Logan Hunter*, for plaintiff. *J. A. Maybin*, for defendants and appellants.

**SPOFFORD, J.** This suit is upon a fire policy to recover a loss upon certain packages of wine.

It is brought by *George Currie Duncan*, in his quality of President of the New Orleans and Carrollton Railroad Company and the Jefferson and Lake Pontchartrain Railroad Company, for the use and benefit of *George Wingfield & Co.*, against the Sun Mutual Insurance Company.

It is alleged that the wine belonged to *Wingfield & Co.*, by whom it was deposited in the railroad company's depôt at Tivoli Circle, in New Orleans, thence transported for hire in the plaintiff's cars to their depôt or wharves on the Lake shore, and there burnt and lost.

The defendants contend that they insured nobody against loss but the railroad company; that there is no privity of contract between them and *Wingfield & Co.*, for which reason that firm has no right of action; and that the railroad company has no right of action, because it has lost nothing.

By the terms of the policy, the defendants covenanted to "insure *George Currie Duncan*, President of the New Orleans and Carrollton Railroad Company, and for the Jefferson and Lake Pontchartrain Railroad Company *against loss and damage by fire on merchandize*, being such as may be placed in the depôts hereinafter named, for conveyance to and from the city to Lake Pontchartrain, to wit: on merchandize contained in the depôt at Tivoli Circle, to the amount of \$3000; on merchandize contained in the depôt at the Lake end of the Jefferson and Lake Pontchartrain Railroad, to the amount of \$5000. The risk in the cars is also to be covered by this insurance to the extent of the amount of this policy, to wit: \$8000, for one year; and the said company do hereby promise and agree to make good *unto the said insured*, their executors, administrators and assigns, all such loss or damage, not exceeding in amount the sum hereby insured, as shall happen by fire to the property, as above specified, during one year, &c., the said loss or damage to be estimated according to the true and actual value of the said property at the time it shall happen, &c., &c."

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The usual condition is annexed to the policy, that "goods held in trust or on commission are to be declared or insured as such, otherwise this policy will not cover such property."

No such words as "for whom it may concern," or "in trust for," are employed in the policy. It is true that there is nothing sacramental or indispensable in these ordinary phrases. If upon a general survey of the provisions of the policy and the circumstances under which it was procured, it appears that the intention of the company was to insure for the benefit of any person in interest, although not named, the common interest of the parties shall not be defeated for the want of technical or even customary phrases. If, on the other hand, the most natural construction of the policy is, that the party named as assured only sought to protect his own interest, the contract is not to be extended so as to cover the interest of a third person. Thus, it is held that a commission merchant who is insured against loss by fire upon "goods, as well the property of the insured as held by him on commission," in a certain store, may recover in his own name the value not only of his own goods destroyed by fire but of those of his constituents in the same store. *DeForest v. Fulton Fire Insurance Company*, 1 Hall, 100.

But the general rule is thus stated by Mr. Phillips: "Insurance made by a person in his own name only, without any indication in the policy that any other is interested, can be applied only to his own proper interest in the subject, or his interest as trustee." 1 Phillips, Ins., § 380.

In the present case the defendants only insured the railroad company against loss or damage by fire upon merchandize in certain of its depôts, or on the transit between them. It is true the policy does not imply that the merchandize must necessarily belong to the company. But no matter to whom it might belong, there is nothing in the policy or in the evidence to indicate that the defendants intended to do anything more than indemnify the railroad company against the loss or damage the company might sustain from the destruction or deterioration of such merchandize by fire. There is nothing in the circumstance of a railroad company taking out such a policy to lead the underwriters to suppose that the company sought anything beyond its own protection. There is no allegation or proof of a usage of railroad companies to insure for the benefit of their customers, nor of a contract with *Wingfield & Co.*, or

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instructions from them to insure, nor of a payment of this loss by the plaintiff to *Wingfield & Co.*, nor even of a liability to pay it, or an undertaking on its part to warrant against all losses by fire.

On the other hand, that the company might have an insurable interest in goods intrusted to it by bailors for transportation is clear. The doctrine upon this subject is well stated by Mr. Angell in his treatise on Fire and Life Insurance, § 77: "An inland carrier will, in general, have an insurable interest and a right to provide an indemnity against such accidents to the property placed in his hands, *as will render him liable under his contract.* Thus, it it was held that common carriers along the line of a canal had an insurable interest to the full value of all the goods placed in their hands which they might protect under the general words of insurance ordinarily employed." But in the following section of the same treatise it is shown that the practice is to allege that the goods intrusted to him as a common carrier were consumed by fire, and that the assured thereby became liable to pay to the respective owners a sum equal to that named in the policy.

It was remarked by Mr. C. J. Jones in the case of *DeForest v. Fulton Fire Insurance Company*, already cited from Hall's Reports, that "a carrier may insure the goods he contracts to carry; yet he has neither the legal title nor the beneficial interest in them; but he is responsible for their loss. His insurance is upon the goods; yet his indemnity is against the consequences of his implied guaranty for their safe carriage, and not against the loss or deterioration of the property by the perils insured against."

As the interest of *Wingfield & Co.* in the wine was not covered by the policy in this case, even by implication, it follows that the railroad company is the real plaintiff. This was also asserted by counsel representing that side, on the oral argument. And as the company did not own the wine, it should show some loss or liability of its own on account of fire to authorize a recovery; for the insurance only promised to indemnify the company for its own loss or damage by fire.

The testimony is that a burning steamboat came suddenly against the wharf where the goods were deposited and set them on fire, and that it was impossible to save them. So far as the evidence goes in this case this would seem to have been an accidental calamity beyond the control of the company or its servants. And the Article 2725 of our Civil Code declares that "carriers and watermen may be liable for the loss or damage of the things intrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental or uncontrollable events."

As there is neither allegation nor proof that the railroad company, which alone was insured, has sustained any loss or incurred any liability to *Wingfield & Co.* or any other person, by reason of the destruction of the wine which belonged to *Wingfield & Co.* there should be a judgment of non-suit.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed, and that there be judgment against the plaintiff as in case of non-suit, he paying costs in both courts.

## JOSEPH BERNARD v. W. S. SCOTT—T. J. SCOTT, Intervenor.

Where a deed was executed in the State of Mississippi in the form adopted in a common law State to create a mortgage there, and real estate situated in Louisiana was embraced in the deed, *Held*: That the instrument must be considered as having but a single aspect, and it was not reasonable to suppose that the parties contemplated a mortgage as to the property situated in Mississippi, and a sale as to the property in Louisiana.

From the fact that the parties to the deed were both residents in States where the common law prevails, and that the instrument was executed in a common law State in the form of a mortgage, part of the property to be affected by the instrument being situated in that State, it must be considered that it was the intention of the parties to create a mortgage to secure the payment of a sum of money.

When the purchaser of property was fully informed of the title of his vendor, and that he claimed under a deed executed in another State and embracing property situated there as well as in this State, he was bound to enquire what effect the law would give to such a deed.

**A** PPEAL from the District Court of East Baton Rouge, *Robertson, J.*  
*J. W. Seymour*, for plaintiff. *F. R. Brunot and Clarke & Bayne*, for defendants and appellants.

**MERRICK, C. J.** This is an action of partition. The plaintiff claims title to one-fourth of a tract of land situated in the parish of East Baton Rouge, by mesne conveyance from *Thomas J. Scott*, who was the owner of one-fourth in common with his three brothers, *William S. Scott, John Scott and Samuel Scott*. *Thomas J. Scott* has intervened in the suit, denying plaintiff's title and praying that his demand be rejected. The defendants answer by a general denial. The court having maintained the plaintiff's title, they have appealed.

The only question raised in the case is one of construction of a deed from *Thomas J. Scott* to one *Ruderstein*. The plaintiff contends that it is a sale under a condition which has become absolute—the defendant that it is a mortgage.

The instrument itself is executed by *Scott* alone, and acknowledged before a Justice of the Peace of Warren county and State of Mississippi. It purports to be executed on the 22d day of May, 1841, between *Thomas J. Scott*, of the city of Vicksburg, Mississippi, on the one part, and *John G. Ruderstein*, of the city of Cincinnati, of the State of Ohio, of the other part.

The consideration specified is the nominal sum of \$6000. The property conveyed consisted of certain property in and adjoining Vicksburg, and property in Louisiana. The instrument commencing at the *habendum*, is as follows: "To have and to hold the aforesaid tract and lots of land unto him, the said *John G. Ruderstein* and his heirs, executors and assigns forever, and the said *Thomas J. Scott* warrants and defends the title of the aforesaid lots or parcels of land with all appurtenances, against the claims of all persons whatsoever. But with this reserve, that the said *John G. Ruderstein* holds two bills of exchange, one for \$3162 79, drawn by said *Ruderstein* in favor of *J. C. Bull*, dated March 12th, 1840, and payable 90 days after date, the other for \$3000, same date and payable 60 days after date, drawn by same in favor of same, both of which bills are indorsed by said *Bull*, and accepted by said *Thomas J. Scott*. Now, if the said *Thomas J. Scott* shall well and truly pay or cause to be paid to the said *Ruderstein* the amount of said two bills of exchange, then

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the above conveyance to be null and void, otherwise to remain in full force and virtue."

This instrument must be considered as having but a single aspect. It was intended either as a conditional sale or as a common law mortgage to secure the payment of *Thomas J. Scott's* acceptances. For it is not reasonable to suppose that the parties contemplated a mortgage as to the property situated in Mississippi, and a sale as to the property in Louisiana; that the debt should be wholly or partially paid by the foreclosure of the mortgage and the sale of the property in Mississippi, and that there should also be a forfeiture of the property in Louisiana by the non-payment of the whole price. As the parties to the instrument were both resident in States where the common law prevails, as the instrument was executed in a common law State and in the form adopted to create a mortgage there, and as a part of the property subject to the action of the instrument was situated in the State of Mississippi, there can be no question that the original parties to the act, the grantor and grantee, intended to create a mortgage to secure the payment of a sum of money. 2 Blackstone Com., 158, 159; Burrill's Law Dic. Equity of Redemption; 4 Kent Com., 159. As between themselves, therefore, there is no doubt what effect ought to be given to the instrument.

But was *Ruderstein's* vendee, *Shalor*, a resident of Louisiana, bound to know the law of Mississippi and what construction ought to be put upon the instrument as between the parties? The power of attorney under which *Cook* acted for *Ruderstein* expressly refers to his title from *Thomas J. Scott*, and empowers the attorney in fact to sell all his right, title and interest in and to the property in controversy, "the same conveyed to him by *Thomas J. Scott*, by deed dated Vicksburg, on ——— of ——— 1841, the particular description of which will appear by reference to said deed, on record in the office of the Parish Judge of said parish," East Baton Rouge.

The purchaser was, therefore, fully informed of the title under which *Ruderstein* held, and as it covered property both in the States of Mississippi and Louisiana, he was bound to inquire what effect the law would give to the same. Similar instruments have been held to be mortgages of property situated in a common law State and afterwards removed here. See *Smoot v. Russell*, 1 N. S. 522. In the case of *Hayden v. Nutt*, 4 An. 71, the court recognized an instrument similar in form, executed in the State of Mississippi, and operating on the undivided interest of the grantor in a tract of land situated in Louisiana as a mortgage. We think the instrument relied on as the basis of the plaintiff's title can have no greater effect.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment against the demand of the plaintiff and in favor of the defendants, and that the plaintiff pay the costs of both courts.

COLE, J., concurring. The question in this case is whether this act is a sale or mortgage, and in order to determine this another question must be solved, and that is, whether its character is to be determined by the laws of Louisiana or Mississippi.

Art. 10 C. C. enunciates the principle, that "the effect of Acts passed in one country to have effect in another country is regulated by the laws of the country where they are to have effect."

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This Article does not speak of the *interpretation* of Acts as to their *character, form and nature*, but as to their effect.

Its phraseology shows that the meaning of this Article is, that the Act passed in the foreign country is taken as a perfect manifestation of the will of the contracting parties, which must be executed in accordance with the laws of Louisiana; that is, if there is anything in the Act repugnant to our laws it will be void, but so far as it is in harmony with them it will be carried into effect. The preceding part of Article 10 ordains, that the *form* and effects of Acts are to be determined by the laws of the country where they are passed; then follows the part of the Article now under consideration: "the *effect* of Acts passed in one country to have effect in another country is regulated by the laws of the country where they are to have effect."

The word "Form" is omitted in this part of the Article, and the law-giver speaks of an "Act passed," that is, of a contract good between the parties, and perfect according to the laws of the country where it is made."

The law-giver means that taking this Act, which is good between the parties in a foreign State and framed according to those laws, so as to give effect to such an Act in that State, yet the power of executing it in Louisiana will depend on the conformity of its intended effect with the provisions of our law; the concluding part of Article 10 justifies our interpretation, for it says: that the exception, that the effect of Acts passed in a foreign country is regulated by the laws of the country where they are to have effect, does not hold when a citizen of another State of the Union or a citizen or subject of a foreign state or country disposes by will or testament, or by any other act, *causa mortis*, made out of this State, of his movable property situated in this State, if at the time of making said will or testament, or any other other act *causa mortis*, and at the time of his death he resides and is domiciliated out of this State.

The latter part of this Article shows that the word "effect" has no reference to the form or character of the Act, but only to the result and consequence of the Act.

Article 483 C. C. confirms this interpretation of Article 10: "Absolute ownership gives the right to enjoy and to dispose of one's property in the most unlimited manner, provided it is not used in a way *prohibited by laws or ordinances*: persons who reside out of the State cannot dispose of the property they possess here in a *manner* different from that prescribed by its laws.

The signification of the words "in a *manner* different" &c. is, that the foreign Act cannot transfer property in Louisiana to other persons than to those who are entitled to it by the laws of this State.

The principle of comity and convenience requires that a contract made according to the laws of a foreign state should be carried into effect, if it does not clash with the positive legislation of our State, and it would be unjust to interpret contracts different from the intention of the contracting parties; and this would be the case if what would be a mortgage by the laws of the State where it is passed should be by the laws of our State an obligation, to take effect immediately, but with a resolatory condition, (2016 C. C.) and on that account be considered by our courts a present sale with a resolatory condition.

The way to arrive then at a just conclusion in this case is to inquire whether the act from Scott to Ruderstein is a mortgage or sale by the laws of Mississippi where it was passed.

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By the common law which prevails it that State this act is a mortgage, and as there is no sacramental form of mortgage in Louisiana, and this act does not violate any of the provisions of our laws, effect ought then to be given to the intention of the parties and it ought to be considered a mortgage, although, by the provisions of our Code, it might be viewed as a sale with a resolatory condition.

No injustice is done to any party, because the act of *Scott to Ruderstein* was on record in the parish where the land was located, and parties had it in their power to examine the effect of this act.

For these and the reasons adduced by Chief Justice MERRICK I concur in his opinion.

SPOFFORD, J., dissenting. "The effect of Acts passed in one country to have effect in another country, is regulated by the laws of the country where they are to have effect." C. C. 10.

No independent State permits its land titles to be governed by a foreign system of laws. Lands can only be transmitted, conveyed and hypothecated according to the *lex loci rei sitae*. Any Act or instrument purporting to affect in any way lands situated in this State is to be interpreted by our law exclusively, even though the Act was passed in a foreign State it cannot be construed by the foreign law.

I believe this to be the just and sound rule, and that it has been generally adopted in civilized States as being essential to maintain the sovereignty of each within its own territorial limits and the purity of land titles. If a deed touching lands in Louisiana were made in China, that deed must be construed by the law of Louisiana alone, and the law of China would be nothing to the purpose. It is the same with a deed made in Mississippi concerning lands here. In this matter, Louisiana and Mississippi are independent sovereignties, foreign to each other.

To one who had never read the system of law which prevails in Mississippi but who was versed in the law of Louisiana, the instrument in question would present no difficulty. It is an obligation to take effect immediately, but coupled with an express resolatory condition; C. C. 2016. It is a present sale of the land, defeasible, however, by the vendor when he shall fulfil a certain duty. Until that condition is fulfilled the vendee is clothed with the title—he is master of the thing; as such he can maintain a petitory action, or an action of partition. The deed was recorded in the proper office.

It is only by looking at it through the law of Mississippi that this instrument assumes another hue; but that medium can serve only to distort and mislead, for our lands are not to pass according to the forms and theories of Mississippi law.

So far as my researches have gone this is the first case in which the legal character of a conveyance of Louisiana lands has been fixed by a foreign law.

*Hayden v. Nutt*, 4 An. 71, was decided by the rules of our Code, on the ground that the contract "was in its terms an accessory contract intended for the assurance of the payment of a principal contract." The court said the instrument fell within the definition of a conventional mortgage given in our Code, because on its face and before purporting to convey anything, the Act proclaimed that it was made for the "consideration of securing to David Dawson the payment of four notes, &c."

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*Smoot v. Russell*, 1 N. S. 523, related to *slaves* who were in Alabama at the time the contract relative to them was made there. It has no bearing upon the present case. The court expressly declined deciding whether the contract was a sale or a mortgage, although it quoted an expression in the beginning of the Act, declaring that it was made "for the better *security* of the plaintiffs, and to indemnify them against all loss, or against the payment" of a certain note, &c.

Here the deed was executed and the land has passed into the hands of a third person upon the faith of the recorded deed, this deed is, upon its face, translativ of property, and not a mere security; it has a dissolving condition reserved to the vendor; he is an intervenor in this cause, and does not pretend, even in his pleadings, that the condition has happened, that he has done what he reserved to himself the liberty to do in order to defeat his most formal conveyance. There is no equity in his favor, and I think the law sustains the judgment appealed from.

Mr. Justice VOORHIES concurs in this opinion.

#### C. A. BARRIÈRE & BROTHER v. D. McBEAN.

The accidental omission in the petition of the name of one of the plaintiffs, where they are a firm, will not vitiate an attachment where the affidavit was made by one of the firm on behalf of the firm, and the bond was given by the firm as principals.

In such a case no new bond and affidavit are required.

The property of a partnership having a domicile out of the State can be attached here in a suit against one of the partners.

APPEAL from the Sixth District Court of New Orleans, *Cotton, J.*

*H. A. Morse and Chilton & Harrison*, for plaintiffs. *Smiley & Perrin and M. M. Cohen*, for defendant and appellant.

SPROFFORD, J. This suit was commenced by attachment. A quantity of lumber was seized, and also rights and credits in the hands of *Stocker*, who was made a garnishee.

*Stocker*, as agent of *McBean*, bonded the lumber immediately. The condition of the bond was that, whereas the attachment had been released upon the appearance of the defendant in the suit, the said defendant should satisfy whatever judgment might be rendered against him in the cause.

From a final judgment rendered against him in conformity to the prayer of the petition this defendant has appealed.

There was a judgment against the garnishee for a part of the sum claimed. He has taken no appeal.

There are no intervenors in the cause.

The appellant urges that in the original petition *François G. Barrière*, one of the firm of *C. A. Barrière & Brother*, did not appear, and that, therefore, the attachment was a nullity which could not be cured by the subsequent appearance and joinder of *F. G. Barrière* in a supplemental petition. The case of *Purdee v. Coche*, 18 L. 660, is cited in support of this view.

The case is not in point. Here the affidavit was made by one of the firm on behalf of the firm, and the bond was given by the firm as principals. The defendant's rights were thereby fully protected. No new bond and affidavit

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were given or required. The accidental omission of the name of one of the firm in the petition might well have been supplied by an amendment, it appearing that the suit was brought in the interest of the firm.

On the oral argument it was suggested that the cause was not at issue when it was fixed for trial. There is nothing of record to show this; moreover, if there was, the defendant should have objected to going to trial at the time the cause was called for trial.

The appellant mainly relies for the reversal of the judgment upon an allegation that he was only interested as a partner in the property seized, and that the property of a Mississippi partnership cannot be attached in this State in a suit against one of the partners.

The contrary doctrine seems to have been held in *Fraser & Co. v. Thorpe*, 9 An. 518. See also Story on Partnership, § 261 *et seq.*

Something belonging to the defendant was seized. He admits that as a partner he had a right of property in the lumber. He was, therefore, brought into court. He bonded the property in his own name. He thereby contracted the obligation of defending the suit and responding to a personal judgment against him. *Kendall v. Brown*, 7 An. 668. The plaintiff's claim was fully proved.

We see no error in the judgment to the prejudice of the appellant.

Judgment affirmed.

### PAULIN MARTIN, Syndic, v. ABRAHAM DRUMM.

In cases where a sale or transfer of property is attacked, upon the grounds of alleged fraud and simulation, the defendant is not bound to produce proof of his good faith and the reality of the sale, when the property did not remain in the possession of his vendor. The *onus* of proving it is on the part of plaintiff, who alleges the fraud.

The presumption established by the Act of 1817, reenacted in 1855, (Revised Statutes, p. 257, § 25) applies to cases alone in which proceedings are instituted against the insolvent to deprive him of the benefit of the insolvent laws, on the ground of his having given an unjust preference to one or more of his creditors over others.

**A**PPEAL from the District Court of St. Tammany, *Merrick, J.*  
*J. L. Tissot*, for plaintiff and appellant.

VOORHIES, J. This is an action instituted by the syndic of the creditors of *Theobald Koenig* to avoid and set aside a sale of certain lots and improvements in the town of Covington from the insolvent to the defendant, made within three months of the surrender, on the ground of fraud and simulation.

The only question presented in the case is whether the *onus* was on the plaintiff to prove the alleged fraud or simulation, or on the defendant that the sale was real and *bona fide*.

*William B. Homer*, the only witness in the case, testifies that the vendor and vendee had been living together on the property conveyed in 1854, that is, *Mr. Drumm* constantly and *Mr. Koenig* often during the course of the year, sometimes alone and sometimes with his wife. No change in the possession, it appeared to him, had taken place since the transfer in 1854. Moreover, it appears from the recital in the deed of sale, executed on the 13th of January, 1854, and an extract from the proceedings in the case of *Theobald Koenig v. His Creditors*, that the insolvent was a resident of the city of New Orleans.

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The deed of sale shows that the price stipulated was the sum of \$500, payable, in the defendant's note to the order of the insolvent, two years after date, with eight per cent. per annum interest thereon from said date until paid. The note thus given does not appear to have been included among the property and effects surrendered by the insolvent to his creditors. Neither is it alleged or shown that the price thus stipulated was inadequate to the value of the property conveyed.

On the trial below, on the 5th of June, 1855, the note thus given was, according to its term of payment, evidently still outstanding and negotiable. The fact of its non-payment could not, therefore, have the least effect upon the defendant's right. If it was the property of the insolvent at the time of his surrender, and was fraudulently concealed from his creditors, it was for the latter to resort to the remedy given to them under the statute, or the syndic to take legal steps for its recovery. Revised Statutes, p. 255, § 22 *et seq.* *Duplessis v. Boutté*, 11 L. R. 345.

It appears to us clear, from the evidence, that the defendant was not bound to produce proof of his good faith and the reality of the sale, as the property did not remain in the possession of his vendor, hence the Articles 2456 and 1915 of the Civil Code, relied upon by the appellants, must be considered inapplicable. Neither can the presumption of fraud, established under Articles 832 and 1979 of the Civil Code, be considered applicable, inasmuch as it is neither alleged nor shown that the defendant was a creditor of the insolvent. The presumption established by the Act of 1817, reenacted in 1855, (Revised Statutes, p. 257, § 28,) applies evidently only to cases in which proceedings are instituted against the insolvent, to deprive him of the benefit of the insolvent laws, on the ground of his having given an unjust preference to one or more of his creditors over the others. As we have seen, the defendant does not fall within this category.

Judgment affirmed.

BUCHANAN, J., dissenting. In January, 1854, *Theobald Koenig* sold to his father-in-law, the defendant, a house in Covington, parish of St. Tammany, for the ostensible price of five hundred dollars, in a note of the vendee to the order of the vendor, payable two years after date.

In March, 1854, two months after this sale, *Koenig* sued his creditors, in the Third District Court of New Orleans, for a respite, which being refused him, his proceedings were converted into a surrender, and the plaintiff was appointed syndic. He brought this action in August, 1854, within one year after the sale, to annul the same, as made in fraud of *Koenig's* creditors.

This action is based upon the Articles 1965, 1984 and 1989 of the Civil Code, and upon the 10th section of the Act of 1840, (Bullard & Curry, 474,) reenacted in 1855, page 435, section 21.

By those statutes there is a presumption of fraud, which throws the burden of proof on the defendant to establish the validity and good faith of the sale. He has offered no proof whatever on the subject. The suit was tried in June, 1855, when the note, pretended to have been given for the price by defendant to the insolvent *Koenig*, had but a few months to run. The existence of the note at that time should at least have been established. If it was in existence, and in the hands of a third holder for value, it is more than probable that it would have made its appearance. If it was still in the hands of *Koenig*, it belonged to his creditors, represented by plaintiff.

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The circumstance of *Koenig* not having put the note on his bilan, corroborates the legal presumption of fraud and simulation in this contract.

Again, *Koenig* has remained in possession since the sale. He was seen superintending the shingling of the roof a few days before the trial. This also creates a legal presumption of fraud, which throws the burden of proof upon the defendant. C. C. 1915, 2456.

The case of *Duplessis v. Boutté*, 11 L. R., has no application adverse to plaintiff in this suit. That was an intervention of a syndic in an action of partition, claiming that the interest of defendant in the property to be divided had passed to his creditors. The syndic prevailed although many years had elapsed.

This suit is also a revendication of property which belonged to creditors, and should have been surrendered. It is not at all a proceeding under the sections of the Act of 1817, reenacted in 1855, which have been cited, and the proceeding by opposition to the discharge of an insolvent debtor under those statutes does not exclude the direct revocatory action given by the Code and the statute of 1840, also reenacted in 1855.

I therefore think the judgment should be reversed.

SPOFFORD, J., concurs in this opinion.

#### H. N. SEIBRECHT, Syndic, v. CITY OF NEW ORLEANS.

Corporations possess only *jura minorum*. They have not the power of contracting on all subjects, like persons of full age and *sui juris*. Having only such powers as are conferred by their acts of incorporation, they cannot be bound by contracts made by those not authorized to represent them.

A corporation cannot be bound for any contract made without its authorization expressed by a resolution of the Common Council.

APPEAL from the Fourth District Court of New Orleans, *Reynolds, J. T. A. McDonald*, for plaintiff. *J. J. Michel*, for defendant and appellant.

MERRICK, C. J. It is not pretended that any person having authority on behalf of the city contracted with *Robinson & Olroyd* for the carpeting used in the Third, Fourth and Sixth District Courts.

The person who bought it says that he was not authorized by the Common Council or any committee of the Council, but that he purchased at the request of some of the Clerks or Judges of the court.

Now is the city bound to pay for the articles because they were deemed necessary by a Clerk or a Judge, and were constantly used in the court rooms, and because the city usually supplies the courts with such furniture?

Corporations possess only *jura minorum*. They have not the power of contracting on all subjects like persons of full age and *sui juris*.

*Respublica minorum jure solet, ideoque auxilium restitutionis implorat potest.* Code, Const. 4, tit. 54, liber 2; *ibid*, Const. 3, liber 11, tit. 29; *ibid*, Const. 4, liber 11, tit. 31; see also 3 An. 308.

Having only such powers as are conferred by their Acts of incorporation, they cannot be bound for contracts made by those not authorized to represent them. C. C. 430.

But it is said that a corporation may be bound on a *quasi* contract arising *ex equo et bono*. So may a minor. But then it must be for necessities which the tutor would not provide, or things which have augmented the minor's estate, and not those things which have been consumed by use or lost in speculations. C. C. 1778; *Babcock v. Penniman*, 5 N. S. 651.

Now although no money can be drawn from the city treasury except upon a special appropriation by the Common Council, no application was made to them to make the purchases, nor was any of its proper officers consulted on the subject. The city then is not in the condition of the minor whose tutor refuses to supply him with necessities.

But it is said that the materials were used in the court rooms, and that the city has neglected to return the same.

To pursue the analogy further, the minor who *resists* the contract is not bound to restore the goods which he has worn out or squandered. He is bound to restore only when he avails himself of the *restitutio in integrum* and is himself the plaintiff.

But in what manner has *the city* refused to return the goods? Who is the city? Is it a being having knowledge of all that transpires in its markets, its streets, its school houses, its court houses and public buildings? If a person chooses to place furniture in any of these buildings, which is used by the occupants, is the city bound for it?

On the contrary, it seems to us that the doctrine announced will, if carried out, lead to bankruptcy. The Mayor and Aldermen are not presumed to know (even if they visit all the public buildings) the sources whence everything they see has been obtained.

The only safe rule is to hold that the city cannot be bound for any contract made without its authorization for furniture furnished any of the public buildings, and that if any person shall furnish the same, without being authorized thereto by a resolution of the Common Council, that he does so knowing that the city is not bound to pay him for the same, and that his only remedy is to take away his furniture when they refuse to pay for it.

The case before us is probably a hard case, because the plaintiff suffered his carpets to be worn out before he presented his bills. But as he knew that the city had not passed any resolution authorizing the purchase, so it was his own folly to sell his goods upon the uncertainty of the city's ratifying the bargain.

A large city like this cannot be controlled in its appropriations for its improvements and the refurnishing of its public buildings by the acts of unauthorized persons. The power to judge of the necessity of a change is vested in the Common Council, and the city courts must at least first communicate their wants to such Council before undertaking to order those things they deem necessary.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment against the demand of the plaintiff and in favor of the defendant, the plaintiff paying the costs of both courts.

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## SUCCESSION OF HENRY FLETCHER.

The Auditor of Public Accounts has no authority, under the Act of the Legislature of 13th March, 1855, (sec. 9,) to appoint counsel to appear for the State in civil suits in the District Courts in New Orleans, or to appear for the State in the Supreme Court in New Orleans.

In the city of New Orleans the State is represented by the Attorney General, its highest law officer, who is required by law to keep his office there.

It was the intention of the Legislature, in the above recited Act, to provide for the collection of money due the State in parishes or in courts where the State should be unprovided with an official representative.

**A**PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*H. C. Miller*, for the State, appellant. *J. Culbertson* and *A. Hennes*, for the testamentary executor.

**BUCHANAN, J.** *Henry C. Miller, Esq.*, an attorney-at-law, has taken this appeal in the name of the State of Louisiana, by virtue of an appointment by the Auditor of Public Accounts to that effect.

The appellee moves to dismiss the appeal, on the ground that the Auditor of Public Accounts was without authority to employ counsel to represent the State in the premises, and that the Attorney General is the only proper officer to take the appeal.

The appellee relies upon the Act to regulate the office of Attorney General, approved February 20th, 1855, the first section of which declares that it shall be the duty of the Attorney General to appear for the State and prosecute and conduct, in the District Courts in the city of New Orleans, all civil suits in which the State may be a party or be interested, and to appear for the State in the Supreme Court sitting in New Orleans, and prosecute and defend all appeals, in cases criminal or civil, in which the State may be a party or interested, and to intervene, whenever the interest of the State shall require such intervention, in all suits now pending, or which may hereafter be instituted, in the courts of the First Judicial District, and in the federal courts, &c., when the amount or value of the property at issue in such intervention shall exceed two thousand dollars.

The appellant relies upon the Act to regulate the office of Auditor of Public Accounts, approved 13th March, 1855, which declares, (section 9,) "that the Auditor of Public Accounts is authorized to employ attorneys to recover money due the State from any cause whatever, whenever in his discretion he may deem it proper and expedient to do so."

It has been correctly argued by the appellant that the latter of these two statutes must control the former wherever they differ, inasmuch as it was passed and promulgated after the former. But it is only where there is an obvious and necessary inconsistency of the provisions of the two statutes, that the Act relating to the office of Attorney General must be considered as repealed.

Tested by this rule, we do not find that the Auditor of Public Accounts has authority to appoint counsel to appear for the State in civil suits in the District Courts in the city of New Orleans, or to appear for the State in the Supreme Court sitting in New Orleans, or to intervene, on behalf of the State, in suits in the courts of the First Judicial District, in which the amount or value at

issue exceeds two thousand dollars. For in all these classes of cases the Act of February 20th makes it the duty of the Attorney General to represent the State. The power of the Auditor of Public Accounts to employ attorneys "to recover money due the State from any cause whatever" is, therefore, exclusive of the Supreme and District Courts sitting in the city of New Orleans. In that city the State is represented by its highest law officer, who is required to keep his office there. There is no reason for supposing that the Legislature intended to confer upon the Auditor of Public Accounts the extraordinary power of superceding, whenever he should think proper, the Attorney General elected by the people, by appointing an Attorney General *pro hac vice*, in any or every civil suit for the recovery of money from the debtors of the State, in the courts in the First Judicial District, and in the Supreme Court sitting in New Orleans.

It is more reasonable, and perfectly in harmony with the language of the statute relied on by the appellant, to suppose the intention of the Legislature to have been to provide for the collection of moneys due the State in parishes or in courts where the State should be unprovided with an official representative.

Again, the present proceeding is not an action to recover money due to the State. It is an intervention in the name of the State in an opposition to an account of administration filed by a testamentary executor. The State had already been decreed, by judgment of this court, to be the heir of *Fletcher*, in a proceeding to which the Attorney General was a party. See 11 An. 59. By that judgment it was ordered that, instead of the gross amount of assets in the executor's hands, being turned over to the Attorney General, (as had been ordered by the District Court,) the administration of the testamentary executor should be carried on to final settlement and liquidation of the estate, by reducing the assets to cash and paying the debts, and that the balance remaining upon such final liquidation shall be paid over, not to the Auditor of Public Accounts, but to the State Treasurer, in conformity to Article 1184 of the Civil Code.

The cause being thus referred back to the Second District Court of New Orleans, the executor sold the property of the estate, and rendered his account, showing a balance, after the payment of all debts and charges, of \$6806 10, stated to be the "balance coming to the State of Louisiana." This account was opposed by the appellee, claiming to be a creditor of *Fletcher's* succession. The appellant, *Miller*, acting under the appointment of the Auditor, intervened and pleaded prescription and other pleas against the demand of the opponent. It is evident that his position in this cause is that of defendant, instead of actor. In no sense can the appointment by the Auditor be viewed as regular or legal.

Appeal dismissed.

A. & F. REMY *v.* MUNICIPALITY NUMBER TWO et al.

As a general principle, a plan annexed to a petition should be used to explain anything that is ambiguous or unexplained in the petition, but it cannot control a written description of the nature and bounds of the land claimed in which there is nothing ambiguous.

Previous to the compromise of September, 1830, between the city and various claimants of the batture of the faubourg St. Mary, the levee followed the outer edge of Tchoupitoulas street, which was the original high road along the river bank, and lots for private occupation could not have been lawfully laid out upon the soil of Tchoupitoulas street.

The Act of the Legislature of the 21st of March, 1853, authorizing the city of New Orleans to lay out and establish lots upon the batture in front of the faubourg St. Mary, raised an interdict which the Legislature had imposed by the Act of March 8th, 1836, upon the private occupation of the batture outside of New Levee street.

Until the Act of the Legislature of 3d of April, 1853, the corporation had the exclusive right to determine where and to what extent the riparian proprietors might take possession of the batture.

The division of the batture outside of New Levee street as far as Front street, into streets and squares, was not an expropriation of the property so far as the streets were concerned, of which the riparian proprietors had never been in possession.

The jury to be empanelled under Art. 2608 of the Civil Code, to estimate the value of property to be expropriated, should have a personal knowledge of the value of real estate in the vicinage; they act as experts, and though it is proper, especially if they request it, that they should be aided by the opinions of witnesses, a personal examination of the premises by the jury in a body, after it is empanelled, should be a feature of every proceeding under that Article of the Code.

**A** PPEAL from the Fifth District Court of New Orleans, *Augustin, J.* Tried by a Jury. *Durant & Hornor*, for plaintiffs and appellants. *J. J. Michel*, for defendants.

**BUCHANAN, J.** The plaintiffs appeal from the verdict of a jury of freeholders, summoned, under the 2608th Article of the Civil Code, to assess the value of their property taken for the public use.

The first question presented is, whether the soil of Tchoupitoulas street in front of the lot purchased by the father of plaintiffs from *Théard*, in 1805, is included within the land recovered by plaintiffs of defendant by judgment of this court rendered in February, 1856. 11 An. 148.

The petition describes the land claimed by plaintiffs as follows: "A certain tract or lot of ground commencing at New Levee street, near St. Joseph street, being sixty feet in width and running to the river, being part of the batture in that neighborhood; that the yellow coloring on the map or plan herewith filed as part hereof, shows the tract or land belonging to petitioners; petitioners reserving to themselves, however, the right to file a more accurate description of the property by them claimed, and to correct any error into which they may have fallen in reference thereto."

The decree of the court is, "that plaintiffs be recognized as the true and lawful owners of the property claimed by them, to wit: that portion of the batture lying and being in front of the lot described in the petition, to wit, a lot of ground situated in the faubourg St. Mary, being numbered 64," &c.

Plaintiffs pretend that the words of their petition, "commencing at New Levee street," are controlled by the plan annexed to and made part of the petition on which the whole of the original lot No. 64 of the faubourg St. Mary, acquired from *Théard*, as well as all the intervening space between that lot and the river, is represented colored yellow. But this construction of plaintiffs' claim is clearly inadmissible. For the yellow portion of the plan includes

the lot No. 64 itself; and the petition sets forth, that the ancestor of plaintiffs sold the lot in 1810.

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But although, as a general principle, a plan annexed to a petition should be used to explain anything that is ambiguous or unexplained in the petition, yet it cannot control a written description of the metes and bounds of the land claimed in which there is nothing ambiguous. It may very well be that the party merely intended, by coloring the intervening space between the lot No. 64 and New Levee street the same as he colored the lot itself and the space between New Levee street and the river, to present to the eye the connection between the lot in question and the batture outside of New Levee street, as claimed in the petition.

Besides, the sale from *Antoine Remy to Joseph Tabony*, of January 17th, 1810, referred to in plaintiffs' petition, and given in evidence by them as a muniment of their title, proves an alienation by the ancestor of plaintiffs, of whatever title he had to the soil of Tchoupitoulas street. The description of the land conveyed by that sale, is as follows: "Un terrain, situé au faubourg Ste. Marie, designé sous le No. quarante, de soixante pieds de face à la levée, sur deux cents vingt-six pieds de profondeur."

In this description two things are to be noted:

1st. *Remy sells to the levee.* Now it is a matter of historical and local notoriety, that previous to the compromise of September, 1820, between the city and various claimants of the batture of the faubourg St. Mary, the levee followed the outer edge of Tchoupitoulas street. It is so represented on the engraved plan of the city of New Orleans and its faubourgs made in the year 1815, by *J. Tanasse*, city surveyor.

2d. *Remy sells the lot with a depth of two hundred and twenty-six feet*, whereas he had purchased from *Théard* with a depth of 160 feet. The additional sixty-six feet conveyed to *Tabony*, can be nothing else than the width of Tchoupitoulas street, in front of the lot No. 64, as originally bounded in the plan of the faubourg by *Laveau Trudeau* referred to in the deeds from *Gravier to Théard*, and from *Théard to Remy and Effingham*.

Another and more important question forces itself upon our attention, in connection with the evidence upon which the jury has found the verdict of which the plaintiffs complain.

The same draughtsman who made the plan annexed to the petition, has made another plan which is submitted to us, as a pictorial representation of the *locus in quo*. Both plans depict a prolongation of the side lines of lot No. 64 of the original plan of the faubourg St. Mary to the river Mississippi. On both, the space embraced within the prolongation of those lines is intersected by four streets, Tchoupitoulas, New Levee, Fulton and Front, and is occupied in a portion of its length by St. Joseph street. But on the plan last made, the soil occupied by these five streets, is cut up into thirty-one lots, of which four occupy Tchoupitoulas street, three New Levee street, three Fulton street, three Front street, and eighteen St. Joseph street. It is upon this arbitrary and fanciful configuration of lots in impossible situations, blocking up all the public thoroughfares, that the extravagant estimations of the plaintiffs' witnesses before the jury of freeholders were based. The slightest reflection shows that this basis of estimation is false, and only calculated to lead the jury into error. For, not to speak of the absurdity of private occupation of Tchoupitoulas street, the original high road along the river bank, and for several generations

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the only means of communication by land between the city and the country above, it would be entirely to ignore the sovereign power of the State, the administrative power of the city corporation as settled by many adjudged cases, and the no less well settled rights of riparian proprietors themselves upon alluvial deposits of the river within the limits of this city, to suppose that lots can be laid out for private occupation upon the soil of the streets which the city of New Orleans was authorized by the Act of the Legislature of the 21st of March, 1850, (Session Acts, page 197,) to lay out and establish upon the batture in front of the faubourg St. Mary. By that Act, the Legislature raised an interdict, which it had imposed by Act of March 8th, 1836, upon the private occupation of the batture outside of New Levee street; sanctioned a plan prepared by *George T. Dunbar*, city surveyor, for the extension of old streets, (including St. Joseph street,) and the creation of new streets (Fulton and Front) upon the said batture; and formally ordered, by the third section of the Act, that the batture between the river and the street to be laid off fronting the river (Front street) shall be left open, and so kept for the accommodation of the public and the convenience of commerce. Yet the figurative plan submitted to the jury in the court below, represents the streets laid out by *Mr. Dunbar* by order of the city council, and sanctioned by the sovereign power of the State in 1850, as susceptible of private ownership and occupation in 1856.

The administrative control which the city council had over the alluvial deposit, was settled in the cases of *Municipality Number Two v. The Orleans Cotton Press Company*, and *Pulley & Erwin v. Municipality No. Two*, in 18th Louisiana Reports. The corporation had the exclusive right to determine when, and to what extent, the riparian proprietors might take possession of the batture.

Until the Act of 30th April, 1853, the riparian proprietor was bound to await patiently the action of the corporation, and was not allowed to take the initiative, in limiting or terminating the public occupation of the batture.

The judgment in the petitory action instituted by the plaintiffs against Municipality Number Two, cannot be interpreted as having recognized a right in the plaintiffs to the private occupation of the whole of the batture in front of lot No. 64, without regard to the administrative power of the city corporations over the batture and landing, or to the action of the State and of the city in relation to this batture in the year 1850, previous to the institution of the plaintiffs' suit, or the steps taken by the city authorities for the opening of streets on the batture, in furtherance of such legislative and municipal action. In our view of the case, the division of the batture outside of New Levee street, as far as Front street, into streets and squares, was no expropriation of the plaintiffs, so far as the streets were concerned, for they had never been in possession of the soil of those streets, nor indeed of any part of the batture. Such division was, in fact, a restriction of the public use, which had previously extended to the whole batture, to the comparatively small portion of the batture covered by the streets; and it does not admit of doubt, that the reservation of streets, as avenues of communication, was necessary (in the words of the Statute of 1850,) to the accommodation of the public and the convenience of commerce. We would, therefore, be inclined to the opinion, that the plaintiffs were entitled to very little, if any, compensation for the public use of the soil of the streets on the batture; and thus thinking, cannot favor the application

of the appellants to remand the cause for the purpose of having the compensation increased ; neither can we reduce the amount of the judgment appealed from, inasmuch as the appellee, the city, has not asked for an amendment in its favor.

There is a point of practice under the Article 2608 of the Civil Code raised by a bill of exceptions which perhaps requires notice, although not strictly necessary to the decision of this case. The jury empannelled under that Article, is a jury of a peculiar character. It must be composed exclusively of freeholders, and the members who compose it are evidently supposed and intended by the Legislature, to have a personal knowledge of the value of real estate in the vicinage, which entitles them to rely upon their own opinion, in forming their judgment ; although, doubtless, it is proper that their own opinion should be aided, especially if they request it, by the opinions of witnesses. Such a jury are, in truth, experts ; and we suggest that a personal examination of the premises by the jury in a body, after it is empannelled, should be a feature of every proceeding under this Article of the Code.

Judgment affirmed, with costs.

SPOFFORD, J., concurring. I am of opinion that the plaintiffs' right to a fair indemnity for that portion of their batture property heretofore converted into streets, is not an open question between these parties. See the case between the *Remys* and the *Municipality*, reported in 11 An. 148, and the opinion of this court pronounced December 22d, 1856.

But I am of opinion that the freeholders whose duties are prescribed by the Article 2608 of the Code, are vested with a larger discretion than ordinary juries. They are not bound by the opinion of witnesses, but may make their own appraisement, either upon view of the property, or after hearing and weighing such evidence as the court thinks to be legally admissible. The District Judge in this case stated in overruling the motion for a new trial, that the jurors declared themselves to be perfectly familiar with the property in question. They were far better able than we are to appreciate what it was worth ; and there is no evidence of prejudice or passion. I do not find that the Judge committed any such errors as would require the case to be remanded, and, therefore, concur in the judgment.

VOORHIES, J., dissenting. The plaintiffs, under the former judgment of this court, must be considered as the lawful owners of "a lot of ground situated in the faubourg St. Mary, being numbered 64, and having 60 feet front on the river and 180 feet in depth, with a reservation in favor of the city to use for the purposes of administration such part of it as may be subject to the servitudes established by law on lands fronting on the Mississippi river, within the limits of the city." 11 A. 148.

The use of the bank of the river is, in my opinion, the only servitude established by law on the property in question. In the exercise of it, it is clear that the plaintiffs cannot be placed on a more unfavorable footing than that of any other front proprietor. This right, however, does not appear to be the subject matter in contestation. Neither do I understand our former decision to be at variance with any of the principles laid down in the decision of the Orleans Cotton Press case, 18 L. R. 122.

The question as to the plaintiffs' right to a fair price for that portion of their property which has been appropriated to public use, must be considered as af-

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firmatively settled by the decision of this court, in which the case was remanded merely for the purpose of ascertaining such price by submitting the matter to a jury of freeholders in accordance with Article 2608 of the Civil Code.

The record contains bills of exceptions which present several questions to the consideration of the court. The Judge *a quo* erred, in my opinion, in refusing to charge the jury as requested by the appellant's counsel, that in assessing the amount to be paid to the plaintiffs they were to be guided by the testimony of the witnesses. On the contrary, he charged that they were not bound to consider it, if not disposed to do so, "*but might disregard it altogether, and decide on their own notion unaided by it.*" I do not think the law authorizes the conclusion, that greater powers are conferred on juries convoked under the Article of the Civil Code to which I have already alluded than on ordinary juries. It must be evident that if such powers were intended to be conferred, as those assumed by the Judge *a quo*, a trial would then amount to a mere idle and vain ceremony; indeed, it would only be necessary to obtain the report of twelve freeholders in such cases, *founded on their own notions*, without putting the parties to the trouble and expense of a trial. But I feel fully persuaded that a verdict rendered by such a jury must, as in all other cases, be founded on legal proof. It is true in arriving at a conclusion they may consider facts coming within their own knowledge, but such facts must be disclosed on the witnesses' stand. For in the exercise of its revisory powers, in order to act understandingly, this court must necessarily be put in possession of all the facts of a case; else the right of appeal would be a mere shadow.

On the other points I am inclined to think the Judge did not err to charge the jury as requested by the appellants' counsel.

I am, therefore, of opinion, that the judgment should be reversed, and the case remanded for a new trial.

#### STATE OF LOUISIANA v. C. H. MYHAND.

In the punishment of offences, where the law leaves it to the discretion of the court, the discretion of the court does not extend to the infliction of the penalty of imprisonment at hard labor.

**A** PPEAL from the Sixth District Court of West Baton Rouge, *Robertson, J. J. D. Stuart*, District Attorney, for the State. *R. G. Beale* and *D. N. Barrow*, for defendant and appellant.

**MERRICK, C. J.** The defendant was indicted for an assault with a dangerous weapon. The jury found him guilty of an assault and battery, and the court sentenced him to pay a fine of \$20, and to be imprisoned in the jail for thirty days.

The defendant appealed. We have no jurisdiction of the case; the offence charged in the indictment is provided for by the 10th section of the Act of 1855, page 131, and the punishment is fine or imprisonment, or both, at the discretion of the court.

We do not understand the discretion of the court to extend to the infliction of the penalty of imprisonment at hard labor. Acts 1855, p. 151, §6.

The jurisdiction of this court is conferred by the 62d Article of the Constitution, which, among other things gives this court appellate jurisdiction in all

criminal cases on questions of law alone, whenever the offence charged is punishable with death or imprisonment at hard labor, or when a fine exceeding \$300 is actually imposed.

The 26th section of the Act of 14th of March, 1855, page 154, merely follows, but adds no force to these provisions of the Constitution. It must be considered as merely providing that appeals in criminal cases may be taken without giving bond.

It is clear that the case of the defendant does not fall within the category of cases in which appeals are allowed by the Constitution.

It is, therefore, ordered, adjudged and decreed, that the appeal taken in this case be dismissed at the costs of the appellant.

J. BURNSIDE & Co. v. MCKINLEY & MOORE.—McELROY & BRADFORD,  
Garnishees.—DAVID TAYLOR & Co., Intervenor.

The garnishees received a lot of cotton from the defendants, with instructions to sell as soon as practicable or advisable, and to pay over the proceeds to the intervenors. The garnishees communicated at once with the intervenors, and submitted themselves to their arbitrament of the propriety of an immediate sale, tendering their advice to hold on for a rising market.

The intervenors accepted this advice, and directed the garnishees to delay sales. *Held*: That the stipulation *pour autrui* contained in the letter of instructions to the garnishees, having been accepted by the party for whose benefit it was made, could no longer be revoked by the shipper of the cotton.

The intervenors acquired a vested interest in the cotton, which entitled them to a preference over an attaching creditor.

APPEAL from the Sixth District Court of New Orleans, *Cotton, J.*

*Elmore & King*, for plaintiffs and appellants. *Clarke & Bayne*, for intervenors.

The court having rendered a decree in favor of the plaintiffs and appellants, *Clarke & Bayne* applied for a re-hearing:

There is no question of more general interest to a commercial community than that passed upon in this case. None that has been more frequently before the courts—none better settled by precedent—than the doctrine which is understood to be admitted here, that “where the owner of property has lost his control over it, and cannot change its destination, his creditors cannot attach.” If this doctrine is to be varied by circumstances—after being so often and so uniformly announced from the bench—public policy requires that the grounds of this variation should be clearly and definitely understood.

The case is stated by the court as follows: “The plaintiffs, being creditors of *McKinley & Moore*, who are absent defendants, levied an attachment upon the twenty-one bales of cotton in the hands of *McElroy & Bradford*. Accompanying the shipment from the defendant to *McElroy & Bradford* was the following letter of instructions:

“‘SHREVEPORT, LA., March 29th, 1856.

“*Messrs. McElroy & Bradford*:

“I send you some cotton, which I hope you will receive in due time, and I wish you to sell as soon as you can, or as the times justify, and when sold please pay the proceeds to *David Taylor & Co.* I will forward some more as soon as I get it to the river. Please let me hear from you as soon as you sell.’

“This letter was shown, before the attachment, to *David Taylor & Co.*, who have intervened in this suit, and have claimed the proceeds of this shipment, as applicable to a debt due to them from the defendants. At the date of the service of the attachment, the cotton had been sold, but had not been weighed or delivered.”

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It appears by the answers of the garnishees and the testimony of their clerk that the cotton was received, with the above letter of instruction, and soon after its receipt, *David Taylor & Co.* were informed that the cotton had been received for them, and that they (the garnishees) would hold it for them, and pay them over the proceeds. They stated to *Taylor & Co.* that they were not selling any cotton at that time; that they would hold these twenty-one bales for them (*Taylor & Co.*) if they were willing. *Taylor & Co.* accepted the shipment made to them, and consented that the garnishees might hold for them till they made sale. They had made sale, and received eight hundred dollars from the purchasers on the day of sale, but had not weighed the cotton. These are the facts of the case.

The court say: "The possession of the agents was, so far only as legal consequences flowed therefrom, that of the principal, and in his hands it would have been liable to attachment." What legal consequences did flow from the possession of the agent under the instructions above given? The first consequence was that *McElroy & Bradford* could not divert it from the purpose for which it had been sent—could not divert it from *David Taylor & Co.* This the court admit in commenting on the case of *Palmer & Co. v. Hornor*, 10 An. The next consequence is, that *McElroy & Bradford* stand charged as holders of this cotton for *David Taylor & Co.* the moment after they have communicated to them the receipt of the cotton for them. They attorned to them, and recognized them as entitled to the cotton or its proceeds. Such obligations arose between them and *David Taylor & Co.* as prevented *McKinley & Moore* from changing the destination of the cotton. *Cutter v. Baker*, 2 An. 572. In the case of *Gray v. Trafton*, 12 M. R. 702, an order had been given upon attorneys to pay to —, when collected, and the court say: "In the present case the evidence fully establishes the fact that *Trafton's* attorneys agreed to pay the claimants the amount by him ordered, when the money should be collected, which did not take place until long after the date and acceptance of his order. The attorneys were, therefore, debtors only conditionally, viz: in the event of recovering the money of their client. The latter was free to direct its appropriation in anticipation of collection, and the persons to whom payment was ordered, after acceptance by his agents, held a vested right in the debt, subject, however, to the condition of said acceptance. From that period *Trafton's* attorneys, thus charged with the collection, may be considered as trustees for the claimants, who had a vested interest, and consequently the funds thus transferred were not subject to the plaintiff's attachment." *Gray v. Trafton et als.*, 12 M. R. 703.

In the case of *Armor v. Cockburn et als.*, 4 N. S. 668, "the defendant, it appears, was indebted to both plaintiff and intervenor; he shipped twenty-five bales of cotton in Alabama, and delivered it to one *Mason*, with directions to sell the same on his arrival in New Orleans, and pay the proceeds to *Banks, Miller & Kincaid*, the intervening creditors, to extinguish, as far as they would go, a debt he owed them. The cotton, on its arrival, was placed in the hands of the intervenors, as agents for the said *Mason*. Before the service of the attachment, he informed them that he had received the cotton from *Cockburn*, on the conditions already expressed, and that, in conformity with these instructions, he would pay over the proceeds to them, to which they assented. The cotton was not sold until after the attachment was levied. We think that, after the promise made to the intervenors, and accepted by them, the cotton could not be attached. We cannot distinguish the case from *Gray v. Trafton*, and we have never had occasion to doubt the soundness of the principle on which that case was decided. The true test in such case is this: that where the owner of the property has lost all power over it, and cannot change its destination, the creditors cannot attach; the converse of the rule being that whenever the proprietor can sell and deliver the creditor may seize. In this case that power was gone. After the person in whose hands the cotton was placed promised to pay the intervening creditors, he became personally responsible to them, and the owner could not, by a change of determination, have compelled him to pay the money to any other person. The agreement constituted what is called a *stipulation pour autrui*, and once accepted by those for whose benefit it was made, it could not be revoked." C. C. 1896; 5 La. 316. Now this case is precisely on all fours with the case before the court, except ours is a stronger case in this, that the cotton had been sold by the garnishees, and eight hundred dollars of the proceeds had been realized by them.

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In that case, as in ours, the shipment was made to pay a preëxisting debt due to the intervenors. No advance was asked or obtained by the agents, nor was any new credit given upon the faith of the promised appropriation of the proceeds. The shippers announced to their consignee, that the cotton was sent to him, and he was to pay the intervenors out of the proceeds. The cotton was attached *before it was sold*, and yet the court, treating the cotton as identical with its proceeds, gave it to the intervenors. In no case in the books is any distinction drawn between the Article itself and its proceeds, or that into which it is converted in the usual course of business; and we do not understand the court to decide this case upon such a narrow point as this.

In the case of the *Bank of St. Mary v. Morton*, 12 Rob. 411, *Morton* shipped 163 bales of cotton to *Franklin & Henderson*, and gave an order for the avails of shipment. This order was communicated to *Franklin & Henderson* before sale and before attachment. The court, putting out of view all other questions, say: "It seems to us that, it suffices that said proceeds were regularly transferred to the intervenor for a valuable consideration, before the date of the attachment, to give the latter the right of recovering them as against an attaching creditor, provided it is shown, that due notice of the transfer was given to the debtor of the proceeds, previous to the levying of the attachment. The doctrine, so often recognized by this court—that where the owner has lost control over his property, creditors cannot attach—is applicable to the rights of the parties in this cause." In all the cases decided, the court intimates, that whenever the agent of the shipper has communicated to third persons notice of shipment for advantage of said third persons, from that moment the shipper loses control and has no attachable interest in the shipment. In the case of *Goodhue v. McCarty*, where the decision is adverse to the intervenors, it is put distinctly upon the ground "that nothing had occurred which created, on the part of *Hebitt, Heran & Co.*, consignees, an obligation to hold the property for the benefit of intervenors." In the case of *Piner v. Williams*, the real question argued in the court below was, whether or not the intervenors were entitled to the proceeds of the cotton, although they had no notice of shipment to pay them, and the case of *Bonaffe v. Lane*, 5 An. 225, was cited in support of this doctrine. The Judge of the court below put his decision distinctly upon the ground, "that the attachment was levied before any correspondence was had with the intervenors, or any act was done by them, based upon the supposed assignment."

In the court above, the Judges intimate, that *Yeatman & Co.*, the garnishees, by receiving the cotton under instructions to pay proceeds to intervenors, accepted a trust in favor of said intervenors, even without notice to said intervenors, from which they could not be relieved by paying the money over to the original shipper; but, the court say further, that they are relieved from the necessity of deciding this question by proof of the acceptance by intervenors, of shipment made for their advantage. After such an acceptance, there was no doubt of the right of intervenor in preference to an attaching creditor. And in the case of *Oliver v. Lake*, 3 An. 78, which was argued most elaborately, it will be seen, that the sole object in seeking to make the contract subject to the law of Mississippi is, to relieve the intervenors from the necessity of proving that they had notice of the shipment made for their advantage—to relieve them from showing that they had accepted it.

It will be seen, by examining the argument of the distinguished counsel engaged in that case, (one of them, *Judge Bullard*, formerly occupying a seat where your honors now sit,) it was conceded, that if the intervenor had notice of the shipment for his advantage, and had accepted it, the property was not attachable as the property of the shipper; and we understand that to be the doctrine of this case.

The cotton might be at the risk of the shipper, and yet his ownership be so far diverted as to place it beyond the reach of attachment by his creditors. The case of *Urie v. Stevens*, 2 Rob. 253, is put upon the grounds that the consignees, agents of shipper, had, with his consent, agreed to pay out balance proceeds cotton to *Turner & Woodruff*; that the owner had lost his control, and, therefore, it could not be attached by his creditors.

The case of *Cutters v. Baker*, 2 An. 573, does not seem to be put upon any contract made at the time of the shipment, but upon the agreement made at New Orleans, by consignees, to hand over proceeds to the intervenor; and is stated by the court as follows: "We consider the rights of the bill-holders as

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superior to those of this attaching creditor. The agreement made between the bill-holders and *F. J. & Co.* in conformity to *Baker's* letter of advice, anterior to the attachment, placed that merchandize and its proceeds beyond the control of *Baker*." And as a natural sequence beyond the attachment of his creditors. The cases of *Armor v. Cockburn*, 4 N. S., 667, and other cases are here cited.

No advance was necessary by *Taylor*, as a special consideration. A consideration is anything that induces one to act or not to act. The agreement of *McElroy & Bradford* to pay proceeds to them, may have induced them not to seize the cotton, not to seek other modes for collection of their debt. Such is a valid consideration. *Mouton, Governor, v. Halsted*, 1 An. 192.

No special advance seems to have been made or required, in the other cases heretofore cited, to bring them within the rule.

We have endeavored to show that there is but one rule by which to solve all questions like this, now before the court. That the creditors of a shipper of property can have no more rights upon it, in the hands of consignees, than he has. That this case cannot be distinguished from the cases of *Gray v. Traf-ton*, 12 Martin's Reports, 702; *Armor v. Cockburn*, 4 N. S. 667; *Oliver v. Lake*, 3 An. 78; *Piner v. Williams*, 10 An. 278; and others. That, in those cases, the shipment was to pay a preëxisting debt, without any special advance made on the shipment. That the position of the consignee is not identical with that of the shipper, because the acceptance of a shipment under instructions, to appropriate the proceeds in a particular manner, creates an obligation on his part thus to appropriate them. That, when he communicates this to the third person, for whose benefit the shipment is made, the instructions cannot be revoked by the shipper, and such third person would have a right to sue consignees for the proceeds. C. C. 1896; C. P. 35; 11 An. 333; *Pemberton v. Zacharie*, 5 La. 316; numerous cases cited, *Hennen's Digest*, p. 1086.

It was a *stipulation pour autrui*, which the shipper was authorized to make, and which the parties receiving it bound themselves to comply with; they could not divert to their own use, as decided in case of *Palmer v. Horner*, and suggested in case of *Piner v. Williams*. *McKinley & Moore* could not, by a change of mind, recall the cotton, and give it any other destination. They could not relieve *McElroy & Bradford* from the obligation created by their promise to pay to *David Taylor & Co.*; and in this respect, the position of *McElroy & Bradford* is far different from that of *McKinley & Moore*—the possession of *McElroy & Bradford* is not the possession of *McKinley & Moore*—they have become agents for *David Taylor & Co.*, for whose account and advantage the cotton was shipped to them. If *McElroy & Bradford* had wasted the cotton, or, by negligence, had lost it, *David Taylor & Co.* could, under the cases cited, have sued them for its value.

If *McKinley & Moore* were in New Orleans, in possession of the cotton it might be physically possible for them to divert the proceeds from *Taylor & Co.*, though they could not do it in good faith; but *McElroy & Bradford* could not do so under new instructions from *McKinley & Moore*. They may be so far the agents of *McKinley & Moore* as to place the cotton at their risk (as in the case of *Oliver v. Lake*), and yet under such obligations to *David Taylor & Co.* as to compel a delivery of proceeds to them.

*McKinley & Moore* may have such a qualified ownership as to put the cotton at their risk, make its loss before delivery their loss, and yet have so far lost control and dominion over it as to put it beyond the reach of their creditors. In the case of *Oliver v. Lake*, Chief Justice Slidel thus enunciates this doctrine: "In this connection it is proper to notice the argument of the plaintiff's counsel with regard to the ownership of this property, as tested by the maxim *res perit domino*. It is very true that, if the cotton had been lost on its voyage to New Orleans, or been destroyed by fire here, or if *Martin Pleasants & Co.*, after selling it, and receiving the proceeds, had failed, the loss would have fallen on *W. A. Lake*, the shipper. But there is no inconsistency in the concurrent existence of a qualified ownership in one party and a control and dominion over it for certain purposes in another party. Thus, when property is given in pledge, the pledgor parts with the possession and control of the thing pledged; but, if it perishes without the fault of the pledgee, the loss is the pledgor's, and the debt remains unsatisfied. The payee of a bill of exchange has an order upon the funds in the hands of the acceptor; but, if the acceptor fails, the drawer, if there has been due diligence on the part of the holder,

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bears the loss; so a consignee, who has made advances, is deemed a qualified owner of the property consigned; but there is also a qualified ownership in the consignor, and its destruction is his loss."

*McElroy & Bradford* had sold the cotton, and on the day of sale, received eight hundred dollars. Were not *David Taylor & Co.* entitled to those eight hundred dollars, proceeds of the cotton, the moment they came into the hands of *McElroy & Bradford*? But we have shown, that in all the cases the merchandise and property shipped are treated as convertible terms for proceeds. As in case of *Gray v. Trafton*, the order is for money when collected: and in case of *Armor v. Cockburn*, the instructions are to pay the balance of proceeds of cotton, and the attachment was before sale.

After examining all the cases with great care, and the books are full of them, and turning them in every possible phase, we find that each one inculcates the doctrine in broad and general terms—that, "where the owner has lost his control over it, and cannot change its destination, his creditors cannot attach." A doctrine thus hallowed by precedent—universally understood and acquiesced in by the bar and the community at large should not be varied for any slight cause.

*Elmore & King* replied:

We have attentively read the argument in behalf of the intervenors for a rehearing, and consider that its whole force depends upon a very ingenious statement of the case, not at all warranted by the evidence. That statement is as follows:

"It appears, by the answers of the garnishees and the testimony of their clerk, that the cotton was received, with the above letter of instructions; that soon after its receipt *Taylor & Co.* were informed that the cotton had been received for them, and that they, the garnishees, would hold it for them and pay over the proceeds. They stated to *Taylor & Co.* that they were not selling any cotton at the time; that they would hold these twenty-one bales for them (*Taylor & Co.*) if they were willing.

*Taylor & Co.* accepted the shipment made for them, and consented that the garnishees might hold for them till they made the sale."

This is not the case before the court as shown by the evidence.

The answers to the interrogatories were made by *Mr. McElroy*. In his testimony in the case, he shows that he had no personal knowledge whatever of the affair. That all that had passed between his firm and the house of *Taylor & Co.* had been through *Mr. Gribble*.

All that was said about "accepting the letter, or the cotton, or the proceeds, came from *Mr. McElroy*; who says himself he had no interview with *Taylor & Co.* about the cotton.

To get at the facts, then, we must, of course, refer to the testimony of *Mr. Gribble*.

He tells us exactly what passed between him and the house of *Taylor & Co.* and winds up with the emphatic declaration, that "this is exactly what passed and nothing more." In his testimony there are no such expressions as "*Taylor & Co.* accepted the shipment made for them, and consented that the garnishees might hold for them till they made sale."

He did not inform *Taylor & Co.* "that the cotton had been received for them, and that the garnishees would hold it for them." He simply, as he states, "showed them the letter of instructions, and said *McElroy & Bradford* could sell the cotton immediately, but were then holding the cotton for an advance in the market, and should hold theirs also; and *Taylor & Co.* gave their assent to this." This was what passed, "and nothing more."

We here again insert the letter of instructions:

SHREVEPORT, La., March 29th, 1856.

*Messrs. Elroy & Bradford*:

Gentlemen,—I send you some cotton, which I hope you will receive in due time, and I wish you to sell as soon as you can, or, as the times may justify; and when sold, please pay the proceeds to *David Taylor & Co.* I will forward some more as soon as I get it to the river. Please let me hear from you as soon as you sell.

Yours, very respectfully,  
[Signed]

J. N. McKINLEY

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This letter, with *Mr. Gribble's* testimony, and the admitted fact that the cotton was not weighed or delivered at the date of the attachment, constitute the material facts of the case.

This letter was showed to the intervenors, and they were thus apprised of the nature of the agency of *McElroy & Bradford*, and the extent of their powers. This letter was their power of attorney. The defendants were bound by their acts, just so far as this letter authorized, and no further; and the intervenors are, in law, presumed to have known this.

The letter, on its face, is a mere private letter, which could not be communicated without a violation of the faith of a private correspondence. This the intervenors knew. It was not intended, either from its language or by any fair implication, to put the cotton out of the control of *McKinley & Moore*—this the intervenors knew. Any attempt of *McElroy & Bradford* to take this cotton out of the control of *McKinley & Moore*, and put it under the control of *Taylor & Co.*, was unauthorized by the letter, and not binding on *McKinley & Moore*. All this the intervenors knew or ought to have known.

If *McElroy & Bradford* misunderstood the letter, and misconceived their powers, *Taylor & Co.* acquired no advantage from the mistake, because they were cognizant of the mandate and the power conferred.

Suppose *McKinley & Moore* had been in the city, and had informed *Taylor & Co.* that as soon as they sold the cotton and realized the proceeds, they would pay them? Would this have placed the cotton out of their control? Such language is common with planters to their creditors.

This is in effect precisely what they did through their agents *McElroy & Bradford*. Is it possible that the same expressions, through an agent not authorized to make the communication, should have greater effect than when made by the principal in person? Suppose *McKinley & Moore* had casually remarked, in the presence of *McElroy & Bradford*, that when the proceeds of their cotton were realized, they intended to pay *Taylor & Co.*; and *McElroy & Bradford* had repeated this casual conversation to *Taylor & Co.*, would this have taken the cotton out of the control of *McKinley & Moore*? This is the substance of what occurred, so far as the legal rights of the parties are concerned.

The counsel for the intervenors have argued this case as though the court had decided that the plaintiffs could attach even when the defendant had lost the control of the property. The court made no such decision. What the court decided was, that under the facts of this case, the defendants had not so lost the control of the cotton as to exempt it from attachment.

There was nothing in the letter to *McElroy & Bradford* which could have prevented *McKinley & Moore* from coming to New Orleans, and taking the cotton out of the hands of *McElroy & Bradford*, and selling it themselves.

If *McElroy & Bradford* had violated their instructions with a third person not acquainted with the nature of those instructions, *McKinley & Moore* might, to some extent, have been bound. But *Taylor & Co.* knew the instructions, and are presumed, in law, to have known that *McElroy & Bradford* had no power to give them the control of cotton or any right whatever in the cotton. They cannot, therefore, justify their claim by the acts of agents which they knew were unauthorized. If *McElroy & Bradford* came under any obligations to *Taylor & Co.*, not authorized by the letter of instructions, it was their own affair, and could not affect the right of control in *McKinley & Moore*.

The counsel for the intervenors say: "The possession of *McElroy & Bradford* is not the possession of *McKinley & Moore*. They have become agents for *D. Taylor & Co.*, for whose advantage and account the cotton was shipped to them." This position assumes the whole question at issue. We deny every syllable of it. *McKinley & Moore* shipped the cotton to *McElroy & Bradford*, as their agents. They never authorized them to change the control of the cotton or the possession, to *Taylor & Co.* Receiving the cotton as the agents of *McKinley & Moore*, *McElroy & Bradford* could not, by their own act, change the nature of the possession held by them, or hold it as the agents of *Taylor & Co.*

"A party cannot change, by his own act, the nature and origin of his possession." C. C. 3480; *Hpod v. Ligrist*, 12 R. R. 210; *Phelps v. Hughes*, 1 A. R. 320.

They received the cotton as the agents of *McKinley & Moore*; and as such, they held it at the date of the attachment. The letter of instructions did not

authorize them to hold the cotton as the agents of *Taylor & Co.*; and this fact the latter knew, because the letter was shown to them.

The counsel for the intervenors have assimilated this case to that where the shipper has given an order to some third person, on the agent for the property or proceeds in his hands.

The order, in such cases, is a declaration on the part of the shipper that he desires some third person to have the control. Its acceptance is an acknowledgment on the part of the agent, that he will in future hold the property for such third person, and thereby becoming the agent of such third person. The cases cited by intervenors' counsel apply only to such causes.

*Gray v. Trafton*, 7 M. R. 702, is precisely such a case; also, *Cutters v. Baker*, 2 A. R. 572; *Bank of St. Mary's v. Morton*, 12 R. R. 411.

It is submitted that the distinction is so broad between such cases and the one before the court, as to render comment unnecessary.

Another class of cases cited by intervenors' counsel, is where the property had actually been transferred, so that the legal title was in the intervenor. Such as—

*Williams v. Piner*, 10 A. R. 277. The bill of lading showed the legal title was in *Grant & Barton*, the intervenors. The cotton was shipped on "their account." *Bank of Port Gibson v. Burke*, 4 R. R. 440; *Abbot on Shipping*, old paging note, p. 334 and 335; *Oliver v. Lake*, 3 A. R. 78, is a case of the same character.

In *Armor v. Cockburn*, 4 N. S. 668, the facts of the case and the reasoning of the court are stated so carelessly and obscurely, that it is only by an attentive perusal that the report can be understood.

The defendant, residing in Alabama, being indebted to *Banks, Miller & Kincaid*, shipped 25 bales cotton, delivered to one *Mason*, with instructions to sell the same, and pay to *B., M. & K. Mason*, on arriving at New Orleans, delivered the cotton itself to *Banks, Miller & Kincaid*, telling the purpose for which it was sent and the conditions under which he had received it.

While the cotton was thus in their own hands, placed there to pay their debt, another creditor of the defendant had it attached.

The court decided that the cotton could not, under the circumstances, be taken out of the hands of *Banks, Miller & Kincaid*.

This is a widely different case from the one before the court. Neither law nor equity would take cotton thus situated out of the hands of one creditor to pay another.

None of the cases relied on by intervenors' counsel are applicable to the case; while the principles stated in the case of *Goodhue v. McClarty*, 3 A. R. 54, cover every ground we have taken.

The counsel for the intervenors say that the promise of *McElroy & Bradford*, to pay the proceeds to the intervenors, may have prevented their attaching.

*Mr. Gribble's* testimony shows that no such promise was made; but even had it been, it was unauthorized by *McKinley & Moore*, and did not at all prevent *Taylor & Co.* from attaching. A creditor may even attach property of the debtor in his own hands. *Taylor & Co.* may have supposed that, under the circumstances, it would not be necessary to attach; if so, it was their own mistake, and could not be the foundation of any legal right to the cotton.

Neither could the mistakes of *McElroy & Bradford*, as to their power under the letter of instructions, benefit *Taylor & Co.*, for they were cognizant of the letter and extent of power conferred by it.

With regard to the \$800 advanced to *McElroy & Bradford* on the purchase of the cotton, neither the defendants nor *Taylor & Co.* were entitled to that until the sale was perfected by delivery. Until that event, the money belonged to the purchaser, and if anything had prevented the delivery of the cotton, he was entitled to a return of the money.

This was the state of things produced by the attachment in this case. Suppose the Sheriff had taken possession of the cotton, would *Taylor & Co.* have been entitled to these \$800? or would the purchaser, who had been disappointed in the delivery? We think, most unquestionably, the money would have to be returned to the purchaser. The same legal consequences flow from the garnishment.

The cotton being liable on the attachment, the whole of the proceeds in the hands of the garnishees must be liable.

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Besides, the letter of instructions did not authorize *McElroy & Bradford* to raise money on the cotton, by way of advance or in any other mode, for the benefit of *Taylor & Co.* It only authorized them to pay over the proceeds after the cotton was sold. There could be no proceeds until the cotton was weighed and delivered. The condition precedent, on which the rights of *Taylor & Co.* depended, had not happened at the date of the attachment. That condition could not happen subsequently, so as to change the rights of parties which had become irrevocably fixed by the attachment.

On the re-hearing, the opinion of the court was delivered by

BUCHANAN, J. The garnishees, *McElroy & Bradford*, received on consignment, between the 2d and 12th April, 1856, twenty-one bales of cotton belonging to defendants, accompanied by the following letter of instructions:

"Messrs. *McElroy & Bradford*:

"I send you some cotton, which I hope you will receive in due time, and I wish you to sell as soon as you can, or as the times justify, and when sold please pay the proceeds to *David Taylor & Co.* I will forward some more as soon as I get it to the river. Please let me hear from you as soon as you sell.

"Yours, very respectfully,

"J. N. MCKINLEY."

The garnishees immediately notified *David Taylor & Co.* that the cotton was on hand as shipped by *McKinley* for their benefit, and exhibited to them *McKinley's* letter of instructions, and told them that as soon as the cotton was sold, the proceeds of the same would be paid to them. The garnishees also offered at the same time to *Taylor & Co.* to sell the cotton immediately, if required, but advised them to hold on for an advance in price, to which *Taylor & Co.* assented. Several weeks after this conversation the garnishees made sale of the cotton, but before they had weighed and delivered it, garnishment process, at the instance of plaintiffs, was served upon them herein, on the 1st May, 1856. *David Taylor & Co.* intervene in this suit, prove that they are creditors of defendants, by account, to an amount exceeding the value of the cotton, and claim its proceeds by preference over the attaching creditor.

The facts of this case are very similar to those of *Armor v. Cockburn*, 5 N. S. 668. The garnishees, as we have seen, received the cotton from the defendants, who were its owners, with instructions to sell as soon as practicable or advisable, and to pay over the proceeds to the intervenors. Those instructions left a discretion as to time of sale of the cotton, but the destination of the proceeds was peremptory. The garnishees communicated at once with the intervenors, and submitted themselves to their arbitrament of the propriety of an immediate sale, tendering merely their advice to hold on for a rising market. The intervenors accepted this advice, and directed the garnishees to delay sales. The stipulation *pour autrui* contained in the letter of instruction of defendants to the garnishees having been thus accepted by the party for whose benefit the stipulation was made, could no longer be revoked by the shipper of the cotton. C. C. 1884. The shipper had lost the control of it, and could no longer give it another destination.

From the moment of the acceptance, as manifested by the acts above detailed, the garnishees are to be viewed as trustees for the intervenors, who had a vested interest in the cotton and its proceeds, which entitles them to a preference over the attaching creditor. *Gray v. Trafton*, 12 M. R. 702; *Conery v. Webb, Raveling & Co.*, 12 An. 282.

We deem it proper to state that Mr. Justice LEA, upon the re-hearing, had come to the same conclusion which we now express.

It is, therefore, adjudged and decreed, that the judgment of this court, heretofore rendered, be set aside, and that the judgment of the District Court be affirmed, with costs.

OVERRULLED DECISION OF LEA, J. The plaintiffs being creditors of McKinley & Moore who are absent defendants, levied an attachment upon twenty-one bales of cotton in the hands of McElroy & Bradford. Accompanying the shipment from the defendant to McElroy & Bradford was the following letter of instructions:

"SHREVEPORT, LA., March 29th, 1854.

"Messrs. McElroy & Bradford:

"I send you some cotton, which I hope you will receive in due time, and I wish you to sell as soon as you can, or as the times justify, and when sold please pay the proceeds to David Taylor & Co. I will forward some more as soon as I get it to the river. Please let me hear from you as soon as you sell.

"Yours, very respectfully,  
"J. N. MCKINLEY."

This letter was shown before the attachment to David Taylor & Co., who have intervened in this suit, and have claimed the proceeds of this shipment as applicable to a debt due to them from the defendants. At the date of the service of the attachment the cotton had been sold, but had not been weighed or delivered.

These are substantially the facts of the case.

The question to be determined is whether David Taylor & Co., the intervenors, had acquired such an interest in the cotton or its proceeds, as to protect it from attachment at the suit of a creditor of the shipper.

The cotton was in the hands of the defendants' agent; it had not been weighed or delivered. The possession of the agent was, so far as any legal consequences flowed therefrom, that of the principal, and in his hands it would have been liable to attachment.

The case is not presented, as in that of *Palmer & Co. v. Hornor*, of a factor who, having accepted a consignment, seeks to divert the proceeds to a different purpose from that contained in his instructions. It may be conceded that the factors in this case could have given no other destination to the proceeds of the cotton in their hands than that contained in the letter accompanying the shipment, but the rights of third parties are not affected by their obligations as factors. The exhibition of the letter of instructions to the intervenors could, under the circumstances, confer no rights upon them: it merely conveyed information of the intentions of the defendants with reference to the disposition which would be made of the proceeds of the shipment when sold. No advance was asked or obtained by the agents, nor was any new credit given upon the faith of the promised appropriation of the proceeds: the transaction consisted simply in the announcement of the intentions of the shipper, which no doubt would have been carried out but for the seizure. Until the sale of the cotton was complete it was subject to seizure in the hands of the defendants' agent.

It is true, as a general rule, that where the owner has lost all control over the property, and cannot change its destination, creditors cannot attach, but the application of this rule has been restricted to cases where the delegation was in some manner or form the subject matter of a contract. A mere letter of instructions from a shipper to his own agent, which is not made the basis of any new engagement or transaction, cannot be so considered, though such instructions may have been communicated by the agent to the party to whom the payment was intended to be made.

It is ordered, that the judgment appealed from be reversed, that the plaintiffs, *J. Burnside & Co.*, do have and recover of the defendants, *McKinley & Moore*, the sum of \$930 17, with interest thereon at the rate of eight per cent. per annum from the 30th day of April, 1856, till paid, and costs of suit to be paid by preference out of the proceeds of the property attached herein. It is further ordered, that the intervention of *David Taylor & Co.* be dismissed at their costs, and that the defendants and intervenors pay the costs of this appeal.

# THE STATE OF LOUISIANA, on the relation of JAMES FOULHOUSE, v. THE JUDGE OF THE FIFTH DISTRICT COURT OF NEW ORLEANS.

*Writs of mandamus and prohibition to the District Judges will only be issued in aid of the appellate jurisdiction of the Supreme Court.*

## APPLICATION for a writ of prohibition to the Judge of the Fifth District Court of New Orleans, Eggleston, J.

SPORFORD, J. The relator, producing his commission and oath of office as Judge of the Second Judicial District Court of Louisiana, seeks a writ of prohibition upon the following allegations: that his predecessor in office, *Octave L. Rousseau*, assuming still to be Judge of the Second Judicial District, on the 16th April, the day of the date of relator's commission, filed in the Clerk's office for the parish of Plaquemines a petition contesting the relator's election to the said office; that assuming still to act as Judge as aforesaid, the said

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*Rousseau*, on the 29th May filed in the same Clerk's office a paper purporting to recuse himself in the trial of the contested election suit, and referring the same to the *Hon. H. B. Eggleston*, Judge of the Fifth District Court of New Orleans, or any other District Judge from an adjoining district, to try the case on the third Monday in June next in the parish of Plaquemines; that said *H. B. Eggleston*, Judge, &c., has been notified thereof, and has also permitted and ordered to be filed a supplemental petition by the said *Rousseau*, setting forth new matter of controversy, and that unless restrained by a writ of prohibition from this court, the said *Eggleston*, Judge, &c., will proceed to the parish of Plaquemines and illegally assume to try said contestation; the relator avers that his commission and oath of office are conclusive evidence of his possession and title; that he is sole Judge of the Second Judicial District; that his predecessor, being *functus officio*, committed an act of usurpation in assuming to recuse himself and to select a Judge to try this case; that no law of the State, except a special law for the parish of Orleans alone, authorizes such a judicial proceeding as is here attempted to test the validity of the election of a Judge who is a district and not a parish officer; that there is no law authorizing a Judge of one of the District Courts of New Orleans to go to the parish of Plaquemines to try recused cases; that these irregular proceedings impede the administration of justice and interfere with the appellate jurisdiction of this court, and produce injuries which cannot be redressed by the ordinary form of procedure on account of its slowness; wherefore an order is prayed for prohibiting the said *H. B. Eggleston*, Judge, &c., from taking cognizance of said pretended case, or attempting to hold a court in the parish of Plaquemines, and the said *Rousseau* from prosecuting said suit or granting any orders therein.

The petition certainly presents a strong case, but it is now the settled jurisprudence of this court that it will issue writs of *mandamus* and *prohibition* to District Judges only in aid of its appellate jurisdiction. Were we in this form to decide that the District Judge could not sit to try such a case as is described in the relator's petition, we would be taking original jurisdiction of a question which has not yet been mooted before the District Judge; an exception to the jurisdiction or an exception to the mode of procedure should first be presented to the court which assumes to take jurisdiction in an improper case, and then, if overruled, the question may be brought regularly before us by prohibition, as in the case of *Foute*, 11 An. 187; *non constat* but that the District Judge, on looking into the law and hearing the parties, will be of opinion that there is no legal warrant to be found in the statutes for such proceedings as are sought to be carried on by the complainant *Rousseau*.

The case of the *Succession of Whipple*, 2 An. 236, is precisely in point. There the Supreme Court refused an application for a prohibition, because the question of jurisdiction had never been raised before the District Court, nor decided by it. See also the *State v. The Judge of the Commercial Court*, 4 Rob. 48.

Application refused.

## MRS. MARGARET N. LAYTON v. CITY OF NEW ORLEANS.

As it respects municipal corporations it has always been held that the law of the State creating them and conferring upon their officers a part of the sovereign authority as mandataries of the government is not a contract, and, as a consequence, that the Legislature may modify such Acts of incorporation at its pleasure.

The Legislature had the power to abolish entirely the corporation of the former city of Lafayette, until it became incorporated in the city of New Orleans, and was finally protected as a part of the same by the Constitution of 1852.

The Acts of the Legislature which, in consolidating the three municipalities and the city of Lafayette under one government, directed that the debts of each, which were to be assessed by the city at large, should alternately be liquidated and paid by taxation of the inhabitants of the respective districts, in proportion to the burden which they imposed upon the new government by their respective debts, were not contracts. There was nothing to prevent the Legislature from changing its policy and providing, as was done by the Act of 12th March, 1856, that the taxes should be equal and uniform within the entire limits of the city. The statute complained of is a literal compliance with the commands of the Constitution, and does not violate any contract or interfere with any vested right.

APPEAL from the Sixth District Court of New Orleans, *Cotton, J.*

*A. W. Jourdan*, for plaintiff and appellant. *J. J. Michel*, for defendant.

MERRICK, C., J. The plaintiff's counsel states his case as follows, viz:

"The defendants have demanded the payment of certain taxes, known as the 'consolidated loan tax,' which is imposed for the purpose of paying the interest upon and ultimately liquidating the 'consolidated debt' represented by bonds, issued under the Acts of the Legislature of February 23d, 1852, by virtue of which Acts the three municipalities were consolidated, and the city of Lafayette annexed.

"Plaintiffs have enjoined the collection of this tax upon the ground that as residents and property owners in the Fourth District, late city of Lafayette, their property can only be made to pay such a *per centage upon* property in the Fourth District as will raise the sum of *fifty thousand dollars*, the amount fixed by the Act of 1852, as sufficient to pay the interest upon, and, ultimately, the debt of the city of Lafayette; for which debt only, the real estate and slaves in the Fourth District are liable to contribute, so far as regards debts due at the date of the said Acts.

"That said city of New Orleans, have assessed the tax at ninety cents on the one hundred dollars, being the same amount of tax imposed upon the other districts of said city, when in truth, and legally, the tax should not exceed sixty-three cents on the one hundred dollars, and that, by so equalizing said tax, plaintiffs and other property holders in the Fourth District, are made to pay the debts due by the 'old city' and by the three municipalities anterior to the consolidation and annexation.

"Plaintiffs therefore allege that the ordinances and law assessing said consolidated tax, and equalizing it, are in violation of the contract, and vested rights under the Act of 1852, and unconstitutional, ask that such be decreed by this honorable court, and that defendants be perpetually enjoined from collecting said tax.

"Defendants answer by demurring to the petition of plaintiffs, aver that there is no cause of action, plead said exception as an answer, admitting the facts, and submit the case.

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"There was judgment in the District Court maintaining the demurrer and dismissing the suit.

"Plaintiffs have appealed, and ask that the judgment of the District Court be reversed, and that the suit be decided upon its merits, the facts and evidence being admitted."

The statute complained of as unconstitutional is the Act of 12th March, 1850, which makes it unlawful for the City Council to levy any tax whatever, whether on real estate or slaves or movables, except the same be equal and uniform within the entire limits of the city. See Acts of 1856, 68, 69.

It is alleged that this Act violates the contract entered into by the Legislature with the different municipalities and the city of Lafayette, by the Acts of 20th March, 1850, (p 156,) 23d February, 1852, (p. 42,) and particularly the Act of the same date, entitled "An Act supplementary to an Act to consolidate the city of New Orleans and provide for the incorporation of the city of Lafayette and the city of New Orleans." P. 55.

These statutes while they consolidated the three municipalities and the city of Lafayette under one government, called the city of New Orleans, directed that the debts of each, which were to be assumed by the city at large, should ultimately be liquidated and paid by the taxation of the inhabitants of the respective districts in proportion to the burden which they imposed upon the new government by their respective debts, which the city was obliged to assume. The amount which was imposed upon the Fourth District, being the former city of Lafayette, was \$50,000 annually. These Acts evidently were based upon the theory that it was right and proper that the inhabitants of each district should be charged with their own debts, and that those which had been judicious and frugal in the management of their municipal affairs ought not to pay the debts of those which had been lavish and prodigal in their expenditures.

The statute of 1856 involves a different theory, viz: that it is just and right that the people at large should pay the debts of the delinquent districts, and that they will derive an equivalent in the general prosperity of the city, in its improved credit, and that those districts which by the new arrangement are more heavily taxed will also be benefited in the end by new improvements which must now be borne by the city at large.

If the Acts of 1850 and 1852 were contracts fixing the amount each district should pay, as alleged by the plaintiffs' counsel, the Legislature was not at liberty to disregard its obligation and change its principles of action. But it may be pertinently asked if there was a contract with whom was it made? Not with the city of Lafayette, for the Legislature had the power until it became incorporated in the city of New Orleans and was finally protected as a part of the same by the Constitution of 1852, to abolish it altogether.

There was no contract made with the individuals comprising the city of Lafayette, for they did not intervene in the proceeding, nor give an equivalent, nor stipulate in their favor that the State should surrender its power of taxation.

As it respects municipal corporations, it has always been held that the law of the State creating them and conferring upon their officers a part of the sovereign authority as mandataries of the government is not a contract, and, as a consequence, that the Legislature may modify such Act of incorporation at its pleasure. 14 L. R. 406; 5 An. 665.

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If it has the power to create, modify, or abolish, it has the power to provide in what manner the taxes shall be levied for their support, and how their debts shall be paid upon their dissolution. This is a discretion vested in the Legislature, (with whom is vested the power of judging of the necessity of taxation) and nothing prevents it from changing its policy if it shall deem the necessities of the public so require. The courts can only interfere when it has overstepped the limits prescribed by the Constitution.

But it is said that taxation must be equal and uniform. The statute complained of purports to equalize the taxes throughout the limits of the city, and instead of being opposed to the Constitution, is a literal compliance with its commands in this particular.

The evil complained of is not a want of equality in the taxes but the reverse. It is that *the city* is burdened with the debts of the municipalities which the plaintiffs, as citizens of the Fourth District, think they ought not to be compelled to pay *equally* with the inhabitants of those municipalities who contracted them.

Judgment affirmed.

### J. D. WEAVER v. N. D. MARVEL and C. SNEDICKER.

Where one endorses his name on a negotiable note with a space left in blank for the name of the person to whose order it was to be made payable to be afterwards inserted, and the maker sells the note in that condition without the blank space being filled, the holder cannot treat the party who had thus endorsed his name as merely surety and hold him liable without notice of protest.

It is not unusual to endorse promissory notes containing blanks to be afterwards filled up so as to make the party an endorser, and the note as to him is to be treated exactly as if it had been filled up before he endorsed it.

**A**PPPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*T. A. Bartlette*, for plaintiff and appellant. *Waples & Eustis*, for defendants.

VOORHIES, J. The defendants are sought to be made liable as sureties of the maker of the following promissory note:

"\$865.

NEW ORLEANS, *March 15th, 1856.*

"Sixty days after date I promise to pay to the order of ——— the sum of three hundred and sixty-five dollars, value received.

H. DONOHUE.

"Endorsed, N. D. MARVEL.

C. SNEDICKER.

"It is admitted that *Donohue* sold the note to *Weaver* in the condition in which it now is, with the endorsements thereon." Further, "that the notice of protest was not sufficient to hold the defendants as endorsers."

We do not think the defendants can be considered bound merely as sureties. The cases on which the plaintiff relies to hold them liable as such, without notice of protest, appear to us to be clearly distinguishable from the one at bar.

WEAVER ? In all of those cases, reported in 4 M. R., 639; 3 N. S., 659; 10 L. R. 374;  
 MARVEL. 14 *ibid*, 386; 4 R. R., 161; 1 A. R., 248, 274; 2 *ibid*, 592; 4 *ibid*, 279; the  
 notes declared upon had not been endorsed by the payees, in other words, the  
 defendants were not parties to them. For in legal intendment the payee is  
 called the endorser, and so is every other person who successively puts his  
 name on the back of the bill of exchange or promissory note, and the person  
 to whom it is then assigned or delivered is called the endorsee or holder. It is  
 true in the cases of the *Louisiana State Bank v. Senecal*, 11 L. R. 80, and  
*Leekie v. Scott et als.*, 10 L. R., 415, also relied upon, the defendants as en-  
 dorsers of accommodation paper were considered to be sureties. But in neither  
 of these cases does the question appear to have been raised as to whether  
 the rights and obligations of the parties were to be governed in other respects  
 according to the rules of the commercial law or not. But in the case of *Jacobs*  
*v. Williams*, 11 R. R., 187, where the defendants were accommodation en-  
 dorsers, the court used the following language: "The suretyship between an  
 accommodation endorser and the maker of a note exists only as between them-  
 selves; with respect to the holders, their liability must depend on the rules ap-  
 plicable to negotiable instruments in general. The holder must, therefore,  
 take the necessary steps to bind them, and they can avail themselves of any  
 defence which might belong to a maker, or endorser, on business paper." The  
 doctrine thus announced was subsequently recognized by this court in the  
 case of *Braux v. LeBlanc*, 10 A. R., 98, where Mr. Justice Ogden, as the organ  
 of the court, said: "An accommodation endorser stands on the same footing  
 with other endorsers, as to what is legally requisite to fix his liability." In  
 the case at bar, *Donohoe* was neither the payee nor endorser of the note sued  
 upon. In receiving the note thus we think the plaintiff had good reason to  
 consider the defendants as parties to it when endorsed by them, *Marcel*, the  
 first endorser, as payee; and there was nothing to prevent him from filling up  
 the blank by the insertion of the name of the payee.

Judgment affirmed.

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SAME CASE ON A RE-HEARING.

VOORHIES, J. In refusing a re-hearing we will briefly add, that it is not  
 unusual to endorse promissory notes containing blanks to be afterwards filled  
 up, so as to make the party an endorser. In all such cases, as against him, the  
 note is to be treated exactly as if it had been filled up before he endorsed it,  
 and he will be bound accordingly.

5 Cranch, 142; 4 Mass. R., 45, 55; 7 Cowen's R., 336.

It is, therefore, ordered, adjudged and decreed, that the re-hearing prayed  
 for in this case be refused.

## JOHN C. SHANNON v. STEAMER AMERICA and OWNERS.

Where the consideration of a note due *in presenti* was the acceptance by the plaintiff of the maker's draft payable at twelve months, by which the latter was enabled to purchase property—*Held*: That the maker could not resist payment on the ground that the note was not immediately exigible.

APPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*

*T. B. Hart*, for plaintiff and appellant. *J. Ad. Rozier*, for defendants.

SPOFFORD, J. We are not prepared to say that the District Judge erred in considering the surety on the attachment bond insufficient. The judgment dissolving the attachment must, therefore, be affirmed.

The exception of prematurity of suit is clearly untenable as to the accounts embraced in the plaintiffs' demand. There is no evidence of any fixed term of credit having been given, and the promises and letters relied upon are too indefinite to constitute an extension of time such as would be available in law to postpone a right of action. There seems to have been no consideration for a contract of the nature alluded to, and the fact that supposed promises subsequent to the date of the account are relied on by the appellant, shows that whatever credit was originally given had expired.

The due-bill presents a greater difficulty. On its face it is payable on demand. It is not a contingent obligation. If it had a valid consideration, we do not perceive any good reason why it should not be exigible at the will of the plaintiff, according to its tenor. The consideration was an acceptance by the plaintiff of the draft of the defendants at twelve months, which enabled the latter to buy the steamboat America. By taking a note due *in presenti* for this acceptance, the plaintiff, perhaps, became absolutely bound on the acceptance. At any rate, he could hardly be considered a mere accommodation acceptor. He had received value for accepting. Nor are we prepared to say that if he were simply an accommodation acceptor, the parties might not lawfully so modify their contract as to give the acceptor the means of indemnifying himself so soon as he should find that he was in danger from the impending insolvency of the drawers. The defendants certainly meant something by giving the due-bill payable on demand; and, without intimating any opinion to the prejudice of third parties who may hereafter complain of this arrangement, we do not think it lies in the mouths of the defendants to deny their own contract, and to say that the due-bill is not now exigible.

It is, therefore, ordered, that the judgment of the District Court dissolving the attachment sued out in this case be affirmed. And it is further ordered, that the judgment dismissing the suit be avoided and reversed, the petition reinstated, and the cause remanded for further proceedings according to law; the costs of this appeal to be borne by the defendants and appellees.

## J. ROUANET v. L. CASTEL et al.

The Code of 1825, on the subject of respite, has not introduced a new rule of counting the votes at the meeting of the creditors. The majority in number and amount is to be ascertained by reference to those admitted by the debtor upon the tableau.

The Legislature having apparently acquiesced in this previous construction of the law, which is proving the obligation of contracts, the court has less difficulty in adopting it.

**A**PPEAL from the Second District Court of New Orleans, *Morgan, J. J. & E. Bermudez*, for plaintiff. *L. Eyma*, for defendants and appellants.

MERRICK, C. J. In the Code of 1808, under the title *Respite*, it is provided that "the creditors who have not taken the oath, (at the meeting of the creditors,) cannot be reckoned in the number of the creditors who possess three-fourths of the debts." Page 498, Art. 4.

This provision of law is reproduced in the Code of 1825, in these words:

"The creditors who do not make this oath, shall not have the right of voting, and their credits shall not be counted among those by which it is to be determined whether the respite is granted or not." 3054, No. 5.

Under the Code of 1808, it was held that those creditors placed on the bilan who did not appear at the meeting of the creditors and vote, should be counted among those refusing the respite. 3 N. S. 446; *ibid* 504.

The question presented in the present case is, whether the provision of the Code of 1825 just cited, has introduced a new rule of counting the votes; whether in counting the votes to ascertain the majority in number and amount, those at the meeting of creditors alone are to be considered, or whether the majority in number and amount is to be ascertained by reference to those admitted by the debtor upon the bilan?

The point was made and the question appears to have been considered in the case of *Janin v. His Creditors*, 8 L. R. 467, and the same construction was put upon the New as upon the Old Code in this particular. It is possible that we might have found some difficulty in arriving at the same conclusion. But as the construction is one favoring the obligation of contracts, and as the Legislature has, since the abovementioned decision was rendered, passed a law amending Art. 3053 C. C., so as to give power to a majority of creditors in number and amount to bind the others, thus apparently acquiescing in the construction of our predecessors, we do not feel ourselves called upon to adopt a different construction of the Article in question. See Acts 1843, p. 51.

Judgment affirmed.

**SUCCESSION OF MARTIN BRÖDERICK.—On opposition of SPENCER FIELD & Co. et als. to the tableau of distribution.**

A steamboat is not an object susceptible of hypothecation under the laws of this State.

The Act of Congress regulating the mode of registering mortgages on vessels was not intended to legalize contracts between citizens of the same State, made within the limits of that State, and intended to be executed there, which are contrary to the law of the State.

The limitation of sixty days does not apply in the case of a privilege of a vendor of coal furnished to a steamboat when the coal had never been received on the boat, but was piled up on the bank of the river.

The privilege of the vendor of the engine, boilers and machinery of a vessel, which form a component part thereof, is a privilege under Article 3304 of the Code, and is lost in the sixty days after the materials were furnished.

A judgment obtained by the furnisher of such materials, with a lien and privilege, is not binding upon other creditors who were not parties to the judgment.

An allowance cannot be made for the support of the minor heirs of a succession, under the Act of the 29th March, 1826, when such minor heirs are not creditors of the succession of their deceased parent.

**A PPEAL** from the Second District Court of New Orleans, *Morgan, J.*  
*T. W. Collins, L. Eyma and R. M. Dyson, for appellants. Durant & Hornor, for appellees.*

BUCHANAN, J. *Spencer Field & Co.*, appellees, claim a privilege of vendor on certain coal found in this succession, and also a right of mortgage on the ferry-boat Two Brothers.

Their privilege was allowed but their mortgage rejected by the judgment of the court below. They have answered the appeal, and pray that the judgment be amended in their favor by allowing them a right of mortgage upon the proceeds of the Two Brothers.

They offer in evidence an act under private signature, made at New Orleans the 18th July, 1854, whereby *Martin Broderick*, sole owner of the steamboat called the Two Brothers, of New Orleans, as per enrollment No. 100, granted at the port of New Orleans on the 24th day of May, 1854, acknowledged himself indebted to *Spencer Field & Co.*, merchants of this city, in the sum of three thousand four hundred dollars, for coal furnished by said firm to the said steamboat, for which amount said *Broderick* had given nine promissory notes, dated the 18th July, 1854, and payable, monthly, from one to nine months after date, and in order to secure the payment of said notes at their maturity, said *Broderick* mortgaged his said steamboat to the said *Spencer Field & Co.* until the final payment of said notes.

Appended to the mortgage is a certificate from the Collector's office of the port of New Orleans that this mortgage was presented for record at that office on the 18th July, 1854, and recorded in Book A, p. 77.

The counsel of *Field & Co.* contend that under the constitutional power given to Congress to regulate commerce, and Congress having by the statute of 29th July, 1850, (9th Statutes at Large, p. 440,) regulated the mode of registering mortgages on vessels, and the registry of this mortgage having been made in conformity to that Act of Congress, this mortgage is valid and binding, and has the effect of incumbering the steamboat Two Brothers to the prejudice of third persons.

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The Act of Congress of 29th July, 1850, includes not only hypothecations but all conveyances of vessels. Its expressions are (sec. 1st): "No bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the Collector of the Customs, where such vessel is registered or enrolled."

We regard this as a mere registry law. It certainly was never intended to legalize contracts between citizens of the same State, made within the limits of that State, and intended to be executed there, which are contrary to the law of the State. And that this pretended hypothecation of the steamboat *Two Brothers* is contrary to the law of Louisiana is settled by many decisions. See *Malcolm & Wood v. Schooner Henrietta*, 7 L. R. 490; *Grant v. Fiol*, 17 L. R. 158; *Hills v. Phoenix Co.*, 2 Rob. 35; *Clark v. Laidlaw*, 4 Rob. 345; *Lambeth v. Vawter*, 6 Rob. 127; *Harrod v. Churchman*, 4 An. 310. To the same effect was the case of *Wickham v. Levistones*, decided by us in May, 1856, and not reported. And we find, upon an examination of the record and briefs in the last mentioned case, that the mortgage of *Hunneville Hill & Co.* upon the Steamship *Cincinnati* was duly registered under the Act of Congress, and that its registry was specially set forth in the pleadings and argument of counsel. The District Court did not err in rejecting the claim of *Spencer Field & Co.* to a mortgage upon the *Two Brothers*.

Neither did it err in allowing them the privilege of vendor upon the coal sequestered by them and sold by the Sheriff. The identity of that coal with the coal sold by them to *Broderick* is proved by the witness *Randolph*. Neither does the limitation of sixty days apply to this privilege, as contended by counsel of appellants, for the coal sequestered had never been on board the *Two Brothers*, but was at first in a flatboat, whence it had been removed on shore, and was piled up on the bank of the river near the ferry landing.

The next matter of which the appellant complains is the allowance of a privilege of vendor upon the boilers, engine and machinery of the Steamboat *Two Brothers*, in favor of *John Coleman*, as subrogated to a judgment of *Knap & Wade*. The evidence shows that *Knap & Wade* sold the boilers, &c., to *Broderick* in March, 1854, and took in part payment his notes, endorsed by *Coleman*, at four and six months, which were protested at maturity for non-payment, and suit brought against *Broderick* on October 2d, 1854. *Broderick* confessed judgment on the 6th of the same month, "with vendor's lien and privilege upon the boilers, engine and machinery of the steam ferry-boat *Two Brothers*." On the 11th October the steamboat, her machinery, tackle and apparel were seized in execution and advertised for sale by the Sheriff. But this seizure seems to have been abandoned, for the boat was afterwards, to wit: on the 29th January, 1855, sold by the Sheriff on an order of court obtained on the petition of the executors of *Martin Broderick*, who had died on the 24th October, 1854. *Succession of Gaulden*, 9 An. 205.

*Coleman* has claimed, in an opposition which has been sustained by the judgment of the District Court, the vendor's privilege upon the proceeds of the steamer *Two Brothers*, but it is very clear that it cannot be allowed. It is true the judgment in favor of *Knap & Wade* recognized such a privilege, and it is also true that *Coleman* has acquired all the rights of *Knap & Wade* under

their judgment. But the engine, boilers and machinery sold by *Knap & Wade* were part of the materials of the vessel, and formed a component part thereof. The privilege of *Knap & Wade* was a privilege under the 3204th Article of the Code, which was lost in sixty days after the materials were furnished. The judgment for a privilege is not at all binding upon the other creditors of *Broderick*, who were not parties to that judgment.

The appellants are special mortgagees upon the real estate of the succession to an amount exceeding the proceeds of said real estate. And as there are no special privileges upon said real estate, they can only be primed by general privileges. Those general privileges are—

|                                                                                  |          |
|----------------------------------------------------------------------------------|----------|
| 1st. Funeral expenses.....                                                       | \$128 50 |
| 2d. Law charges.....                                                             | 1808 55  |
| 3d. Expenses of last illness.....                                                | 243 30   |
| 4th. Widows' Homestead, \$1000—deduct paid on account by executor, \$404 97..... | 595 03   |
| 5th. Provisions for family of deceased during last six months.....               | 108 40   |

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\$2883 78

The account shows that the net proceeds of movables and cash collected to have been (exclusive of the proceeds of the coal, which was absorbed by the special privilege of *S. Field & Co.*) as follows:

|                                    |          |
|------------------------------------|----------|
| Furniture.....                     | \$740 99 |
| Flatboat, &c.....                  | 56 60    |
| Collections.....                   | 55 00    |
| Steam ferry-boat Two Brothers..... | 1818 18  |
| Hire of slaves and rents.....      | 424 18   |

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\$3094 95

It is thus seen that the general privileges may be satisfied in full without encroaching upon the immovables.

The application for an allowance of fifty dollars a month to the minors *Broderick*, in addition to the portion allowed under the Homestead Act, was properly rejected.

This application was grounded upon an Act of 29th March, 1826, (Bullard & Curry, 497, 498) section 10. The Act in question only applies to minors who are creditors of the succession of their deceased parent. It is not pretended that the minors *Broderick* have any such claims. The allowance made them under the Homestead Act of 1852 is predicated upon a state of facts inconsistent with the application now made on their behalf. It strikes us as being both unjust to their father's creditors and unwarranted by law to cumulate in their favor, those two statutory remedies.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended by rejecting the opposition of *John Coleman*, claiming the privilege of vendor upon the proceeds of the steamboat Two Brothers; and that, as thus amended, the judgment be affirmed; the costs of the lower court to be paid by the succession and those of appeal by the appellee, *John Coleman*.

## HAYDEN &amp; BANCROFT v. THE HEIRS OF H. M. SHIFF.

Where the right to the unexpired term of a lease, together with the movables on the premises, were sold under an execution against the lessee, and the leased premises were afterwards destroyed by fire—*Held*: That the purchaser had no right of action against the lessor for the repetition of the rent which had been paid to him on the distribution of the proceeds of the sale.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Race & Foster*, for plaintiffs and appellants. *Durant & Hornor*, for defendants.

VOORHIES, J. *Charles Cottingham*, it appears, leased of defendants certain premises for the term of one year, from the 1st of November, 1853, for which he stipulated to pay them the monthly rent of \$111 66 $\frac{2}{3}$ .

Having absconded, the movables found on the premises, together with his right to the unexpired term of the lease, were seized under different attachments and afterwards sold under an execution on a judgment in favor of *J. L. Bach & Co.*, the movables producing \$2,141 98, and the unexpired term, of which the plaintiffs became the purchasers, \$112. On the distribution of the proceeds, the defendants received, in advance, the full amount of their rent, ending the 1st of November, 1854, and the plaintiffs retained in their hands the price of adjudication of the unexpired term, as the first attaching creditors thereof. Shortly after the judicial sale, to wit, the 4th of June, 1854, the leased premises were destroyed by fire. The present action is brought against the defendants for the repetition of the rent thus paid from the date of the destruction of the premises, until the expiration of the stipulated term of the lease.

\* The mere statement of the case, it seems to us, clearly shows the action to be groundless. The plaintiffs by the adjudication, it is obvious, only acquired the right of *Cottingham* as lessee, burdened with the conditions or obligations implied by law. We think it would be unreasonable to conclude, as being in legal contemplation, that the rent thus prepaid should, in the event of the destruction of the property, enure to their benefit as vendees of the unexpired term of the lease. To hold that the claim for rent erroneously paid in advance also passed by the adjudication, cannot, we think, find any sanction in the law. The lease was at an end not only by the adjudication *quo ad Cottingham*, but by the destruction of the property. C. C. 2667; 11 An. 433. Hence the sum thus erroneously applied to the payment of the rent, in advance, out of the forced sale of the movables must be considered as a debt due to *Cottingham*, and not to the plaintiffs.

Whether there was any error in the distribution of the proceeds of that sale or not, and what effect such distribution may ultimately have on the rights of the parties, are questions upon which we refrain from expressing any opinion.

Judgment affirmed.

SPOFFORD, J., took no part in this case.

## C. &amp; J. M. TATE v. SAMUEL GARLAND.

The Act of the Legislature of the 5th March, 1852, having fixed the prescription of the accounts of merchants and all other open accounts at three years, whereas the prescription was previously ten years, when more than one-third of the time required for the prescription under the former law had elapsed—*Held*: that the account sued on was prescribed after the lapse of two years (being two-thirds of the time required under the new law) from the date of the promulgation of the statute to the institution of the suit.

The Act of the Legislature of 1848 abolishes the distinction between residents and absentees in matters of prescription.

**A** PPEAL from the Fourth District Court of New Orleans *Reynolds, J.*  
*Elmore & King*, for plaintiffs. *Steele and Hamner & Hays*, for defendant.

BUCHANAN, J. The plaintiffs were in 1847 and 1848 the factors in New Orleans of the firm of *G. T. Williams & Co.*, tobacco manufacturers in Lynchburg, Virginia, of which firm defendant was a partner.

The petition alleges that, on the 15th February, 1848, by a mistake and error on the part of plaintiffs, they paid *G. T. Williams & Co.* six hundred and seventy-three dollars and forty-seven cents. In an account which is annexed to the petition, and which is referred to as making part of the petition, it is charged that this amount of \$673 47 was paid defendant's firm, in plaintiffs' acceptance of the draft of *George T. Williams & Co.* in favor of *Turner and Burwell*, at four months date, due and paid February 15th, 1848, the same being the suspended debt due by *Samuel M. McLean*.

The plaintiffs further allege in their petition and annexed accounts, that they committed an error to their own prejudice of thirty-six dollars in an item on the debit side of an account current rendered by them to defendant's firm on the 11th July, 1848.

And now the plaintiffs sue the defendant, by citation served on the 7th April, 1855, for reimbursement of these two sums thus erroneously paid, and omitted to be charged, in February and July, 1848.

Defendant pleads the general issue and the prescription of five and ten years.

The evidence shows, that *George T. Williams & Co.* drew upon plaintiffs a draft for fifteen hundred dollars, which was accepted by plaintiffs, and was by them paid at its maturity, the 15th February, 1848. But it is also proved, that the plaintiffs charged defendant's firm with the amount of this acceptance and interest in the account current of the 11th July, 1848, rendered by plaintiffs, and that the same has been thus refunded to plaintiffs.

As to the error of thirty-six dollars which appears in the same account current, in the charge of *P. H. Prout & Co's* note due 18th October, 1847, and not paid, we think it covered by the plea of prescription. By the Act of 5th March, 1852, (No. 118 of the Session Acts,) the prescription of the accounts of merchants, and all other open accounts, was fixed at three years. Before that statute the prescription of such an account as this was ten years. From the date of the account current to the date of the promulgation of that statute, a period of three years and eight months intervened. More than one-third of the time required for prescription had then elapsed. Under the statute of 1852

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this account became prescribed, therefore, by the lapse of two years—or two-thirds of the prescription time as reduced thereby—and those two years expired in 1854, a year before the institution of this suit.

By the Act of 1848, page 60, the distinction between residents and absentees in matters of prescription was abolished.

The judgment of the District Court is, therefore, reversed, and judgment is rendered in favor of defendant and appellant, with costs in both courts.

SPOFFORD, J., concurring. I concur in the judgment, because I think the whole claim of the plaintiffs is barred by prescription.

The basis of the suit is an account. It is an *open* account, because it has never been stated or acknowledged expressly or impliedly by the defendant. It comes within the meaning of the 2d section of the Act of March 5th, 1852, (p. 90,) by which it is declared that the prescription of all other open accounts the prescription of which is ten years under the existing laws, shall be three years. Giving the items of this account their proper date, the whole account is prescribed. The fact that the defendant resided in another State of the Union did not suspend prescription during his absence. He did not conceal himself, but his domicil was known to the plaintiffs who were constantly in correspondence with him. See *McMasters v. Mather*, 4 An. 418.

VINCENT & Co. v. J. GANDOLFO.—B. A. DRYER, Garnishee.

Compensation rests upon good faith.

An assignee, for the purpose of distributing a fund which is the common pledge of one's creditors, cannot offset his own debt (the character and terms of which he does not disclose) against a portion of the common fund thus entrusted to him.

The fund is liable to attachment in his hands at the suit of the creditors of the assignor.

**A**PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*

*Charles A. Taylor*, for plaintiff and appellant. *Emerson & Huntington*, for garnishees.

SPOFFORD, J. The plaintiffs have appealed from a judgment discharging the garnishee, *Dryer*, on his answers.

He acknowledges that he had funds in his hands belonging to the debtor, *Gandolfo*, to an amount sufficient to satisfy the claim of plaintiffs, but under the following circumstances, which he contends authorize him to compensate what he has against a debt due him by *Gandolfo*. He says that "on the 8th November, 1856, the said *Gandolfo*, on condition that his creditors should give him a discharge from the debts and obligation which he owed to them respectively, conveyed and assigned to said creditors certain rights, chattels and effects. *Judah Hart* and respondent were appointed assignees to receive and dispose of said property, and distribute the avails among the creditors *pro rata*. The property was sold by *Messrs. Blache & Leumont*, and the proceeds, amounting to \$2460 53, were paid into our hands. Of this amount the sum of \$470 50 has been applied by us to the payment of privileged creditors of said *Gandolfo*, leaving a balance in our hands for distribution of \$1989 05. Attachments to the amount of \$1400 have been laid on said money in the hands of said *Hart* and myself in the following suits, &c., and the balance

respondent says he is entitled to retain to satisfy his claim against said *Gandolfo*, amounting to about \$720. Respondent further says that said *Hart*, having declined to act any further as one of the assignees aforesaid, delivered up to respondent the possession of said money; respondent is ready to distribute the same as soon as the attachments aforesaid are removed." It is stated in the printed argument of appellee's counsel that the creditors did not accept the assignment.

Under these circumstances it is apparent that the respondent got and retains the money only in a fiduciary and confidential capacity. He styles himself an assignee for the purpose of distributing a fund which is the common pledge of *Gandolfo's* creditors. To offset his own debt (the character and terms of which he does not disclose) against a portion of this common fund intrusted to him for a specific purpose would be a violation of good faith, and compensation rests upon good faith. The case of *Bogart, Williams & Co. v. Egerton*, 11 An. 73, is in point. See also the recent case of *Morgan v. Lathrop*, ante, 257.

It is ordered, that the judgment of the District Court be avoided and reversed; and it is now ordered and decreed that the plaintiffs, *Vincent & Co.* do have judgment against the garnishee, *B. A. Dryer*, for the sum of four hundred and twenty dollars and eighty-two cents, with five per cent. interest thereon from December 29th, 1856, until paid, and the costs of suit in both courts.

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#### SUCCESSION OF ALETHEA SHROPSHIRE.

There is no prescription of obligations of individuals for the security of stock subscribed and unpaid, so long as the liquidation of the company continues.

APPEAL from the District Court of East Feliciana, *Ratliff, J.*  
*W. F. Kernan*, District Attorney, for the State, appellant. *E. P. Ellis*  
and *J. B. Smith*, for appellees.

BUCHANAN, J. The Clinton and Port Hudson Railroad Company, an insolvent corporation, represented by *Bythel Haynes*, liquidator, has opposed the final account of administration of *John Collins* in this succession, and claims to be recognized as a creditor of the same for the sum of three thousand and seven hundred dollars, with interest and special mortgage on certain lands. This opposition was dismissed on an exception that *Mr. Haynes* had been destituted of his office of liquidator of the said insolvent corporation, by judgment of the District Court.

It was admitted on the trial of the exception, that an appeal was pending in the Supreme Court from the judgment of destitution. That appeal was decided by a judgment of this court rendered on the 20th of April ultimo, reversing the judgment of destitution. *Mr. Haynes* stands, therefore, before this court perfectly competent to represent the rights of the Clinton and Port Hudson Railroad Company, for the purpose of enforcing all claims against the debtors of the said company.

His opposition is based upon an authentic act passed before *John Morgan*, notary public of the parish of East Feliciana, on the 26th of September, 1838,

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whereby *James H. Shropshire* and his wife, *Alethea Collins*, acknowledged themselves jointly and severally bound for the payment of a subscription of thirty-seven shares, amounting to three thousand and seven hundred dollars, in the capital stock of the Clinton and Port Hudson Railroad Company, and also for the payment of any loan that said company might grant thereon; and for further security to said company or assigns, the said *Shropshire* and wife jointly mortgaged and hypothecated to the said company or assigns, two several tracts of land, particularly described in the act, which act is the evidence of a personal as well as real obligation on the part of the deceased *Mrs. Shropshire*; obligations legalised by the 20th section of the amended charter of the company. Session Acts of 1834, page 120. It does not appear that any portion of the subscription of *James H. Shropshire*, to the stock of the Clinton and Port Hudson Railroad Company has ever been paid; and it is admitted, that he is dead and his estate insolvent.

The plea of prescription made by the administrator, is untenable. There is no prescription of obligations of individuals for the security of stock subscribed and unpaid, so long as the liquidation of the company continues. See *Jackson Railroad Company v. Estlin*, 12 An. 184.

The opposition of the liquidator must be sustained; but the property mortgaged does not appear to have been sold by the administration of *Mr. Shropshire*. At least, its proceeds do not figure upon this account, in such a form that they can be recognised.

The State of Louisiana, by its District Attorney and Auditor, intervened in this litigation, when the District Court had ruled the liquidator incompetent to stand in judgment; and filed an opposition, to the same effect that he had done, claiming that the State was subrogated to the rights of the Clinton and Port Hudson Railroad Company. The court dismissed this opposition also, and the District Attorney took an appeal.

The appellee has moved this court to dismiss the appeal of the State; but it is unnecessary to examine the grounds of this motion, because we understand the interests of the two opponents to be identical; and our judgment sustaining that of the liquidator, will enure to the benefit of the State as a creditor of the company.

It is, therefore, adjudged and decreed, that the judgment of the District Court upon the opposition of *Bythel Haynes*, liquidator of the Clinton and Port Hudson Railroad Company, be reversed; that the account of administration herein filed, be amended by placing thereon the Clinton and Port Hudson Railroad Company as a creditor of this succession, for the sum of three thousand and seven hundred dollars, without prejudice to the mortgage rights of said company, under the notarial act of the 26th of September, 1838, before *John Morgan*, notary public in East Feliciana; and that the costs of this opposition and appeal be borne by the succession.

Chief Justice MERRICK recuses himself, having been of counsel in similar cases.

ANNA E. WOLF v. DANIEL WOLF, her husband.—PRICE, WALSH & Co.,  
Third Opponents.

Although there can be no sale without a price in money, it does not necessarily follow that the act is void because it wants this requisite of a sale; if there be no just cause for declaring it null, it may exist in another form as an exchange, a donation or a pledge.

The vendor himself is not permitted to question the sale he has made, unless he has reserved a counter-letter, or relies on the answers of his adversary to interrogatories on facts and articles.

Nether can any third party question the same without showing not only that it is simulated or fraudulent, but that it is also injurious to such third person who complains of it.

There is nothing immoral in using the contract of sale as security for money advanced or to be advanced.

The title of owner, under such a contract, must necessarily embrace that of pledge, and enable a party clothed with the legal title to protect himself for advances, on the expectation of which the sale was made.

A pledge, as well as a mortgage, may be made to secure an obligation not yet risen into existence.

**A** PPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*M. Grivot* and *C. Roselius*, for plaintiff and appellant. *Wolf & Singleton*, for appellees.

MERRICK, C. J. This case will be best understood by a statement of facts in the order in which they occurred.

On the 29th day of June, 1855, *Daniel Wolf*, by an act executed in the presence of two witnesses and a notary public, made a formal act of sale of a house and certain lots, and certain other real estate in the city of New Orleans, to *Price, Walsh & Co.*, for the nominal sum of \$10,000, acknowledged in the act to have been paid. The plaintiff, *Anna E. Wolf*, made herself a party to the act of sale and renounced in favor of the purchaser her tacit mortgages and privileges.

On the second day of July, the said *Daniel Wolf* sold to the same vendees, by another notarial act, a negro woman and certain household furniture, and a carriage and horses, for the ostensible sum of \$4212. The wife also signed the act renouncing, as in the former instance. The property purported to be sold belonged to the community existing between *Wolf* and wife.

On the first day of October, 1855, *D. Wolf & Co.* owed *Price, Walsh & Co.* \$14,029 92, and on the 30th of the same month, they owed \$21,757 64. This amount appears to have been subsequently increased by the payment by *Price, Walsh & Co.* of certain bills due to the vendors to *D. Wolf* of the furniture. *Wolf*, who traded in Mexico, left the house where he resided, which was on one or more of the lots sold to *Price, Walsh & Co.*, on the fifth day of July, 1855, taking his wife with him. *Mrs. Wolf* returned on the 19th of October, and then removed from that place to the Florence House.

When *Wolf* left for Texas, *Samuel Lockhart* had charge of the house and furniture for him. *Lockhart* subsequently, on being informed that the property belonged to *Price, Walsh & Co.*, received his wages from and held the property for them.

On the 13th day of February, 1856, *Anna E. Wolf* instituted a suit for a divorce against her husband, and joined *Price, Walsh & Co.* as co-defendants, alleging that said acts of sale were null and void, and were never intended as a *bona fide* sale, no value having been received for the same. She prayed that

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*Price, Walsh & Co.* "be made parties to test the validity of the two acts of sale."

The court having made an order allowing the plaintiff one hundred and fifty dollars a month alimony, on the 24th day of March, 1856, she issued an execution under which she caused to be seized "all the goods, chattels, lands, tenements, rights, credits, bills of exchange and promissory notes and property of every kind whatsoever in the hands of *Price, Walsh & Co.*," and propounded interrogatories to them on facts and articles, on the third day of April, 1856.

On the 16th day of April, *Price, Walsh & Co.* answered the interrogatories, in which they denied being indebted to *Daniel Wolf*, but on the contrary answer that *Wolf* was indebted to them in a sum of over \$20,000, and that they are upon his paper for over \$30,000 more; that they refused to make these advances for *Wolf*, unless he would make an absolute sale of his property, specified in the two acts of sale to them, that the sale was made in order to secure them any advance they might make; that as soon as *Wolf* shall pay them the money they have advanced, a portion of which was advanced to pay notes secured by the vendor's privilege on some of the property contained in the acts of sale, they will re-transfer said property to said *Wolf*; but until that is done, they hold it as security for their advances, and that they suppose the property worth not over \$10,000, if it is worth that much.

After the filing of the answers to the interrogatories, a new *feri facias* issued for the succeeding instalment of alimony, and on the third day of May the Sheriff seized, under the first writ, the household furniture sold to *Price, Walsh & Co.*, then on the premises sold them, and in the custody of *Samuel Lockhart*, as their agent. On the 22d day of May, *Price, Walsh & Co.* intervened as third opponents, claiming the proceeds of the sale. The furniture brought, after deducting costs, \$1054.

The matter in controversy is the right to this fund. The Judge of the lower court awarded it to *Price, Walsh & Co.*, and the plaintiff appealed.

The only question of fact in the case, about which the parties differ, is as to who had possession of the movables at the time the seizure was made.

We think *Price, Walsh & Co.* must be considered as the possessors of the personal as well as real property, for the following reasons:

1st. They bought by notarial act, which *prima facie* gave them the possession of the real estate, and the movables were in their house. C. C. 2455.

2d. *Samuel Lockhart* says expressly, that at the time of the seizure of the property, he was keeping it for *Price, Walsh & Co.* His language is: "When the Sheriff seized the property, I was keeping it for *Price, Walsh & Co.*"

The plaintiff considered the property in the possession of *Price, Walsh & Co.* when she brought her suit to "test the sale" and when she propounded the interrogatories to them, their answers confirming such possession.

The appellants raise the following questions of law in this case. They maintain:

1st. That the pretended sale of the property by *Daniel Wolf* to *Price, Walsh & Co.*, was a mere simulation; no price was paid, nor is it pretended that any price was agreed upon.

2d. That *Price, Walsh & Co.* have no privilege, for in the first place they have no act of pledge, and in the second place, even if the simulated act of sale could be considered as a disguised act of pledge, it is null and void for want

of actual delivery, possession being the essence of the contract, and also because there was no existing principal obligation to which the contract of pledge could attach.

3d. That the renunciation of the mortgage by the wife produced no effect.

We have already said that we think that *Price, Walsh & Co.* had the possession of the property at the time of the seizure. We will consider the legal objections with reference to this fact.

I. It is true there can be no sale without a price in money, but it does not necessarily follow that an act is void because it wants one of the essential requisites of a sale. If there is no just cause of declaring it null, it may exist in another form, as an exchange, a donation, or pledge. *Rhodes v. Rhodes*, 10 L. R. 85; *Williams et al. v. Sch. St. Stephen*, 1 N. S. 417; 2 N. S. 22; 2 Rob. 101. But as the vendor himself is not permitted to question the sale which he has made, unless he has reserved a counter-letter or interrogates his adversary under oath on facts and articles, so also can no third party question the same without showing both that it is not only simulated or fraudulent, but that it is also injurious to the party complaining. 1 N. S. 166; 2 Rob. 94; 18 L. R. 368. Neither does it follow, because parties have clothed their contract in one form instead of another, that it will not avail in either. There is no such penalty declared by the law-giver, and the courts cannot supply it. Then is there anything immoral in using the contract of sale as the security of money advanced or to be advanced in good faith? We think not. The Civil Code has itself traced certain provisions of law in regard to sales with a power of redemption. See Art. 2545 *et seq.* If the vendor chooses to trust so much to the vendee as to make him a sale of the property without any security for the price, we know no law to prevent him. As he may make an absolute donation of his property, saving the rights of parties injured, we see no reason to declare an act void because the vendor has contented himself with a false cause, a fictitious price, instead of inserting the true cause of the contract. C. C. 1894. The act, therefore, on which *Price, Walsh & Co.* rely, being clothed in the form of a sale, they stand before us *prima facie* as possessing the highest title to the property known to our law, viz, as absolute owners of the entire thing with all its accessories.

II. It is true that *Price, Walsh & Co.* have no act of pledge *eo nomine*; nevertheless, as has just been observed, they have the absolute ownership of the thing, the *dominium* which includes the *jura in re*. Their higher title of owner will enable them to hold so much of the thing or its price as is due them, against any person who seeks to deprive them of the same by an inferior title. 1 N. S. 417. The title of owner must necessarily embrace that of pledge, as the pledgor can dismember or carve this lesser interest out of his right, and still have a right existing in the thing, as against the pledgee. Mackeldey book 1, No. 239, P. Speciale. But it is said there was no existing principal obligation to which the pledge can attach as accessory. When *Daniel Wolf* conveyed this property to *Price, Walsh & Co.*, nothing remained in abeyance. The property became (so far as all the world was concerned) the property of *Price, Walsh & Co.* If they had sold it to a *bona fide* purchaser, he would have held it; if they had mortgaged or pledged it, the mortgage or pledge would have been good. Clothed as they were with the legal title, there was nothing which prevented them from continuing so to hold to protect themselves for the advances made by them, on the expectation of which the sale was made.

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A mortgage may be made to secure an obligation not yet risen into existence, and we find no principle of law which prevents a pledge being made for the same purpose. 3259, 3251 C. C. We think, therefore, that in the present instance, *Price, Walsh & Co.* may be considered as possessing under their absolute title as pledgees of the property, and that the proceeds must first be applied to the extinguishment of their debt before it can be applied to the execution of the wife, considered as a third person.

III. As the husband is the head and master of the community, and as he had the power to pledge or sell the effects of the community, or even donate the movables by particular title, without the assent of the wife, we have considered the case without reference to the renunciation of the wife made in the two acts of sale. C. C. 2373.

Inasmuch as *Price, Walsh & Co.* have, as just observed, a better title to the proceeds of the property, in virtue of the acts of sale in their favor, than has the plaintiff under her garnishment and seizure, the judgment of the lower court must be affirmed.

Judgment affirmed.

SPOFFORD, J., dissenting. *Price, Walsh & Co.*, third opponents, claim a privilege upon the proceeds of certain furniture, which has been seized and sold under execution upon a judgment obtained by *Anna E. Wolf v. Daniel Wolf*.

The sole question then is, did *Price, Walsh & Co.* have a privilege upon the seized furniture at the date of the seizure? and, *quoad* this question, they are plaintiffs and must prove their case.

To say that they were *owners* of the furniture, would be to contradict their own allegations and to give them more than they ask. By submitting to the seizure and sale, by claiming a privilege on the proceeds, and by the whole tenor of their opposition, they have admitted, and are concluded by the admission, that the furniture was the property of the seized debtor.

Now, have the opponents a privilege? Privileges are *stricti juris*, and exist only in cases for which our law has made express provisions, and then only by virtue of an exact compliance with the requisites of the law to create a privilege.

The only modes by which the opponents pretend to have acquired a privilege, are two: first, by paying the vendors who sold the furniture to *Wolf*, and thus becoming subrogated to the vendors' lien, and, secondly, by pledge.

On the first point, there is no proof to authorize for a moment the inference of a subrogation to the vendors' privilege.

On the second, the proof is far from satisfactory. There is no act of pledge. The act of sale proves nothing, for it is acknowledged to be a sham. The answers of *Price* to the garnishment, which he offered in evidence on the opposition, do not, in my opinion, establish a valid contract of pawn. They prove no definite principal obligation, which is essential to support the auxiliary contract. They establish no delivery of the furniture. The witness *Lockhart* does not, to my mind, prove any delivery of the furniture to *Price, Walsh & Co.* All his testimony must be considered together, and, so considered, fails to show such a tradition as is essential to constitute a pawn.

My impression is, that the judgment should be reversed and the opposition dismissed.

VOORHIES, J., concurring.

**F. M. McINTOSH v. MERCHANTS' AND PLANTERS' INSURANCE COMPANY—**  
**On opposition of ANGELRODT & BARTHE.**

The decision in the case of *McIntosh v. Merchants' and Planters' Insurance Co.*, 9th An. 403, that the guarantee notes belonging to the company were not liable to be seized and sold for the benefit of a single creditor, re-examined and affirmed.

The refusal of the court in that and in the present case, to apply the privilege accorded by Art 722 of the Code of Practice, turns upon the particular facts of these cases, the assets having a peculiar character and destination, rendering it impossible to make them the subject of an ordinary seizure, at the instance of a creditor of the company.

The charges for professional services in the settlement of insolvent estates, ought to be in proportion to the results of the liquidation.

**A**PPPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*Durant & Horner*, for plaintiff. *G. Schmidt*, for opponents and appellants.

**BUCHANAN, J.** *Angelrodt & Barthe* prosecute this appeal upon two grounds:

1st. The refusal of an allowance of a privilege to themselves, for the amount of the judgment debt of the company to them, for which they had (previously to the commencement of these proceedings in liquidation) made a seizure under *fi. fa.* of all the assets of the company, being sundry guarantee notes, so styled, subscribed by various persons in favor of the company.

2d. The allowance of three thousand dollars to *Messrs. Durant & Horner*, counsel of the liquidator, for professional services rendered in the liquidation.

The point of law involved in the first of these questions, has been settled in the decision of this court upon a former appeal, reported in 9th Annual, 403, after careful and protracted consideration, with the unanimous concurrence of the court, although there was a difference of opinion upon other questions then at issue. The learned counsel of the appellant has not convinced us that our former decision on this point was erroneous. For the purpose of preventing misapprehension as to the extent that that decision has the authority of precedent, it is, however, necessary that we should add, that the refusal to apply the privilege accorded by the 722d Article of the Code of Practice to the seizures effected by the judgment creditors of this insolvent Insurance Company, before its affairs were put into the hands of a receiver under a judicial order, turned upon the peculiar facts of the case. We held, in the case quoted, that the assets thus seized had a particular character and destination which rendered it impossible to make them the objects of an ordinary seizure at the instance of any creditor of the company, while the company was transacting business under its charter. The reasoning of the court upon that subject is entirely applicable to the seizure of *Angelrodt & Barthe*; and the difference in the facts sufficiently accounts for the apparent difference of the doctrine from that of the case of *Goubeau v. The Nashville Railroad Company*, in 6th Robinson, and the other cases quoted in appellants' brief.

Upon the 2d ground of appellants, the allowance for professional services of counsel of liquidator, the total amount of receipts shown by the tableau of distribution, is \$11,877 62, against which the law charges (including the attor-

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ney's fee complained of) are \$5,569 25 ; leaving \$6,808 37 to be divided among \$66,920 69, due twenty-seven creditors, after five years of litigation.

The forty-seven suits mentioned in the judgment of the District Court, having been instituted by the receiver, were suits on promissory notes against the maker, for all of which the same printed form of petition might have sufficed, with blanks for names, amounts and dates.

At all events, we cannot too often repeat that the charges of the profession, in the settlement of insolvent estates, should bear some sort of proportion to the results of the liquidation.

We think one thousand dollars a reasonable remuneration to the counsel of the liquidator, under the circumstances.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended by reducing the fee of the counsel of the liquidator, *Mons. Durant & Hornor*, for professional services, to one thousand dollars, and that the costs of the opposition of *Angelrodt & Barthe*, and of this appeal, be borne by the mass.

#### STANISLAS WEBER v. LOUIS COUSSEY, f. m. c., et al.

The warrantor, who is not represented by counsel at the trial, is not bound by admissions made by the other parties of the contents of notarial acts not produced in evidence.

When the defendant in a petitory action is evicted from land upon which he has for several years paid the taxes, the writ of possession should be suspended until the taxes are refunded to the defendant as *negotiorum gestor* of the plaintiff.

Under the Code of 1825 the purchaser, in case of eviction, can recover from his vendor only such increase in the value of the property as the parties had in contemplation at the time of the sale.

**A**PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*J. Livingston*, for the city of New Orleans, appellant. *G. Duplantier*, for plaintiff. *E. Filleul*, for defendant.

**BUCHANAN, J.** This is a petitory action for a lot of ground in the Second District, late First Municipality, of the city of New Orleans. The plaintiff and defendant both trace title to the same source—the late corporation, Municipality No. One—the former by auction sale of the 2d March, 1837, confirmed by notarial act of the 22d of the same month to *Manuel Harris*, the latter by notarial act of the 25th March, 1846, to *Paulin Durel*.

Defendant called in warranty his vendor, *Charles Gustave Durel*, who called in warranty his own vendor, *Widow Jean Ursin Durel*, who called in warranty her vendor, *Paulin Durel*, who called in warranty the city of New Orleans, as succeeding to the obligations of the late Municipality No. One.

The case was tried in presence of the counsel of plaintiff and of defendant alone, as appears by the record; the city, who is appellant from the judgment rendered, not being represented at the trial, a fact which is material, because much of the evidence, and indeed all that portion of it which fixes liability upon the city, is supplied by admissions made on the trial of the contents of notarial acts which were not produced. These admissions are only binding on the parties who made them, and do not bind the appellant.

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The appellant was opposed in interest to both the plaintiff and the defendant. Both those parties were bound to make out their case by legal proof; the plaintiff in order to have judgment against defendant, and the defendant in order to have judgment over against his warrantor, the appellant. Now had such legal proof been offered in the absence of the warrantor, as the case appears to have been regularly called for trial, the warrantor could not be allowed to take advantage of his absence to repudiate the effect of such legal evidence. But an admission by counsel of plaintiff and defendant of the contents of authentic acts, which could easily have been produced, is a very different thing. The warrantor had a right to have those muniments of the titles of the parties produced on the trial and spread on the record as the only legal evidence of his contracts, and of the confiction of the titles of the parties. His adversaries had no authority to admit away his case.

The court below gave judgment in favor of plaintiff for the land claimed, as having the oldest title, and gave judgment over against the four warrantors of defendant, in the order above named, the city being the last, for two hundred and eighty-five dollars, being the price which defendant had paid his vendor, with twenty-five dollars for taxes paid, and one hundred and fifty-dollars damages for the increased value of the lot. The city alone has appealed, and a careful examination of the case has satisfied us that the judgment is in several respects erroneous, and that the city is entitled to a nonsuit.

The amount of the price for which the appellant, as last warrantor, is condemned, is taken from a copy of a notarial act of sale from *C. G. Durel* to defendant, annexed to defendant's answer. But if we look at the description of the land conveyed in that sale we find that it is just double the quantity which is claimed by the plaintiff. Plaintiff's petition calls for a lot at the corner of Broad and Dumaine streets, fronting twenty-nine feet and eight inches on Broad by one hundred feet on Dumaine. But the sale from *C. G. Durel*, annexed to defendant's answer, calls for three lots at the corner of Broad and Dumaine streets, each lot having a front of thirty-four feet four inches on Dumaine street by a depth of fifty-nine feet four inches, which is exactly equal to two lots of twenty-nine feet eight inches front on Broad street by a depth of one hundred feet. But even if this were otherwise, and if the land from which defendant is evicted were the very same quantity which he purchased from *Charles G. Durel*, this would only establish his right to recover \$285 from his vendor. It would be no criterion by which to establish the sum to be paid by *Widow Durel* to *Charles Durel*, or by *Justin Durel* to *Widow Durel*, or by the city of New Orleans to *Justin Durel*. Each of those parties would be only bound to restore the price which he, she or it had received, not the price which his vendor, or the vendee of his vendor, had received. 6 N. S. 559.

Now there is nothing in the record, given in evidence or not given in evidence, nor even in the admissions on trial to which we adverted above, giving us the least description of the quantity of land sold by any of the last three warrantors, including the appellant, nor of the price received by any of them.

Again, as to the taxes paid by the defendant upon the land from which he is evicted. These were paid by him for the benefit of the plaintiff, if the plaintiff was the owner of the property. Instead of being charged against defendant's warrantors it should have been charged against plaintiff, and the writ of possession suspended until it was refunded to defendant, as

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*negotiorum gestor* of plaintiff. It would truly be very convenient for many an owner of swamp lots around New Orleans to suffer another person (who perhaps had acquired them at a tax sale) to pay the taxes from March, 1846, to December, 1855, and just before the ten years' prescription had accrued, to step in with his petitory action and recover the land free of all arrears of taxes.

The judgment for \$150, or upwards of fifty per cent. upon the cost of the lot, as damages for increase in its value since its purchase by defendant, is unwarranted by law. The Code of 1825 has omitted the provision of that of 1808, which entitled the purchaser to recover from his vendee, in case of eviction, the increased value of the thing sold since the sale. See 9 L. R. 537. The only increase that can now be allowed is such increase as the parties had in contemplation at the time of the sale. 13 L. R. 150. Besides the evidence on this subject of increase is only applicable to the last sale of this property. There is no ground in the record for doubting the good faith of the appellant or any other of the warrantors.

It was perhaps unnecessary to remark upon the amount of the judgment against the warrantors, for in fact there is no case of warranty made out against the appellant. In the first place the plaintiff did not offer in evidence his own title. He describes it in his petition as annexed thereto. But he contented himself on the trial with the admission of defendant that he (plaintiff) had purchased the land, the names of the vendor and the notary, and the date of the sale.

The copy of the act annexed to the petition was withdrawn from the record by plaintiff's counsel after the appeal was taken, as appears by a receipt at the foot of the petition. No copy of the paper is, therefore, in the record. There is no proof of plaintiff's title as against the appellant.

Secondly, the title of the defendant, though annexed to her answer and copied in the transcript, was not offered in evidence on the trial; nothing but an admission of plaintiff, which, like that of plaintiff in favor of defendant, entered into no particulars except the names of the notary, the seller and the purchaser, and the date of the sale.

As to the three other warrantors, *Mrs. Widow Durel, Paulin Durel* and the city, the conveyances from them respectively were neither annexed to the calls in warranty nor offered in evidence. The record shows nothing in relation to them except admissions of plaintiff and defendant, precisely similar in form to those already mentioned.

It is, therefore, adjudged and decreed, that the judgment of the District Court, so far as it concerns the city of New Orleans, appellant, be reversed, and that there be judgment in favor of the city of New Orleans, appellant, called in warranty herein, as in case of nonsuit, with costs in both courts.

## SUCCESSION OF GEORGE FOULKES.

The commission of the curator of an estate cannot be calculated upon debts included in the inventory, but either fictitious in character or exaggerated in amount.

The claim of the widow under the Homestead Act of 17th March, 1852, yields to the claim of the minor whose tacit mortgage dates from a period antecedent to the passage of the Homestead Act.

The claim of the widow under the Homestead Act, is superior to all privileges created previously to the death of the husband and subsequently to the passage of the Act, except that of a vendor. Her privilege yields to funeral expenses, expenses of last illness, and law charges growing out of the administration and settlement of the succession.

It is the duty of the representative of an estate, upon the rendition of an account, to support every charge against the estate by a proper voucher.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*Durant & Hornor*, for *R. Howes*, tutor, opponent and appellant. *Benjamin, Bradford & Finney*, for curatrix.

**BUCHANAN, J.** The minor children of *John Foulkes*, deceased, have a legal mortgage upon the property of the deceased *George Foulkes*, who was their tutor, for the sum of six thousand and fifty-six dollars, with interest, by judgment of court; which mortgage, by the terms of the judgment, took effect from the 20th December, 1848, the day that *George Foulkes* qualified as their tutor. C. C. 354.

The widow of *George Foulkes* has rendered a final account of her administration as curatrix; from which account it appears that the estate is insolvent.

The present tutor of the minor children of *John Foulkes* opposes the three following items of the account of administration:

First, The item—

"*Johanna K. Foulkes*, curatrix, commission ..... \$242 50"

Second, The item—

"*Johanna K. Foulkes*, her widow's portion..... 1000 00"

Third, The item—

"Proceeds of real estate .....\$4112 80

"Less fees and expenses of sale and notarial fees..... 391 40

—————\$3721 40"

#### I. Of the curatrix's commission:

Article 1187 of the Civil Code declares: "If, at the rendition of this account by the curator to the Judge, at the end of the year after his appointment, the Judge is satisfied that the succession is entirely settled, and that it is not necessary to prolong the administration, he shall allow the curator a commission of two and a half per cent. on the amount of the inventory of the effects of the succession, or of the portion by him administered, deducting the bad debts." The petition accompanying this account styles it "a final account and tableau." The commission of \$242 50 charged, is  $2\frac{1}{2}$  per cent. on the total amount of the inventory, which is \$9701 04. But it appears from the account, compared with the inventory, that there is a portion of the property comprised in the inventory, viz, cattle, estimated at \$470, and a cash balance in bank of \$8 17, which is not accounted for.

Again, the inventory comprises two active debts or claims of the estate, which are stated as follows:

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|                                                     |           |
|-----------------------------------------------------|-----------|
| A bill against <i>Mr. J. Y. Egaña</i> for .....     | \$ 490 00 |
| A bill against the Police Jury of Algiers, for..... | 1041 12   |

|                                                                                                       |           |
|-------------------------------------------------------------------------------------------------------|-----------|
| The aggregate of which two claims is.....                                                             | \$2181 12 |
| But the account shows that these two claims have been collected as follows: From the Police Jury..... | \$287 47  |
| From <i>Egaña</i> .....                                                                               | 290 00    |
| Total .....                                                                                           | 577 47    |

Showing an exaggeration in the inventory, of ..... \$1553 65

Now, it is not to be presumed that the curatrix collected less from these debtors of the succession than was due. Indeed, it appears from the account that one of them (the Police Jury debt) was collected by suit. It follows, therefore, that no commissions are due for the \$1553 65, which was exaggerated and fictitious. For a fictitious debt is, most strictly speaking, a *bad debt*; and bad debts are to be deducted, say the Code, in calculating commissions.

|                                                                    |         |
|--------------------------------------------------------------------|---------|
| We deduct, therefore, from the charge for commissions of curatrix, |         |
| 1st—Two and a half per cent. on \$470 00.....                      | \$11 75 |
| 2d—Two and a half per cent. on \$1553 65.....                      | 88 82   |
|                                                                    | \$50 57 |

|                                                                                                                                              |      |
|----------------------------------------------------------------------------------------------------------------------------------------------|------|
| And we charge the curatrix, 3d, in deduction of her commissions, with the cash balance in Bank of Louisiana not credited in the account..... | 8 17 |
|----------------------------------------------------------------------------------------------------------------------------------------------|------|

Total ..... \$58 74

For which amount the first ground of opposition is sustained.

II. The evidence in regard to the circumstances of the widow and curatrix, is, that she has no property, and makes a living by sewing. She is, therefore, within the terms of the widow's Homestead Act of 17th March, 1852. But her claim under that law cannot be allowed to come in competition with that of the minors of *John Foulkes*, whose tacit mortgage dates from a period antecedent to the passage of the Homestead Act. See the case of *Taylor's Succession*, 10 Annual, 509; also *Milne v. Schmidt*, decided May term, 1857.

It is argued that the widow's privilege under the Homestead Law outranks all other privileges. But this is erroneous. Our construction of this law is, that the destitute widow's portion primes all privileges created previous to the death of the party, and subsequently to the passage of the Act of 1852, except that of a vendor: but that it yields to funeral expenses, expenses of last illness and law charges growing out of the administration and settlement of the succession. For if the contrary doctrine were held, the absurd consequence would follow, in case the movables were not sufficient to satisfy the widow's homestead and the general privileges, that the latter, being preferred over all mortgages, might be thrown back upon the proceeds of immovable property, to the prejudice of mortgagees, who yet, by the age of their mortgages, were superior in rank to the widow's homestead, and would have been preferred to it in a contest for the proceeds of the immovables.

The second ground of opposition is sustained, so far as it relates to the preference given by the account to the widow's homestead over the minors *Foulkes*.

III. The third item of the account opposed by the appellant, is the deduction made from the gross proceeds of the real estate for "fees and expenses of sale, and notarial fees, \$391 40." This item is clearly inadmissible. Two bills, that of the notary who made the inventory of this estate, and that of the auctioneers who made the sales of its effects under the orders of court, are jumbled up in one lumping charge. The note of the evidence, on trial of opposition, informs us, indeed, that \$250 of this charge are for account of the notary, and \$141 40 for the auctioneer. But no items, no particulars, are furnished, any more on trial than in the account filed.

This is not the way that an officer of the court should account for funds entrusted to him in his fiduciary capacity. The 6th section of the Act of 1855 to regulate and define costs and fees, (Session Acts, page 163,) says: "No person shall be bound to pay any costs or fees until the officer claiming the same shall deliver to the person against whom the fees may be charged, an explicit fee bill, signed with the officer's name in full, officially, and on payment the officer shall be bound to give a receipt on said fee bill, if so required." Here we have the statutory form of a voucher for the payment of fees to officers whose fees are fixed by law, when such payment has been made by a party who is bound by law to render an account. And the propriety of enforcing that law appears in this case. For we find, by an inspection of the record, that the legal fees of the notary for the original and for a copy of the inventory, would not have exceeded thirty dollars; and that the legal commissions of the auctioneer, for selling the property of which the proceeds figure in the account, would have been about the same sum. But certified bills of particulars, which would have alone enabled us to say precisely how far this charge exceeds the rate fixed by law, are wanting.

It seems that the notary paid over to the curatrix the proceeds of sales, with a deduction of a round sum, without specifications, for his own fees and those of the auctioneer; that the administratrix received this payment precisely as it was made, and reports it, in the same form, to the court. No voucher appears in the record in the shape of a notary's bill or an auctioneer's bill of any kind. This is a palpable evasion of the law, which, if encouraged, will make the fee bill a perfect nullity. And it would be a premium upon negligence and a precedent of evil example, if we referred the case back to the administratrix for an amendment of the account in this particular.

The District Judge directs the notary's bill to be reduced to his legal fees, but does not say what those legal fees amount to. The record affords imperfect data for ascertaining those legal fees of the notary, and still more imperfect for those of the auctioneers. The judgment in this form can certainly never be the basis of an execution, nor do we see how we can render it more definite. It was the duty of the administratrix to have supported every charge against the estate by a proper voucher; to have made that plain which she has involved in perplexity and obscurity. Not having done so she cannot be allowed to retain the funds of the estate in her hands until she shall produce vouchers upon which we can act understandingly. This ground of opposition is sustained. See 11 An. 435.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed; that the account and tableau filed by the curatrix of this succession be amended by reducing the commissions of the curatrix to the sum of \$183 76; that the net proceeds of movables, and the moneys col-

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lected according to said account, amounting to \$1308 64, be applied to the payment of the following general privileges:

## 1st. Funeral expenses, (unopposed, see C. C. 3160, 3161,):

|                         |          |
|-------------------------|----------|
| Funeral.....            | \$132 00 |
| Tomb.....               | 112 16   |
| Railing round tomb..... | 69 50    |
|                         | <hr/>    |
|                         | \$313 66 |

## 2d. Law charges:

|                               |           |
|-------------------------------|-----------|
| Costs Supreme Court.....      | \$24 20   |
| “ Second District Court.....  | 94 25     |
| “ “ “ “ .....                 | 20 50     |
| “ “ “ “ .....                 | 60 80     |
| “ “ “ “ .....                 | 58 35     |
| “ “ “ “ .....                 | 19 65     |
| “ “ “ “ .....                 | 4 50      |
| Sheriff's fees.....           | 78 10     |
| Commissions of curatrix.....  | 183 76    |
| Counsel of curatrix.....      | 500 00    |
| Attorney of absent heirs..... | 25 00     |
| Appraisers.....               | 16 00     |
|                               | <hr/>     |
|                               | \$1085 11 |

## 3d. Expenses of last illness—doctor's bill..... 50 00

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\$1448 77

That the deficiency of movables to pay the general privileges above specified, being \$140 13, be paid and satisfied out of the proceeds of real estate, being \$4112 80; that the surplus of the proceeds of real estate, after satisfying said privileges, being \$3972 67, be paid to the opponent and appellee, *Robert Howe*, tutor, in satisfaction *pro tanto* of the legal mortgage of the minors *Foulkes* upon the property of the deceased *George Foulkes*, as fixed by judgment of the Second District Court of New Orleans. It is further ordered and decreed, that the credit or deduction of \$391 40, made by the curatrix for fees and expenses of sale and notarial fees, be rejected and disallowed, and that the charge of the curatrix of \$1000, for widow's portion, be also disallowed, the proceeds of movables being exhausted by preferred charges above mentioned, and those of the immovables by the preferred claim of the minors *Foulkes*. It is lastly decreed, that the costs of the District Court be defrayed by the succession, and those of appeal by the curatrix, appellee.

**SPOFFORD, J.** The property of the succession consisted of immovables, all of which were acquired before the passage of the widow's Homestead Act of March 17th, 1852, (p. 171,) and of movables, all of which were acquired since the passage of that law. The minors' tacit mortgage of course rested on the immovables alone.

Now suppose that, on the day of the passage of that law, and before its promulgation, *George Foulkes* had died, it is plain that, however hard we might deem the law, the funeral charges, judicial charges, expenses of the last illness, wages of servants, &c., privileged generally on movables and immovables, would have ranked the minors' tacit mortgage, and been paid out of the immovables by preference thereto, there being no movables.

It was competent for the Legislature to change the law and to create a new privilege which should surpass all others; but in the *Succession of Taylor*, 10 An. 509, we held that the widow's Homestead law was only intended to operate prospectively, that is, it did not prejudice the claims of prior creditors to be paid out of funds arising (as in that case) from the sale of property which the deceased owned prior to the passage of the Act.

The same rules of interpretation which dictated that decision compel me to the conclusion that property acquired or made after the promulgation of the Act of March 17th, 1852, should submit to the dominion of the laws in force at the time of its acquisition. Thus and thus only can the rights of all parties be harmonized.

The movables (out of the proceeds of which the necessitous widow prays to be paid her privileged claim) were the product of her husband's earnings whilst a law was in force which assured her that in case of his death the sum of \$1000 should be paid to her, "in preference to other debts except those for the vendor's privilege and expenses incurred in selling the property."

I find myself unable to discover in these plain and unambiguous words any other meaning than that the Legislature intended thereafter, and out of acquisitions thenceforward made, to secure the indigent widow a little bounty in preference to every species of adverse claim, except that of the privileged vendor of the property thus acquired, and that which must arise from the cost of selling the property to pay her. Because I think they ought not to have given her a preference over funeral charges, law charges, &c. I cannot say they did not. Nor do I see that the minors are injured by the operation of a law which left their rights, as they existed at the time of its passage, intact.

I am, therefore, compelled to dissent from the judgment just pronounced.

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#### THEODORE BRUNING v. NEW ORLEANS CANAL AND BANKING COMPANY.

The apparent servitude of passage or right of way is an appurtenance of the property sold, and any sale implies, without its being expressed, a warranty against acts of the vendor, that would prevent or interfere with the full enjoyment of the thing sold.

Any citizen aggrieved by a public nuisance, is entitled to an action of damages against the offending party, especially if such nuisances involves also the breach of a private warranty.

Usurpations and wrongs to private rights of property, cannot be justified by considerations of benefit to commerce, and the right of expropriation of private property can only be exercised according to the forms of law.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*Larue & Whitaker*, for plaintiff and appellee. *Benjamin, Bradford & Finney*, for defendants.

BUCHANAN, J. On Wednesday, the 23d day of April, 1845, and the succeeding days, the defendants offered for sale at public auction at the Arcade Exchange in Magazine street in New Orleans, through *Hewlett & Cenas*, auctioneers, 400 lots of ground situated in the continuation of the suburbs Saulet, Lacourse and Delord, in the rear of the city and adjoining the canal of the defendants on both sides. This auction sale was made according to lithographed

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plans, which were exhibited to the bidders and which are in evidence. Two of those lots, being those numbered one and two, in the square bounded by Florida Landing, Derbigny, Claiborne and Cypress streets. Lot No. 1, forming the corner of Florida Landing and Claiborne street; and lot No. 2, fronting on Florida Landing adjacent to lot No. 1, were adjudicated (with others) to *George W. Martin*. The defendants, in a notarial act of sale passed before *McCay*, notary, on the 1st of May, 1845, in pursuance of said adjudication, conveyed to said *Martin* the said two lots of ground, by the above description, together with all the privileges and appurtenances thereunto belonging.

The lots thus sold, having come, by several mesne conveyances, into the possession and ownership of *Richard W. Collins*, were by him sold, on the 14th May, 1849, to the present plaintiff, together with all the appurtenances unto said lots belonging, or in anywise appertaining, with a special transfer to the plaintiff of all the vendor's rights and actions of warranty against all the former proprietors of the property conveyed.

The premises thus purchased have been improved by plaintiff, who has erected thereon a dwelling house and grocery, and has ever since occupied the same.

The evidence establishes without dispute, that the defendants, long subsequently to the sale made by them to *Martin*, as aforesaid, and about the time that plaintiff acquired the property, have enlarged their canal at the junction of Claiborne street and Florida Landing, by excavating a basin in the form of a half moon, on the northern margin of the canal, and extending across the whole width of Florida Landing, which has thus been appropriated by defendants to their own use, by converting it from land into water, and from a public highway, as represented on the plan by which they sold the property now occupied by plaintiff, into a navigable canal and harbor for vessels. This is not only an usurpation of soil dedicated to public use, but a manifest violation of the defendants' obligation of warranty under the public sale of the 23d of April, 1845.

The dedication of the soil of Florida Landing, as far back from the river as the plaintiff's property, and much farther, to the public use as a street, was made by defendants in the most solemn and authentic form. The recitals in the deed to *Martin* show, that the lots sold formed part of a tract of land purchased by defendants from *Madame Louise Delord Sarpy*, wife of *Dominique François Burthe*, by act before *Stringer*, notary, on the 28th of May, 1831; and that the division of the tract into squares and streets, according to the description in the deed, was by plan made by *George T. Dunbar*, surveyor of the Second Municipality, on the 1st of February, 1845, which is adopted by the vendors, and of which plan the lithographic plans in evidence are extracts. Those lithographs and the parol evidence on trial, show moreover that Florida Landing is a prolongation or continuation of Julia street towards the swamp in the rear of the city. The entire obstruction of Florida Landing by the defendants, therefore, impedes necessarily, the drainage of the city, by cutting off the discharge of all the water that is carried down the gutters of Julia street; for it is proved the defendants do not allow this water to drain into their canal. Accordingly, the witnesses on both sides prove that the water which comes down Julia street in rains is thrown off, laterally, through *Magnolia*, *Vine* and *Willow* streets, into *Cypress* street, which is thus made to drain two streets instead of one, and that the consequence is an inundation

and a stagnation of water, highly prejudicial to the health, comfort and interest of the citizens in the neighborhood of Florida Landing.

The city council, as guardians of the public property, was memorialized many years ago by individuals who represented that the public rights were invaded by the excavation of the basin in question; but the committee on streets and landings, to whom the subject was referred, having reported unfavorably upon the memorial, nothing was done.

We are not disposed to say, because the decision of this cause does not require it, whether the initiative in the abatement of the nuisance of an obstruction of the public highway, is exclusively reserved to the city council, or whether proceedings might not be commenced for that purpose by individual citizens who were aggrieved by the nuisance. But we assert, without hesitation, the right of any citizen so aggrieved, to an action in damages against the offending party, especially if, as in the present case, the public nuisance involves also the breach of a private warranty. A street is every valuable to the proprietor of land adjoining it, as a passage for ingress and egress to his property. The defendants sold to the author of plaintiff's title, the land with all its appurtenances. As an illustration of the meaning of this phrase, another deed by these defendants to *John Hoey* was given in evidence, conveying other lots in the same square fronting on Florida Landing, at the corner of Derbigny street. The defendants sell to *Hoey* the lots, according to *Dunbar's* plan, together with all the rights, ways, privileges and appurtenances thereunto belonging, or in anywise appertaining.

The description of what was sold is here more full, but it is substantially the same. The apparent servitude of passage or right of way, is clearly an appurtenance of the property; and it is scarcely necessary to add, that in Louisiana every sale implies, even without its being expressed, a warranty against acts of the vendor that would prevent or interfere with the full and perfect enjoyment of the thing sold.

The learned counsel for the defendants argues that his clients were justified in appropriating Florida Landing as they have done, because, by the ninth section of their charter, (Session Acts 1831, page 44,) they had the right of expropriating land to the width of one hundred and twenty feet on each side of their canal, which (by the 8th section) was to be sixty feet wide; and because, by the 26th section of the charter, the land thus acquired by forced sale or otherwise to the extent of 120 feet on each side of the canal, shall belong to the State of Louisiana in thirty-five years from the date of the charter.

It seems to have escaped the attention of the learned counsel, that the ninth section expressly reserved in its concluding clause to the proprietors of lands appropriated, a right of communication with the canal, and with the said route, and this in the whole extent of said lands, which shall be considered as riparian to said canal.

The right of way is here expressly reserved to the adjacent proprietors, even over lands expropriated; and that, to the magnificent extent of one hundred and twenty feet. For the charter says, that their lands shall be considered riparian; that is to say, the intervening space between them and the canal (120 feet) is assimilated to the banks of a navigable river, of which a prominent legal characteristic is, that their use is public. C. C. 440. Apart from this consideration, however, the argument derived from the ninth section of the

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charter, has no force, because the defendants do not occupy towards plaintiff the attitude of a claimant of land for the purposes of their charter under that section.

The charter granted by the Legislature on the 5th of March, 1831, obliged the corporation to construct, *within the space of six years from the passage of the act*, a canal of certain dimensions from some part of the city or suburbs of New Orleans, above the Gravier canal (Poydras street) to Lake Pontchartrain, with one or more basins, and a sufficient breakwater to facilitate the ingress and egress of vessels; and for the accomplishment of this object, the corporation was authorized to acquire lands adjoining the route of the canal by contract, or by a certain form of expropriation therein prescribed.

Now this record shows us that in May, 1831, two months after the passage of the charter, the defendants acquired by contract from *Mrs. Burthe*, land, including the lots now possessed by plaintiff, adjoining the route of the canal, to a much greater extent than 120 feet on both sides of it; through which lands thus acquired, we must presume that the canal was dug within the six years succeeding the charter, or before the 5th of March, 1837; for otherwise the charter, by its terms, would have been forfeited. Eight years after the completion of the canal, the defendants carve sundry lots and streets out of the land acquired by them from *Mrs. Burthe*, leaving a margin for a landing and public street on the north side of the canal, (Florida Landing,) of 108 feet, according to the witness *Harrison*.

Three years after this operation, or eleven years after the completion of the canal, and seventeen years after the acquisition of the 120 feet (and upwards) from *Mrs. Burthe*, the defendants commence excavating the soil of Florida Landing for the basin or half moon, of which the plaintiff complains. What relation has this to the power and extent of expropriation vested in the company by the ninth section of its charter? That power had been exercised and exhausted. Besides, it may be very reasonably objected that, if this be an expropriation under the charter, the forms required by the ninth section have not been observed. The company required the land, and its servants simply took it.

Much evidence has been taken in relation to the benefit to commerce of the half moon in question. This we regard as entirely foreign to the matter at issue in this suit. Usurpations and wrongs are not to be tolerated upon any such considerations. We recognize no power, either in the defendants or in this court, to take money out of one man's pocket and put it in another's, unless in the enforcement of legal obligations, according to the forms of law.

We think the judgment appealed from has done justice. It is, therefore, affirmed, with costs.

## REUBEN M GIBSON v. HUTCHINS &amp; VAUGHAN.

It is only the possessor in good faith, believing himself to be the owner, who can recover from the true owner the value of ameliorations inseparable in their nature from the soil.

Although a settler upon public lands who hopes to obtain a title under the preëmption laws is not a trespasser, he has no claim against a patentee of the Government for the ameliorations made upon the land of which he has had the use. He has no claim against the Government for the value of the improvements made, and the assignee of the Government takes the land free from any liability.

A mere settler, even with the hope of preëmption, until he actually makes his entry, has no title, and improvements made by him on public land are presumed to be for his own benefit and at his own risk.

The case of *Hemkin v. Overly* affirmed, and the cases of *Pierce v. Frantum*, 16 L. 422; *Kellum v. Bippoy*, 8 Rob. 188, and *Williams v. Booker*, 12 Rob. 253, so far as inconsistent with the present opinion, overruled.

APPEAL from the Ninth District Court for the parish of Concordia, *Cooley J. Stacy, Snyder, Shaw, Sparrow, and George Eustis*, for plaintiff and appellant. *A. N. Ogden & Stansbury and York*, for defendant.

SPORFORD, J. This is a petitory action for a tract of land belonging to what is commonly known as the "Bringier Grant." A patent from the United States Government issued in 1853 to the assignees of the original grantee, in pursuance of a judgment which they had obtained against the United States under the special laws allowing the institution of suits for such purposes.

The plaintiff holds under a sale made to effect a partition between all the co-proprietors of this claim. We see no such defect in the plaintiff's title as would preclude him from succeeding in a petitory action against a mere possessor without title.

But the defendant contends that the plaintiff's authors, *Curry and Garland*, relinquished all claim to such portions of the grant as were in the possession of actual settlers who would be entitled under the laws of Congress to a preëmption if the land had been subject to entry. The defendant, *Vaughan*, claiming to have been in this category of persons, insists that the plaintiff by this act of his authors, is estopped from asserting title against him.

The relinquishment alluded to is embraced in a letter to the Register and Receiver of the Land Office at Monroe, dated in January, 1842. The expressions of *Curry and Garland* in this letter were as follows: "You will observe that it is not our purpose to interpose any obstacles against any persons who had a good preëmption right previous to our purchase who may not have paid it out of your office, we only desire in such cases to be notified of the application so that we may make opposition if necessary to protect our rights. We know who are in good faith entitled to preëmption rights, and only desire to be protected from illegal claims. You will please to take notice that *Messrs. McGuire & Ray* are authorized to act as our agents in the premises, and whenever an application is made for preëmption within the limits of our claim we request you will notify them or one of them. In making this relinquishment in favor of innocent purchasers and actual preëmptors, we do not intend to be understood as relinquishing any right or claim for indemnity that we may have on the United States, to give us an equal quantity of land elsewhere, or to pay us for the lands so sold by you or your predecessors."

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This relinquishment must not be extended beyond its plain import. In terms it could only inure to the benefit of such persons as availed themselves of it by an *actual entry under a preëmption claim*. The defendant does not pretend to have so located any part of the land in dispute. If an offer was ever made in his favor by *Curry and Garland*, (which is not altogether clear,) he has constantly rejected it. There never was a contract between him and them, and there is no estoppel.

The appellee's prayer for a reversal of the judgment in favor of the plaintiff must, therefore, be refused.

The plaintiff has appealed, and complains of that portion of the verdict and judgment which awarded to the defendant the sum of six hundred and twenty-eight dollars "for the enhanced value of the land" by reason of the improvements made upon it by the defendant's deceased brother, under whom he holds. These improvements, as they are called, consisted in clearing, ditching, &c., or such ameliorations as the settler made with a view to enable himself to raise crops and reap fruits from the land.

The right of a possessor to recover of the true owner for ameliorations inseparable in their nature from the soil cannot, it appears to us, be recognised in any case, unless the possessor was at least a possessor in good faith, believing himself to be the owner. The mere possessor is presumed to have made such changes for his own amelioration, and to have received a sufficient reward in the immediate benefit which he reaps from the enhanced production of the soil. Perhaps the true owner would have preferred that the primitive forest should remain. Perhaps the ditching will not suit the purposes for which he wishes to use the land. To place the real proprietor at the mercy of a possessor in bad faith by requiring him to pay the latter who has, without just authority, changed the face of the land for selfish purposes of his own, does not accord with those rules of law which give the dominion of the soil to the proprietor only, or to one who has a right to consider himself a proprietor for the time. An intruder may recover such expenses as are necessary for the preservation of the thing. A *negotiorum gestor* may recover what he has spent in doing the business necessary to be done for another, even without a mandate. It is a general rule of equity, that no one should enrich himself at another's expense. But this doctrine must not be stretched so far as to let an intermeddler recover for wilfully doing what was not necessary to be done, or what the owner might not wish to have done, and what the law did not require to be done. If an intermeddler goes to expense with the single view of benefiting himself and reaps the benefit, he cannot demand a reimbursement for his time and trouble from the person upon whose property he has intruded, by suggesting that he too has been incidentally benefited.

The question now arises, was the defendant *in good faith* when he made the alleged improvements on the land recovered by the plaintiff. "The possessor in good faith is he who has just reason to believe himself master of the thing which he possesses, although he may not be in fact, as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which in fact belongs to another." C. C. 3414.

"The possessor in bad faith is he who possesses as master, but who assumes this quality when he well knows that he has no title to the thing, or that his title is vicious and defective." C. C. 3415.

"He is a *bona fide* possessor who possesses as owner by virtue of an Act sufficient in terms to transfer property, the defects of which he was ignorant of." C. C. 495.

The defendant does not show that he ever possessed under a title translatable of property. He produces no title whatever. He says he had a hope of getting a title—a preëmtor's claim. It seems to us a contradiction in terms to call such an expectation a title translatable of property. If it is not, then the defendant's possession lacked an essential element of the *possession in good faith*. He alleges in the answer that, when his brother, *Burriel T. Vaughan*, went upon the land in 1839, it was "public land," and that his brother acquired a right of preëmtion upon it which has descended to himself. Although after the Act of Congress of September 4th, 1841, *B. T. Vaughan* might not be technically a trespasser upon the land, and, as such, be liable to fine and imprisonment, yet he did not by virtue of that Act become, in any sense, an owner of the land. The legal title remained in the United States until the patent under which the plaintiff holds issued in 1853; there was an incipient title or inchoate right in *Bringier* or his assignees before the defendant's brother went upon the land.

From the decision of the court in the claim of *Curry and Garland* against the United States, it followed that the land in question had not been properly subject to entry by actual settlers. And if it were, *Vaughan* could not have had even an expectation of claiming by such a title the whole of the land here in controversy, or half a section, for only a quarter of a section could thus be entered. He had no claim against the United State for improvements. He was rather indebted to the United States for the privilege of living so long undisturbed upon the public land. And the United States ceded its rights to the plaintiff's authors. They took it free from any legal demand against either the government or themselves for improvements.

The defendant relies upon the cases of *Pierce v. Frantum*, 16 L. 422; *Kelsum v. Rippey*, 3 Rob. 138, and *Williams v. Booker*, 12 Rob. 253, as sanctioning his claim for improvements.

These cases were fully considered by this court before determining the case of *Hemkin v. Overly*, decided at Monroe last summer, and were, in one particular, overruled. We found ourselves unable to class a mere possessor of the public lands of the United States, even with the hope of a future entry by preëmtion amongst "possessors in good faith." In other words, we could not consider an expectation of getting a title, as a title, which would put the possessor in good faith.

The overruled cases conceded to a settler upon the United States lands, who possessed with the hope of securing a preëmtion, the right of retaining the land against a vendee or patentee of the United States Government until such patentee should reimburse the settler the increased value of the property as resulting from improvements and expenses upon it during the settlement.

We said in *Hemkin v. Overly* that, "we are unable to recognize the doctrine that one who makes improvements upon property to which he knows he has no title, has any legal or equitable claim to reimbursement for such improvements."

A mere settler, even with the hope of preëmtion, until he actually makes his entry, knows that he has no title. He has an expectancy, and nothing more. He is a tenant by sufferance. He makes improvements for his own

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benefit and at his own risk. The Government does not warrant him a title nor agree to indemnify him for his labor in case he gets none. Whilst he is permitted to settle there by the Government, he may reap the fruits and live rent-free. But when the Government parts with the title to a third person, that title carries with it such inseparable ameliorations as the land may have received from the settler. The settler has no claim upon the owner.

We conceive this to be the true doctrine, as deduced from our own Code. And it is in harmony with the jurisprudence of the federal courts and those of our sister States, to which the case of *Pierce v. Frantum* presents so marked a contrast.

We think it a matter of some moment that the jurisprudence upon the subject of the public lands and the rights growing out of settlements upon them, should be as uniform as possible throughout the several States.

Finally, the defendant has contended that he was entitled to be considered a possessor in good faith by reason of the acts and promises of *Curry* and *Garland* relative to the actual settlers. We find no evidence of any contracts between defendant's brother and *Curry* and *Garland* to hold under them, on the contrary, he has been holding in spite of them, and contesting their title always. He never accepted any of their propositions which, as we have already observed, were precise and predicated only upon the supposition that the settlers would make *actual entries* under their preëmption claims, or purchase of them. The defendant did not do so, and we find no evidence of a promise by the owners of the "Bringier Grant" to pay him for his improvements.

We do not find the strong equities in favor of the settler in this case which the appellee sees. If his brother has enhanced the value of the land, he has had the use of it for more than ten years without paying any rent. By having no title, he has escaped the necessity of paying any taxes. He had a liberal offer from those who turned out to be the true owners, and might have bought from them for a small sum. This he declined. If the law does not require the plaintiff to pay the defendant we have no power to assess the value of these improvements, or the enhanced value of the soil as a tax upon him.

The difficulty of making such an assessment is exhibited by the record in this case. It is almost impossible to approximate a just estimate of the enhanced value of the soil, flowing only from the clearing and ditching, and excluding all other considerations.

It is, therefore, ordered and decreed, that the judgment recognizing the plaintiff as owner of the land claimed in his petition be affirmed; and it is ordered, that in all other respects the judgment be avoided and reversed, and that there be judgment against the defendant upon his demand in reconvention, and that a writ of possession issue in favor of the plaintiff; it is further ordered and decreed, that the defendant pay costs in both courts.

## ANNA E. HARRELL AND HER HUSBAND v. H. R. HARRELL

A crop growing at the time of the dissolution of the marriage forms part of the acquets and gains. The Judge in decreeing a partition must direct the manner in which it shall be made.

APPEAL from the District Court of East Feliciana, *Ratliff, J.*  
*Muse & Hardee and Race & Foster*, for plaintiffs and appellees. *Bowman & Delee*, for appellant.

VOORHIES, J. This is an action of partition. On the 17th of June, 1838, *Frances Hobgood* died intestate, leaving as her legal heirs three minor children, the plaintiffs, *Mary E. and Harriet L. Harrell*, issue of her marriage with the defendant. No steps appear to have been taken by him to have an inventory made of the property of the community or to be confirmed as natural tutor to his minor children until after the marriage of the plaintiff, when an inventory was made on the 11th of April, 1853, which comprised twenty-one slaves, as the only property which belonged to the community. He was confirmed as natural tutor to *Mary E. and Harriet L. Harrell* on the 1st of June, 1853, and on the same day *William B. Hobgood* was appointed their under-tutor.

The plaintiff claims as her hereditary rights, 1st, one-third of the sum of \$1278 32, which her mother inherited during the marriage, and which her father received and converted to his own use, together with 5 per cent. interest thereon; 2d, one-sixth of the slaves thus inventoried as the property of the community, with their hire since the death of her mother; 3d, one-sixth of the crop of the year 1838; 4th, one-sixth of the movables which belonged to the community at the time of its dissolution, and of which no inventory was ever made.

The defence set up by the defendant is, that the community is largely indebted to him, and that the interest and revenues derived from the estate of the plaintiff were exhausted in defraying the expenses for her support and education. He also pleaded a general denial.

The cause was submitted to a jury, who returned a verdict that the plaintiff recover of the defendant the sum of \$1768 80, and that a partition of the community property be made as prayed for by the plaintiff. From a judgment thereon rendered, the defendant, after having made a vain attempt to obtain a new trial, took the present appeal.

In order to determine the sum to which the plaintiff is entitled we must endeavor to ascertain from the evidence what property belonged to the community at the time of its dissolution, and what were the debts which existed against it and subsequently discharged by the defendant.

We infer from the evidence that the crop of cotton, corn and fodder gathered in the year 1838 was worth \$3833, and that the household and kitchen furniture, horses, cattle, hogs, farming utensils, a carriage and a wagon, were worth the sum of \$2077, making an aggregate of \$5910. The defendant must be held bound for this amount, subject, however, to be credited for the debts of the community discharged by him; C. C. 333; 3 An. 611. The debts of the Union Bank of Louisiana, and *William B. Hobgood*, as overseer, were the only debts due by the community as shown by the evidence. At the date of the dissolution of the community the bank debt, exigible the 16th of February,

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1839, amounted to the sum of \$2775, and the debt of *Hobgood*, including his wages for the year 1838, amounted to \$1300, making in the aggregate \$4075. The community must also be charged with the sum of \$1278 83 which was inherited by the deceased spouse and received by the defendant during its existence. Deducting these amounts from \$5910, the acquets and gains amounted to \$556 67, to one-half of which the defendant was entitled, thus leaving the balance, to wit: \$278 83 as a part of the inheritance of his children, to one-third of which the plaintiff is entitled, to wit: \$92 77½. We are satisfied from the evidence that the annual interest of this sum and her portion of the revenues derived from the slaves of the community, were not more than adequate to defray the expenses of the support and education of the plaintiff.

It is contended by the defendant that the crop of 1838 cannot be considered as acquets and gains of the community. The question here raised can no longer be considered as an open question. See the case of *Wilcox v. Henderson* 9 A. 347. The sum of \$400 for overseer's wages for that year, was allowed as a charge against the community, incident to the making of the crop of that year. It does not appear that the defendant claimed any other charge in relation to it.

It is evident, therefore, that the plaintiff was only entitled to recover the sum of \$92 77½ as her share of the acquets and gains of the community and the sum of \$426 11 as her share in the paraphernal estate of her deceased mother, making an aggregate of \$503 77½, and not the sum of \$1768 80 as awarded to her by the verdict and judgment of the court below.

The judgment is also erroneous, as it does not direct the manner in which the partition shall be made, but merely orders that the same be made and referred to a notary. The Code of Practice, Article 1057, declares: "At the expiration of the time allowed for answering the petition, the Judge shall decree the partition, direct the manner in which it shall be made, and refer the parties to a notary whom he shall appoint to make the partition." C. C. 1267; 1 R. 512. In order to ascertain whether property may be conveniently divided in kind, it is essential that the appraisement of it should be made within the year preceeding the decree of partition. C. C. 1247, 1248, 1249. In the present case the decree of partition was rendered on the 29th of November, 1856, more than three years after the appraisement of the slaves was made.

It is, therefore, ordered and decreed, that the judgment of the lower court be avoided and reversed, that the plaintiff recover of the defendant the sum of five hundred and three dollars and 77 cents, with five per cent. per annum interest from the 29th November, 1856, until paid, and that this case in relation to the partition of the slaves of the community be remanded to be proceeded in according to law, the costs of this appeal to be paid by the plaintiff and appellee, and those of the court below to be determined on the final decision of said cause.

Chief Justice MERRICK recused himself, having been of counsel in the case.

## MISS McCALOP v. FLUKER'S HEIRS.

Executory process may be taken out against mortgaged property of an estate yet in course of administration.

Where notice of an order of seizure and sale was given to the defendant as tutrix, she having full authority as such to represent the estate in the proceeding, her qualifying as administratrix did not render it necessary that she should be notified in this latter capacity also.

The maker of a promissory note cannot object to the failure of the holder to demand payment at the place of payment, unless he can show that by such failure his funds there deposited to meet his obligation had been lost.

Judgment amended in the Supreme Court so as to cover an instalment of the mortgage debt falling due since the order of seizure and sale was granted.

**A** PPEAL from the District Court of East Feliciana, *Ratliff, J.*  
*Smiley & Perrin*, for plaintiff. *D. C. Hardee*, for defendant and appellant.

COLE, J. The administratrix of the estate of *David Jones Fluker* has appealed from an order of seizure and sale. The principal objection to its validity is that executory process cannot issue against mortgaged property in the course of administration, comprising part of the effects of a succession represented by an administrator.

This objection has been already considered by this court, and decided to be of no force. The authorities quoted in the decree of the District Judge sustain the judgment.

In *Boguille v. Faille*, 1 An. 205, the court say: "The right of the hypothecary creditor to proceed against the mortgaged property in the possession of the debtor's heirs appears to be beyond controversy." Vide also 2 An. 513; C. P. 62 and 734.

It is also urged that the administratrix ought to have been notified of the order of seizure and sale.

The administratrix is *Mrs. J. A. Fluker*, who is also the widow in community and tutrix to his minor children.

As tutrix she had the right of administration without being specially qualified as such; if then she had not been appointed administratrix, the notice to her in this case would have been good.

Her qualification as administratrix, which was not absolutely necessary, cannot render the notice insufficient, which was given to her as widow in community and as tutrix.

It is also objected that the notice of protest was not served on any one.

*D. J. Fluker* was the maker, plaintiff was the payee and holder. No protest was then necessary as regards *Fluker*, unless he could establish that the note would have been paid, if demand had been made at the place of payment, and by the neglect of plaintiff so to do, that his funds there deposited to meet this obligation had been lost.

Plaintiff has asked to have the judgment amended, as the last instalment mentioned in the petition and act of sale has become due since executory process issued in this cause.

It is therefore, ordered, adjudged and decreed, that the judgment of the District Court be amended, so that the property seized in this case be sold for

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cash to meet the last instalment of seven thousand dollars, with eight per centum interest thereon from the first day of January, 1854, and it is ordered, that the judgment aforesaid be in all other respects affirmed, and that appellant pay the costs of appeal.

SPENCER FIELD & Co. v. MARTIN BRODERICK and MANDEVILLE MARIOT,  
Sheriff, et al.

Where property had been sequestered and was sold by the Sheriff, at the instance of plaintiffs, for cash, pending the suit, as perishable and to save costs, the effect of the Sheriff's sale, under the order of court, was to transfer the legal custody of the officer from the property itself to its proceeds; and the plaintiffs in the sequestration suit could not, by becoming themselves the purchasers of the property at the Sheriff's sale, transfer the legal custody of the sequestered property from the Sheriff to themselves by withholding the price.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
\_\_\_\_\_, for plaintiffs and appellants. *T. W. Collins and L. Eyma,*  
for defendants.

BUCHANAN, J. This is an appeal from a judgment making a rule absolute, which was taken by the Sheriff upon a purchaser of property sold for cash under an order of court, to comply with the conditions of the sale, by paying the price of adjudication. There is no dispute about the correctness of the facts as stated in the rule, but the appellant contends that he is entitled to retain the price in his own hands, because he has a claim pending in the court below, for a privilege upon the property which has been sold.

There is nothing in this defence. The property (coal) had been sequestered at the instance of the appellants. At their instance it was sold by the Sheriff for cash, pending the suit, as perishable and to save costs. The Sheriff was the legal custodian of the sequestered property. The effect of the Sheriff's sale, under the order of court, was to transfer that legal custody of the officer from the property to its proceeds, and the plaintiffs in the sequestration suit could not, by becoming themselves the purchasers of the property at the Sheriff's sale, transfer the legal custody of the sequestered property, from the Sheriff to themselves, as they now seek to do, by withholding the price.

Judgment affirmed, with costs.

Re-hearing refused.

PHOEBE MILNE, Widow, &c., v. F. SCHMIDT.

The Act of the 17th of March, 1853, providing a homestead for the widows and children of deceased persons, is without effect as to creditors whose rights had accrued before the passage of the Act.

APPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*J. H. Holland*, for plaintiff. *J. Legardeur*, for defendant and appellant.

BUCHANAN, J. This is a contest between a widow, claiming under the Act of the Legislature, approved March 17th, 1852, entitled "an Act to provide a homestead for the widows and children of deceased persons," and a mortgage creditor of her deceased husband.

The authentic act of special mortgage granted by the deceased *William Milne*, to the appellant, *Barthelemy Bacas*, to secure the payment of a promissory note of said *Milne*, bears date the 27th of February, 1852, consequently before the passage of the homestead law above mentioned.

*Milne* died in June, 1852, intestate, and *François Schmidt* was appointed administrator of his estate, with the consent of *Milne's* widow, plaintiff herein. *Schmidt* rendered an account of his administration on the 7th July, 1853, which was opposed by the widow, and her opposition overruled by judgment of the 28th January, 1854. From this judgment, the widow did not appeal; but brought suit on the 16th of May, 1854, to make the appellant, *Bacas*, and other creditors of her husband's estate, refund what had been allowed and paid to them under the account of administration.

The appellant *Bacas*, among other matters of defence to plaintiff's action, pleaded that it was barred by her previous appearance as an opponent of the administrator's account; and in this court urges as error, apparent on the face of the record, that his mortgage was anterior in date to the Act of the Legislature, under which plaintiff claims.

It is only necessary for us to notice the last mentioned point, upon which, the authority of the case of *Taylor's succession*, 10 An. 509, is conclusive against the plaintiff and appellee.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, so far as regards *Barthelemy Bacas*, the appellant; and that there be judgment in favor of the said *Barthelemy Bacas*, against the plaintiff and appellee, with costs in both courts.

## W. H. AVERY v. THE POLICE JURY OF IBERVILLE et al.

There is nothing repugnant to the Constitution in the provisions of the Acts of the Legislature of 1813 and 1814, conferring certain powers on the Police Juries in regard to opening natural drains, &c.

The courts will presume that the power conferred on the Police Jury has been properly and judiciously executed by them, and it is for the party complaining to show that the making or opening of works was unnecessary or detrimental to such party.

The court did not err in excluding the opinion of the Civil Engineer as to whether the right fork of a bayou was a natural outlet, or caused by a crevasse, or some sudden eruption of nature. Whether it was caused by a crevasse or some sudden eruption of nature, it was not artificial.

**A** PPEAL from the District Court of Iberville, *Robertson, J.*  
*Geo. S. Lacey*, for plaintiff and appellant. *Thomas Gibbs Morgan* and *A. Talbott*, for defendant.

**VOORHIES, J:** This is a controversy in relation to the right of drainage, in which an injunction was obtained by the plaintiff. He alleges that an ordinance was passed by the Police Jury of the parish of Iberville, on the 23d of July, 1853, to establish a common drain through the point on the Mississippi, opposite the town of Plaquemine, called "Manchac Point"; that *Thomas Towles*, *Thomas S. Billings* and *Thomas C. Brown*, the other defendants, were appointed commissioners to carry the same into effect, with power to remove obstructions to the flow of waters in Bayou Paul or any of its branches, and to open all ancient natural drains; that said bayou is the natural drain of his plantation and the lands lying above it, but not of those of the extreme point, opposite the town of Plaquemine, unless accomplished by artificial works which would be greatly detrimental to the lands below; that in consequence of canals and drains having been made on lands above his estate, he caused one of the forks of Bayou Paul to be closed, as he had a right to do, and dug in lieu thereof a large canal to carry off the waters; and that he was ordered by said commissioners to open said fork, which he refused to do. He avers that said ordinance is illegal, the Police Jury having transcended the power delegated to them; that if enforced, it will have the effect to throw rapidly all the waters from "Point Manchac" on his lands, so as to overflow and render the same worthless. He therefore prays, that said commissioners be restrained from exercising any of the powers thus conferred upon them by said ordinance, which may be declared illegal.

The answer avers that Bayou Paul, having its source at "Manchac Point," opposite the town of Plaquemine, passes over the lands of the various proprietors back and below, and empties itself into Spanish Lake; that if cleared of all obstructions, according to said ordinance, it would be sufficient to drain all the lands above and below, including the plaintiff's; that the plaintiff has illegally closed only one of the forks of said bayou on his land, so as to interrupt the natural flow of the water, to the great damage of all the proprietors, the drainage of whose lands being thereby prevented. They, therefore, pray that the injunction be dissolved; that the plaintiff be ordered to remove all obstructions by him placed in Bayou Paul, especially the dam erected by him across the right fork of said bayou.

The court below gave judgment in favor of the defendants, and the plaintiff appealed therefrom.

The Police Juries are empowered, under the legislative Acts of 1813 and 1814, "to cause to be opened in any town, suburb, or other place divided into town lots, or when a point of land on the Mississippi or other water course shall be divided among several proprietors, such ancient natural drains as have been obstructed by the owners of the adjacent lands; and to prescribe the mode to be observed in that respect; to cause any water course, which is not navigable, to be filled up, for the purpose of carrying the high ways over the same, provided that no injury be thereby occasioned to the neighboring inhabitants; and whenever an application made by twelve inhabitants of a town, suburb, or other place divided into house lots, or when a point of land on the Mississippi, or other water course, shall be divided among several proprietors, it shall be found necessary to dig one or more draining ditches, the said jury shall have power to ordain that the said ditches be dug at the expense of the owners of the lots, and that the expense be borne by a contribution among the owners, to be levied in such manner as the jury shall describe, *saving to individuals or persons aggrieved, the right of complaining of the making or opening of such natural or artificial drainings, when unnecessary or hurtful to them.*"

In pursuance of the powers thus delegated to the Police Jury, the ordinance in question was passed, of which the following are two of its sections, the only ones which we consider necessary to be noticed, viz:

"1st. Be it ordained, That there shall be a cut-off canal or common drain, to conduct the waters from the swamps or head waters of the Bayou Paul in "Manchac Point," the said canal to commence at the upper swamp and crossing the lower swamp in a direct line, to terminate in the Bayou Paul at its head, in the field of *Messrs. Gourier and Anger*, or in the canal of the same. Said bayou or canal shall then be enlarged to a sufficient capacity to carry off the waters until it reaches the bridge at the cut-off road. Said bridge to be lengthened, and the bayou or canal widened and deepened sufficiently to carry the water. Thence the bayou shall be enlarged by cutting off the points when found necessary, and taking straight cuts when advantageous to do so, on account of the bends in the bayou, so far as the point where the line ditch of *J. N. Brown* enters the bayou—thence the bayou to be cleared and enlarged until it reaches a point where the bayou is of sufficient capacity to carry off the waters without such cutting or enlargement.

4th. Be it ordained, That said commissioners be and are fully empowered to remove all obstructions which may be found to prevent or retain the flow of the waters on the Bayou Paul or any of its branches, as well as to open all ancient and natural drains which may have heretofore existed and which may have been obstructed by dams, fences or other obstacles thrown in and across the same."

It is contended by the plaintiff that such power could not be delegated by the Legislature to the Police Jury. The power of the legislative department of the government is supreme within its sphere. The only restriction to such power is prescribed by the Constitution. We do not think there is anything in the provisions of the Acts in question, which can be considered repugnant either to the letter or spirit of the Constitution. 11 An. 370.

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It is also urged, that the ordinance does not fall within the powers delegated to the Police Jury; that it ordains to be drained not only a point, but a portion of a bend on the Mississippi upon the other portion, and thus "inundate a large portion of the immense estate of the plaintiff, condemning the same to perpetual sterility"; for which no necessity is shown to exist, as required by the statute. Whether such necessity existed or not, it was a matter which belonged to the jurisdiction of the Police Jury, and we are bound to presume that it was properly and judiciously exercised by them. It was, therefore, for the plaintiff to show that the making or opening of the projected works was unnecessary or detrimental to him. This he has failed to show.

The other ground of illegality, that the ordinance expropriated the plaintiff and others without previous adequate indemnity, appears to us to be equally untenable.

Our attention has been drawn to several bills of exceptions in the record:

1. We do not think the Judge erred in sustaining the objection to the following question propounded by the plaintiff to several witnesses on the stand, viz: "Would not the removal of the dam, in the prong in *Avery's* field, have the effect of causing incalculable injury to yourselves, by the inundation of your plantations, and overflowing of other large and valuable plantations lying below *Mr. Avery*?"

The fact sought to be elicited from the witnesses, was neither pertinent nor material to the issue.

2. Neither was there any error in excluding the opinion of the Civil Engineer as to whether the right fork of the Bayou Paul was a natural outlet, or caused by a *crevasse*, or some sudden eruption of nature. Conceding it to have been caused by a *crevasse*, or some sudden eruption of nature, it was certainly not artificial.

3. The testimony of *William G. Waller* was sought to be excluded by the plaintiff, on the ground, that it tended to contradict the survey and report made by *Caldwell* as an officer of the court, which was inadmissible, especially as the defendants themselves had sustained said report by his testimony, and on that point had made him their own witness. We think the objection was correctly overruled by the Judge. We have not been referred to any law authorizing the exclusion of such testimony.

On the merits, we think the necessity or expediency of the projected work is clearly shown, the principal object of which was to reclaim a large body of land containing about 5,000 acres. In attaining that end, the question arises, will it prove detrimental to the plaintiff? If so, it is clear that he is entitled to relief.

Bayou Paul, it appears, has its source in a swamp. It runs eastward a distance of eight miles and twenty chains, and empties itself into the "Great Basin," bordering on Spanish Lake. The lands above are drained in a lake and the swamp in which it has its source, and the waters of both flow into it. The fall from the surface of the water in the lake above to the bottom of the "Great Basin," is nearly twelve feet. *Caldwell*, one of the surveyors, testifies that if the improvements were made as directed by the ordinance, they would be adequate to the drainage of the lands above, but not of those below *James N. Brown* and *K. McGavock*. The cutting of the canals would, in his opinion, shorten the incline plane of drainage so as to throw suddenly below a

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larger quantity of water than the bayou could contain and carry off. "This opinion, he says, is based on the hypothesis that no improvement will be made on the bayou below the lands of *McGarock*." Then, it may be inferred from this, that the execution of the work as directed by the ordinance, would avoid such a consequence. A careful examination of the evidence in connection with the map in the case, leads us to the conclusion that the plaintiff has failed to show sufficient grounds to entitle him to the relief which he seeks at our hands.

One of the means indicated by the ordinance for the accomplishment of the works in question, is, "to open all ancient natural drains which may have heretofore existed and which may have been obstructed by dams," &c. The right fork of the Bayou Paul, closed by the plaintiff's dam, is shown to have been "an ancient natural drain," more direct in its course to the "Great Basin," and equally, if not more, capacious than the other fork. It is no sufficient reason for the plaintiff to urge, that the erection of his dam was to prevent the overflow of his estate in consequence of canals which had been dug on the superior estates. His recourse was against those who had occasioned such overflow. The doctrine in the case of *Kilgore v. Grevenberg*, 10 An. 689, and the other cases cited, would then be applicable. But we think it is extremely doubtful whether such an effect would have been produced by the alleged canals. Even if it had, it appears to us that the closing of this drain could not have had the effect to avert such a consequence.

It is, therefore, ordered and decreed, that the judgment of the court below be affirmed, with costs.

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SAME CASE ON A RE-HEARING.

SPOFFORD, J. In refusing the re-hearing prayed for in this case, we remark that it will be the duty of the Police Jury to provide for the exit of the additional waters proposed to be drained through the right fork of Bayou Paul, in such a manner as not to overflow the lands of the plaintiff.

Their attempt to reclaim the swamp at Point Manchac, must not be allowed to bring the waters thence drained in a flood upon the plaintiff's lands. They must provide against injurious consequences to the plaintiff from their acts, or they will be liable in damages. The decision in this case cannot affect the right of the plaintiff to any legal remedies for injuries hereafter threatened or done to his property by the act or neglect of the Police Jury or others. If any expropriation of plaintiff's land becomes necessary, it must of course be effected according to law.

Re-hearing refused.

SUCCESSION OF WILLIAM PLUNKETT—On opposition of PERKINS, CAMPBELL & Co. and of W. B. McDANIEL.

Where the heirs have authorized the curator to settle up the affairs of the estate out of court, they have no reason to invoke the penal statute of 1837 against the curator.

The allegation by the curator that there was another heir in existence besides those whose authority he had, will not render his former acts unlawful, and subject him to the penalty of the statute.

Where a succession is accepted by the heirs purely and simply, the credits belonging to the succession are *ipso facto* and of full right by operation of law divided among the heirs.

Compensation takes place between a debtor of the succession and a creditor of one of the heirs, to the extent of the portion of such heir in the debt due to the succession by the individual creditor of such heir, and the heir cannot defeat the compensation by a transfer of his interest in the succession to a third person.

A creditor of the succession has the means of preventing the injurious effects of the compensation as between the heirs and the debtor of the succession, by demanding a separation of patrimony, by taking out letters of administration in proper time, or by enforcing the collection of his claim against the administrator or executor already appointed.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.* Benjamin, Bradford & Finney, and Eager & Dupuy, for opponents and appellants. George L. Bright and W. Christy, for curator and appellee.

MERRICK, C. J. Perkins, Campbell & Co., assignees of the interest of Joseph Plunkett, as heir to one-half of his father's succession, opposed the item of \$1,557 71, alleged in the account of the curator to have been paid by him to H. R. W. Hill, on account of a debt due him by said Joseph.

The ground of the opposition is, that the alleged payment was made after notice to the curator of the assignment of Joseph Plunkett's interest in his father's succession to the opponents.

Twenty per cent. interest is also claimed under the Statute of 1837.

The heirs (and those deriving rights from them and standing in their shoes) having authorized the curator to settle up the estate out of court, have no reason to invoke the penal statute, the violation of which they have induced.

It is clearly established:

1st. That the heirs, by an act under private signature, regulating the mode of partition of the estate between themselves, withholding certain property from sale and partitioning the slaves, authorized the curator to settle up the claims as soon as practicable, designating, in part, the manner in which he should act by recognizing a certain debt of \$1,000 against the estate.

2d. That the heirs verbally authorized the curator, in order to save expense, to take the affairs of the estate out of court and to settle up the same.

3d. That William and Joseph Plunkett authorized the curator, besides settling up the estate to pay their individual debts.

But it is said, as the curator afterwards denied in his proceedings, that these persons were the heirs, or sole heirs of the deceased, he is estopped now from saying that he administered under their directions as heirs. In our opinion, this is an incorrect application of the doctrine of estoppels; for the plaintiffs cannot recover, except they are heirs, or have the rights of heirs, and it is much more logical to hold that they themselves are estopped from asserting

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that they were not heirs when they authorized the acts of the curator than the contrary. Moreover, in the act referred to, partitioning certain property, the heirs say, that they are all the "known" heirs of the deceased, and the curator, in his answer, merely alleges that he has discovered that there is another, a fourth heir. By this answer, he does not make his former lawful acts unlawful. We see no reason, therefore, to inflict the penalties of the Act of 1837 upon the curator, for the benefit of parties who, through their authors, are *in pari delicto*.

In regard to the correctness or incorrectness of the decision of the lower court in allowing compensation to diminish the portion of the *Hill* debt coming to *Joseph Plunkett*, we are of opinion that the lower court did not err. The indebtedness of *Hill*, personally, to the estate, was, exclusive of interest, \$3,323 36. The one-half of *Joseph Plunkett*, as allowed him by the agreement of the co-heirs in their partition, was more than sufficient to discharge the debt due by *Joseph Plunkett* to *Hill*.

Did such compensation take place? If it did, the subsequent settlement by a curator as the agent of the heirs in conformity to law, cannot operate to the prejudice of the curator; for the whole theory of this branch of the law rests upon the tacit regulation of accounts as to debtor and creditor between the parties. 7 Toul. No. 343.

If *Joseph Plunkett*, therefore, was the creditor of *Hill* for one-half of \$3,323 36, the \$1,557 71 which *Hill* owed him, was compensated, and could not be collected, for it is evident that *Joseph Plunkett's* assignee could have no greater right than he himself had. Then *Hill* could not equitably have been compelled to pay to *Joseph* the whole debt without deducting the amount due by him to the former, nor could the latter have deprived *Hill* of his plea in compensation by a transfer of his interest in the succession, and *Perkins, Campbell & Co.* do not stand in a more favorable position to the estate, than their vendor. *Dees v. Tildon*, 2 An. 414.

Now, by the death of *William Plunkett, Senior*, and by the acceptance of his heirs purely and simply, the credits belonging to his succession were *ipso facto*, and of full right, by operation of law, divided among his heirs. C. C. 2107; 6 Toul. No. 752. The principle of law upon which divisibility of debts reposes is said, by the author just cited, to be as ancient as the twelve tables.

He illustrates the manner in which the division takes place as follows, viz:

No. 753. "Il en résulte que si le créancier et le débiteur ont l'un et l'autre laissé plusieurs héritiers, chacun des héritiers du premier ne pourra demander à chacun des héritiers du second que sa portion dans la dette de celui-ci. Supposons la dette de 8,000 fr. Le créancier et le débiteur meurent laissant, chacun quatre héritiers. La créance de chacun des héritiers du premier, la dette de chacun des héritiers du second est de 2,000 fr.; mais chacun des créanciers ne peut demander à chacun des débiteurs, et chacun des débiteurs ne peut payer à chacun des créanciers, que le quart de sa dette, c'est-à-dire 500 fr., et non 2,000 fr., car cette dette se divise de plein droit contre les quatre héritiers du créancier primitif." See also Pothier on Ob., No. 300.

The reciprocal relationship of debtor and creditor existed therefore between *Joseph Plunkett* and *Hill*, unless there was something in the relation in which *Joseph Plunkett* stood towards the succession which prevented the operation of compensation. We find nothing of the kind in the record. On the contra-

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ry, the heirs had accepted the succession purely and simply by authorizing the curator to settle the estate under their power of attorney, and more especially by making a partition of the slaves among themselves. C. C. 982, 1180. They are, therefore, forever precluded from saying they were not heirs; that all legal consequences did not flow from their acceptance of the succession, and that compensation as one of those consequences has not actually taken place. C. C. 2203.

Toullier, in another place says: "The heir represents the person of the deceased. He is, at the opening of the succession, seized of all of his rights, active or passive, which are then confounded in his person, if he is the only heir, and for his virile share, if there are several.

"The compensation of that which is due to the intestate, with that which is due by the heir, or to the heir, takes effect of *pleno jure* at the instant of the death, the period to which the acceptance of the inheritance always refers." 7 Toul., No. 380.

This doctrine was sanctioned by the Supreme Court in the case of *Martin's Heirs v. Overton*, (1 N. S. 586,) and *Buard v. Buard's Heirs*. 5 N. S., 135.

We think therefore, that the judgment should not only, not be reversed as against the curator, but that it ought to be amended in his favor, so as to relieve him of the twenty per cent. interest decreed against him.

The creditor of a succession has the means of preventing the injurious effect of the compensation as between the heir and the debtor of the succession by demanding a separation of patrimony, by taking out titles of administration or curatorship in proper time, or by enforcing the collection of his claims against the administrator, curator or executor, already appointed. C. C., 1397, 1403.

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the lower court be so amended as also to relieve and exonerate the said *William Christy*, curator, from the payment of twenty per cent interest upon the sum of \$3,169 10, from the 29th day of June, 1856, therein decreed, and that said judgment, so amended, be affirmed, the appellants paying the costs of the appeal.

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HENRY KEANE, (HUGH KENNEDY Ex'r substituted,) v. GOLDSMITH, HARRIS & Co.

A contract with the surety of a creditor to indemnify the surety against the consequences of his suretyship is, in its nature, a contract of personal warranty, recognized by Articles 573 and 574 of the Code of Practice.

A right of action against one who has come under such obligation, accrues to the surety as soon as he has been condemned by a final judgment to pay the creditor, and it is not necessary that he should have paid the judgment to entitle him to proceed against one who was thus bound to indemnify him.

APPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*H. C. Miller and F. H. Clack*, for plaintiff, and appellant. *J. A. Basie*, for defendants.

MERRICK, C. J. This suit is brought by the plaintiff as the transferee of Isaac Hart upon the following agreement:

"KEANE vs. FISHER,—Fifth District Court of New Orleans."

"We hereby agree and bind ourselves to protect Mr. Isaac Hart as surety for Fisher, in the above entitled suit, and desire that Mr. Hart should defend himself against this suit, and if necessary, take an appeal to the Supreme Court, and we bind ourselves *in solido* to protect him fully, including costs and all incidental expenses.

"New Orleans, April 7, 1853.

(Signed) "GOLDSMITH, HABER & Co."

It appears by plaintiff's petition, that judgment was rendered against Hart, as surety for Fisher, on the bond by this court, for \$2,000 and interest; and that Hart transferred the above obligation against Goldsmith, Haber & Co., to the plaintiff.

The defendants excepted to the plaintiff's petition on the ground that it disclosed no cause of action against the defendants. This exception was sustained. The defendants urge that Hart, as surety, must first pay the debt to Keane before he can acquire a right of action against them, which he can transfer; that suretyship cannot be extended from one person to another; and that if the transfer was valid, no action could be maintained against the defendants until notice had been given them, according to Article No. 2613 of the Civil Code.

The defendants are not strictly the sureties of a surety, the *fide jussoris collaudatores*, of Article 3007, of the Civil Code. The surety of the surety contracts with the creditor for the security of the latter, and on payment becomes *ipso facto* subrogated to his, the creditor's, right, besides having his action of mandate or *negotiorum gestorum*, or *de in rem verso* against the debtors, according as his obligation has been entered into with the consent, or without the knowledge, or against the will of such debtor. Here the contract is with the surety, to indemnify him against the consequences of his having entered into the obligation of suretyship with the creditor, and the very exception taken by the defendants pre-supposes that the contract does not, in itself, give the creditor a right of action.

The contract is in its nature, one of personal warranty, recognized by Articles 378 and 379, of the Code of Practice. The defendants bound themselves to protect Hart fully against the consequences of his obligation as surety to Keane. Hart, according to plaintiff's petition, has been fixed as surety for Fisher in the sum of two thousand dollars by the final judgment of a court of the last resort. Now the defendants cannot fully protect Hart without paying the judgment rendered against him, or furnishing him with money to pay the same himself. We discover no good reason why Hart could not transfer his cause of action to the plaintiff if he found it his interest so to do. C. C. 1992, 1994; 9 Ann. 463; Art. 2613, of the Civil Code, is for the protection of third persons, and the only notice the defendants were entitled to previous to the institution of the suit, was the amicable demand, the want of which they have not pleaded.

The judgment of the lower court must be reversed, and the defendants must have an opportunity of traversing the facts alleged in plaintiff's petition which have been taken as true on the exception.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, that the defendant's exception be over-ruled, and that this case be remanded to the lower court, there to be proceeded in according to law, the defendants and appellants paying the costs of this appeal.

SPOFFORD, J., concurring. I concur in the opinion that the exception should be over-ruled.

*Keane*, it is true, has no greater right than his assignor, *Hart*, had. But from the peculiar phraseology of the instrument sued on, it will be seen that it is a promise of *general indemnity*. The promisors, *Goldsmith, Haber & Co.*, covenanting to protect the promisee, *Hart*, fully, for resisting a certain suit, including all costs and incidental expenses.

There was therefore, a breach of the agreement so soon as the liability of *Hart* was fixed by a judgment, and *Goldsmith, Haber & Co.* failed to take his place and satisfy it, including costs and expenses. That breach gave *Hart* a right of action. The right of action was veritable, and therefore assignable. It has been assigned to *Keane*, the party who, in equity, ought to have the money. Perhaps if *Hart* himself, had sued, the court might have been called upon to see that the funds, when collected, should be applied to the satisfaction of the judgment against *Hart*, in favor of *Keane*. The rule generally is, that a party suing upon an indemnity against the payment of money merely, must prove payment, or something equivalent, before he can maintain his action. But upon a promise of general indemnity, a judgment against the promisee is evidence in a suit against the promisor, without proof of payment by the promisee. See *State v. Kimmel*, 8 Watts, 157; *Carman v. Noble*, 9 Barr, 366; *Smith v. Eubanks*, 9 Yerger, 20.

SUCCESSION OF JOHN GILMORE, ARABELLA BAILY v. B. BAILY, HER HUSBAND,  
SUSAN HUBBS, Intervenor.

A judgment signed before a motion for a new trial is overruled, cannot be considered as having its effect until the motion is disposed of.

When the wife's paraphernal property was sold and negotiable notes taken for the price, payable to the husband, on which the husband sued the makers, and obtained judgment against them in his own name for the amount of the notes, it was held that the legal ownership of the judgment was in the husband—that the original notes were merged in and novated by the judgment, and that the judgment might be compensated by any debts equally liquidated due by the husband to the judgment debtor.

The knowledge on the part of the judgment debtor, that the notes on which the judgment was obtained was the property of the wife, would not prevent the compensation from taking place at any time while the legal ownership of the judgment remained in the husband.

APPEAL from the District Court of East Baton Rouge, *Robertson, J.*  
*Joseph Poor*, for appellants. *Felix R. Brunot*, for appellees.

MERRICK, C. J. A motion to dismiss the appeal has been filed in this case.

The judgment was pronounced in June, 1855. Before it became final, the appellants filed a motion for a new trial, which was not disposed of at that time, but submitted to the court without argument at the February term, 1856, and the same day it was overruled.

The appellants then applied for a devolutive appeal, which was allowed them, returnable to the present term of the Supreme Court.

The judgment appealed from, purports to have been signed on the 15th day of June, 1855, and the appeal bond was not filed until January, 1857, more than one year from the supposed signature to the judgment, and within the year from the overruling of the motion for a new trial.

It was the duty of the District Judge to have considered the motion for a new trial at the same term at which the judgment was rendered, and either to have overruled or granted the same. But it was irregular to sign the judgment until the motion for a new trial was determined.

We think the judgment cannot be considered as having its effect, and must be considered as suspended until the motion for a new trial was overruled. The neglect of the judge to perform his duties ought not to prejudice the parties who had a right to be heard on the motion. C. P. 557, 558, 563, 913.

The motion therefore to dismiss the appeal is overruled.

The merits of the case present but a single question which arises out of the following state of facts, viz :

*John and Mary Gilmore* died leaving five children, minors, and an estate consisting of a plantation and slaves, &c. *Bernard Baily* was appointed in 1841, tutor to the minors *Arabella Gilmore, John A. Gilmore, Emeline Gilmore, Ann Gilmore and Susan Gilmore*. He appears to have married his ward *Arabella*. She, with the assistance of her husband, in 1849, sold her interest in the succession of her parents, to *John A. and Emeline Gilmore*, her brother and sister, the notes given as the price being made payable to the order of her husband. She and her husband appear shortly afterwards to have moved to Illinois, where they now reside. *Emeline Gilmore* married *H. C. Finley*. *Bernard Baily* failing in collecting the notes at maturity, instituted a suit on them in his own name, and recovered judgment in April, 1853, against *Mrs. Finley and John A. Gilmore*, in solido, wherein the mortgage upon the property sold was recognized.

In May following, *Susan Gilmore*, wife of *Charles Hubbs*, filed her petition against *Bernard Baily*, to compel him to render his account as tutor.

He filed his account. *Mrs. Hubbs, Mrs. Baily and John A. Gilmore*, filed opposition to the same. *Mrs. Hubbs* considering the account to show a balance in her favor as stated, to the amount of \$1,305 05, besides filing her opposition claiming a large amount, sued out a writ of attachment, which was levied the second day of January, 1854, by attaching in the hands of *John D. Baker, James M. Brunot*, attorneys for *Bernard Baily, John A. Gilmore and Andrew C. Finley*, all moneys, rights, credits or property of any kind, which they had at that time or thereafter might have, belonging to *Bernard Baily*, tutor, or an amount sufficient to pay said *Susan Gilmore*, wife of *Charles Hubbs*, plaintiff, in the sum of \$1,305 05, and costs.

The curator *ad hoc*, appointed to represent *Baily*, answered the suit of attachment, alleging that the property attached was not the property of *Baily*, but belonged to his wife for whom he was merely acting as agent.

*Mrs. Arabella Baily* intervened in the attachment suit, alleging that her husband had no property in Louisiana, and averring that *Mrs. Susan Hubbs* and her husband had, notwithstanding, proceeded to attach a judgment obtained in the name of her husband, *Bernard Baily*, against *John A. Gilmore*

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and *Emeline Gilmore* and husband, *Andrew Finley*, standing in the name of her said husband. She further alleged, that her husband was in embarrassed circumstances, and that she had already instituted a suit against him for a separation of property. She prayed for an injunction to restrain her husband from receiving the amount due on the judgment. This intervention was filed 18th April, 1854. Her suit for a separation of property was commenced April 10, 1854, by the appointment of a curator *ad hoc*, to represent her husband, she representing her and her husband's residence to be Peoria, in the State of Illinois. She alleged that the said judgment obtained in the name of her husband against *Mrs. Finley* and *John A. Gilmore*, to be her separate property,—alleged that she was in danger of losing the same on account of an attachment levied on the same by her sister, *Susan Hubbs*, and on account of the pretensions of other persons having claims against her husband, and averred that *Andrew C. Finley* had enjoined the execution of said judgment as the property of her said husband. She prays that *Hubbs* and wife, and *Andrew C. Finley*, be cited as parties, and that the judgment against *Mrs. Finley* and *John A. Gilmore*, be decreed to be her property, &c. *John A. Gilmore* and *Emeline Gilmore* intervened, and alleged that they had claims against the said *Bernard Baily* arising from his account as tutor, but that as they have filed an opposition to the same, they are unable to state the exact amount due them, but it is more than sufficient to compensate the judgment obtained by *Bernard Baily* against them. On the opposition to the tutor's account, judgment was rendered in favor of *Mrs. Finley*, and *John A. Gilmore*, for \$2,047 27, each.

The Judge of the District Court, in the suit of *Mrs. Baily* against her husband, considering the judgment in the name of *Bernard Baily* as her property, dissolved the attachment, rejected the claims in compensation, and decreed *Mrs. Baily* to be the owner of the judgment in suit No. 1108.

*John A. Gilmore* and *Mrs. Finley* alone perfected their appeal by giving bond. *Mrs. Hubbs* is not before us. The question presented by the appellants is, did the judge err in holding that the judgment was the absolute property of the wife, although obtained in the name of the husband? Where the wife permits her husband to administer her paraphernal property, we see no reason why he should not be considered in relation to her commercial paper in his hands as any other agent. He may collect a debt due her and give a valid receipt in his own name. C. C. 2362; 12 Rob. 525. He may treat a note which he has taken on account of her paraphernal property as his own, transfer it or institute suit on it as owner. *Thibodeaux v. Thibodeaux*, 19 L. R. 440, *arguendo*.

Considering then, that *Bernard Baily* as the agent of his wife, in regard to the promissory note which he had taken in his own name, might recover judgment upon them, such judgment must have as great an effect against the principal as a judgment obtained by any other agent in his own name upon commercial paper belonging to another.

It has long been settled, that the effect to be given to such judgment upon the question of ownership, is that of the thing adjudged. In *Shaw v. Thompson*, 3 N. S. 392, the court said, "the suit appears to have been brought by the persons having the legal interest in the instrument sued on. Whether they were the owners or not, was a matter with which the defendant had nothing to do as the judgment here, formed *res judicata* against any other who might hereafter have claimed an interest in it."

In the case of *Mitaine v. Ferguson*, 18 L. R. 94, the court said that it was immaterial to the defendant, "whether the plaintiff recovers for his individual benefit, or as the agent of another; as the judgment will have the effect of *res judicata* against any one who might hereafter claim an interest in the note." See also 4 L. R. 220.

Whatever claim therefore, *Mrs. Baily* had against *John A. Gilmore* and *Mrs. Finley*, was merged in, and novated by the judgment in the name of her husband against them; the mortgage no less than the notes secured by it. *Dennis v. Payne*, 7 Ann. 334. The judgment was no longer the note, and much less the undivided fifth part of the succession of *John A. Gilmore*.

The consequences growing from the legal ownership of the judgment by *Baily*, were, that it was subject to be attached or seized at the suit of his creditors; he is capable of transferring or releasing it, as well as receiving payment, and the judgment might be compensated by any debts due by him to either of his judgment debtors, provided the same were equally liquidated.

But nothing prevents a judgment creditor from transferring his judgment to a third person, *a fortiori*, he may transfer it to his principal and when notified to the debtor, such transfer will be binding upon him. So also the principal may institute his action against the agent who has obtained a judgment in his own name, to compel him to transfer the judgment to him as the equitable owner of the same, and from the date of the notification of the suit, the judgment debtor would, we think, be precluded from acquiring any rights tending to defeat the claim of the principal, although he might lawfully liquidate any demand he might have against the judgment creditor, and even make payment (unless the judgment creditor should be enjoined from receiving payment) up to the time that the transfer of the judgment should be decreed, and compensation and payment would have their effect.

For up to the time that the transfer of the judgment should be decreed, the legal ownership must, under the authorities cited, be held to be in the judgment creditor, and, as a consequence, he may receive payment, and his judgment must be subject to compensation arising from any demand which becomes liquidated before such title has passed out of the judgment creditor by the decree.

The reason of the rule is this: a judgment debtor is not to be subjected to the hazard of a litigation between the judgment creditor and a third party, claiming the ownership of the judgment, which, after all, may prove unavailing; but he may at once relieve himself by making payment to him who holds the judgment rendered upon the commercial paper, and which has the effect of *res judicata* against all others. C. C. 2135.

So too, it would be unreasonable to prevent the judgment debtor from liquidating his demand (originating prior to notice,) against the judgment creditor, and obtaining the benefit of compensation taking effect by operation of law, so long as the legal title to the judgment remains in him. C. C. 2204, 2206, 2207.

But it is said that good faith is the basis of compensation, and that the plaintiff's brother and sister knew that the notes were given as the price of plaintiff's interest in the plantation, and therefore they cannot be permitted to liquidate a demand against *Bailey* and compensate his judgment by such liquidated demand, although acquired when his ownership of the judgment was unquestioned,

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There would be much force in this argument if such knowledge could have been in any manner made available to them. On the contrary, it will appear by numerous decisions of this tribunal that a plea, that the note belonged to the plaintiff, would have been utterly unavailing against the action of the plaintiff's husband on the note. See cases cited under No. 10, Hennen's Dig. p. 183.

It is true, as urged by the appellees counsel, that the wife cannot become a surety for the payment of the debts of her husband, but if she aid her husband in converting her estate into negotiable paper, or cash, so that he can use it without any indorsement or contract on her part, it is her own fault and she must blame herself if he uses such paper or cash in the payment of his debts, and if other people act on the confidence which her own conduct inspires, third persons may presume that the wife intended to rely upon her tacit mortgage, or upon a re-investment of her paraphernal funds in some other way, or that the husband has already transferred to the wife other property in payment. C. C. 2121. As the debtor cannot prevent the husband, or any subsequent holder, from recovering judgment upon the negotiable paper, payable to the order of the husband, so they ought not to be deprived of such legal consequences in their favor as arise from the judgment itself.

To assume that the institution of the suit by the wife to have the judgment standing in her husband's name adjudicated to her, was but the resumption of the administration of her paraphernal property, is a *petitio principii*, which we think we have sufficiently answered, by showing that the original note merged in and was novated by the judgment, and that it became, so far as it concerns the defendants, the absolute property of the judgment creditor, and that it is subject to attachment and seizure, and may be paid and compensated as his. In fine, that such judgment is as much the property of the husband as any other piece of property of which he holds the *indicia* of ownership. C. P. 548.

It does not appear to us, that the conclusions to which we have arrived in this case, violate natural equity. The plaintiff and her husband have established their domicile in another and distant State, and have doubtless withdrawn their means from Louisiana as far as possible. The husband seems to have carried with him, the money of the plaintiffs' brother and sister, obtained by him while exercising the sacred trust of guardian. The wife allowed him, while here, the unlimited control of her commercial paper, and suffered it to be declared his, by a court of justice. The decree which we shall pronounce, will merely declare that the judgment, to a certain extent, shall be compensated as his, and leave the wife the more convenient resort of the courts of her own domicile to enforce the residue of her claims against the husband.

Whether a wife domiciled with her husband in another State can institute an action for the recovery or separation of property in Louisiana by means of a curator *ad hoc* appointed to represent him, is a question in which these appellants have no interest, further than to be allowed their credits upon the judgment.

The judgment of the lower court on the contest upon the account, liquidating the amount due by *Bernard Bailly* to *Mrs. Finley* and *John A. Gilmore* at \$2,047 27 each—signed the 19th day of June—appears to have been acquiesced in by the parties thereto. The judgment obtained by *Bernard Bailly* against them *in solido*, in suit No. 1103, for the sum of six thousand dollars and interest, as

therein stated, is compensated by said two sums of \$2,047 27, to the extent of four thousand and ninety-four dollars and fifty-four cents, as of June 19, 1856, and the said plaintiff is entitled to be considered the owner and transferee of said judgment in said suit No. 1103, of said Sixth District Court, in and for the Parish of East Baton Rouge, for the remainder due thereon.

It is therefore ordered, adjudged and decreed, by the court, that the judgment of the lower court be so amended as to decree that said judgment in said suit No. 1103, against said *Emeline Gilmore*, wife of *A. C. Finley*, and *John A. Gilmore*, in the Sixth District Court, in and for the Parish of East Baton Rouge, be entitled to a further credit of four thousand and ninety-four dollars and fifty-four cents, as of June 19, 1856, in compensation of the sum of \$2,047 27, due each of said defendants by said judgment against *Bernard Bailly*; and that said judgment in said suit No. 1103, so credited, be decreed to belong to said *Arabella Bailly*, and that her right to recover from her said husband said sum of \$4,094 54, be reserved her, and that the judgment of the lower court so amended be affirmed, the plaintiffs and appellees paying the costs of the appeal.

STOFFORD, J., dissenting. It cannot be pretended, that when *Mrs. Bailly* sold the paraphernal property to her co-heirs, the appellants, and the latter gave their notes for the price payable to the husband, that the notes became absolutely his property. He held them simply in his capacity as administrator of his wife's paraphernal estate, or as her mandatory. The appellants, the co-heirs, who bought her property and gave a mortgage in her favor to secure the notes payable to her husband, *knew* that the notes were hers. When the husband sued on them, they *knew* that it was in that capacity that he sued, for the husband and wife cannot contract with each other, at least she could not sell her paraphernal property to him, pending the marriage. The judgment was therefore still the wife's paraphernal property, standing in the name of her husband as her mandatory, and to the knowledge of the judgment debtors.

For the purposes of this case, it might be conceded that, so long as she chose to leave the control of her separate estate to him, the judgment debtors could discharge themselves by compensating against the judgment, their claims against him personally, but surely no longer. She could, at any moment, lawfully revoke his agency, and resume the control of this judgment, as part of her paraphernal estate. From the instant she gave notice to the judgment debtors that she had resumed the management of her separate property including the judgment, it seems to me too clear for argument, that the debtors could not be permitted to go forward and liquidate a claim they held against her husband individually, in order to plead it in compensation against the judgment which, in truth and to their knowledge, always belonged to the wife, and of which she had notified them that she had resumed the administration. It strikes me that the opposite doctrine would introduce discord into a system of law which, perhaps, goes further than any other towards protecting the property of married women, and it would also, in my judgment, be inconsistent with the old and sacred principle that compensation has its basis in good faith.

Now it appears that in April, 1854, the plaintiff availed herself of the legal right to resume the administration of her paraphernal property, and notified the appellants in the most formal and emphatic manner by judicial proceedings contradictorily with them claiming the judgment, that she had done so.

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It is not pretended that the judgment was *then* in any part extinguished by compensation; indeed, it was legally impossible, for up to that time the appellants had no liquidated claim against her husband. After she had resumed control of this judgment, confessedly her property, to the knowledge of the judgment debtors, and after she had notified them of the resumption, what right had they to go forward and liquidate an unliquidated claim of theirs against her husband personally, in order to pay her off with it, and thus in effect make her a surety for his debts?

I think, with the District Judge, that such a proceeding was inadmissible, and that as the judgment was in no part paid or compensated at the date when the wife notified the appellants that she had resumed control of it, it cannot now be compensated by her husband's debts to them, which were not liquidated till long after such notification.

I think the judgment should be affirmed.

VOORHIES, J., concurs in this opinion.

#### STATE OF LOUISIANA v. LOUISIANA SAVINGS COMPANY.

The Act of the Legislature incorporating the Louisiana Savings Company, was not intended to create a banking institution; it conferred no power to issue notes for circulation, and the laws relative to banking corporations are not applicable to such an institution.

The business of a Savings Company is of such a character that temporary suspension of payment which is almost necessarily connected with its organization, and must have been contemplated by the Legislature, cannot be regarded as an absolute cause of forfeiture. A fraudulent suspension of payment or gross negligence in loaning money without sufficient guaranty by which temporary suspension of payment might ensue, would be different.

From the peculiar nature of the charter of the company, it was held: That the closing of the doors, the cessation of business and the temporary suspension of the company for a few days, were not sufficient causes for forfeiture.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J.*

*E. W. Moise*, Attorney General, for the State. *L. Hunton*, for defendant and appellant.

COLE, J. (SPOFFORD, J., and VOORHIES, J., dissenting.) On the 3d March, 1856, the Commissioners (or Trustees) of the Louisiana Savings Company, notified the public, they deemed it their duty to place in liquidation the affairs of the institution; that its liabilities did not exceed \$50,000, and the assets would realize about \$45,000, although they were nominally more. They were induced to do this by a sudden panic, caused by the rumor that the President of the company, *William H. Garland*, would probably be arrested for alleged defalcation as Treasurer of the city of New Orleans, and also by a mistake in relation to the accounts of *Garland* with the company, he being really their creditor instead of their debtor.

Contemporaneous with this rumor, a large amount of deposits were withdrawn without notice, although a part so taken was upon interest, and previ-

ous notice might have been required. An open credit with the Bank of Orleans was also suddenly withdrawn without notice.

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On the 8th of March, 1856, the public was informed that the institution was then fully prepared to resume business and meet all its engagements, whether for its deposits on time or on call, and that the office would open on Monday, 10th inst.

This institution was thus closed from the 3d to the 10th of March, a period of seven days, and for that time ceased receiving or paying deposits.

On the 15th of April, 1856, this proceeding was instituted by the Attorney General, for the forfeiture of the charter granted by the General Assembly of the State, by an Act approved March 16th, 1854. Session Acts of 1854, page 163.

The reasons for which the privileges conferred by the charter are alleged to be forfeited are, that by said notice of March 3d, the Directors deliberately and wilfully closed the doors of the institution, refused to receive or pay deposits, announced its insolvency, and its purpose to go into liquidation; that the "scope and object" of the incorporation were defeated by the said conduct of the company in closing its doors and giving the notice that the end for which the franchises had been granted was perverted, and its corporate franchises had become forfeited by misuses and abuse.

There was judgment in the lower court, decreeing the forfeiture of the charter.

Before entering upon the argument to show that this judgment is erroneous, we will make some general remarks in answer to some of the reasons which have been urged in its favor.

It is averred, that the misuse and abuse of corporate functions, when they are such as are contemplated by Article 438 of the Civil Code, are sufficient grounds upon which to declare the forfeiture of an Act of incorporation.

This is not denied, but such misuse and abuse must be of that grave character which is intended by that Article.

No wise jurist and no good citizen can pretend that a slight misuse or abuse of corporate functions, is a valid cause of forfeiture; if such a doctrine should obtain, then suits might be instituted against our banks for the most minute variation from rigid canons of correct administration.

Imperfections appertain to humanity, and it is not to be presumed that the lawgiver expected that corporations would be exempt from the general rule; as they are managed by human beings, it is to be supposed that some acts of the Directors may be liable to slight animadversion; but if the dogma of perfection is to prevail, then there would constantly be proceedings instituted for the forfeitures of charters of banks, which would produce depreciation of stock, loss by holders of their bills, a stringency in the money market, and a general financial derangement.

It is also asserted that it is a tacit condition of every Act of incorporation, that its scope and designs shall be carried out. We admit this to be correct, but the admission is not to be supposed to convey the doctrine that the scope and design of incorporation must always be perfectly accomplished, otherwise, that forfeiture shall follow. This would again be the adoption of the canon of perfection, which would create the disastrous results just portrayed.

It is suggested that the object of this Savings Institution, is *alone* to benefit the more humble classes of society, and not its administrators. This corpora-

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tion received its charter from the Legislature, and the object of the grant was to advance the interests of the laboring classes; but did ever any legislator imagine that all those who applied to be incorporated, in order to carry out some great work of public amelioration or to benefit a part of the public, were pure philanthropists and expected no personal benefit!

In this age, almost all important operations are conducted by corporations. The Savings Institute, like many other corporate bodies, is intended to benefit the laboring classes, and also those who conduct it; it is not an eleemosynary corporation; persons may deposit their funds, but the principal advantage of depositing is to receive an interest on the deposits, and the trustees have the right to expect to be recompensed for their trouble in superintending its affairs in the event their operations are successful.

It is alleged, that the charter of this company ought to be forfeited, if, after an important ordeal, it should appear that any part of the entire capital deposited had been lost, or if depositors were not always paid, at the times stipulated, the principal and interest of their deposits; this doctrine is also without any sound legal basis, so far as this institution is concerned, for we shall demonstrate hereafter, that the very nature of this charter raises the presumption, that this company may not always be able to meet its obligations, and without being subjected to any penalty therefor.

It is also said that the assets, two years after the company had been in operation, were not sufficient to pay ninety cents in the dollar upon its liabilities. Admitting such to have been the case, yet it is not shown this was owing to any fault of the trustees; on the contrary, it is to be attributed to the costs of keeping up an institution of this kind in the infancy of its career, and to a depreciation of the bonds of the city of New Orleans, twelve of which were in the possession of the company and estimated in the list of assets at \$12,000, although their market value then was about \$9,000; besides, as the company had to invest money in these bonds, then as long as it complied with the requisites of its charter in investing its money, and its action was characterized by prudence and skill, forfeiture cannot follow in the event the investments are not profitable.

By the statement of the company published March 4th, 1856, the difference between its assets and liabilities, exclusive of interest due depositors and house rent, was \$1,278 11; add to this, \$1,542 00, the amount the Directors thought that *Garland* owed, which, however, he did not, and it will make \$2,820, which, with the depreciation of the city bonds, was the total difference between the assets and liabilities of the company on the 4th of March, 1856, less house rent, interest on deposits, and whatever amount might be due *Garland*, all of which, however, could not have been much, for if they had been, the Attorney General would have established the amount in the lower court. When it is remembered that the company had been in existence but two years, this difference between the assets and liabilities is very little, and independent of the depreciation of the bonds, it was caused by the necessary expenditures for such an institution before sufficient interest could accrue to meet them.

It is also urged, that in order to have resumed business, "the Directors must have made good the deficit in these assets out of their private funds," and that the life of the company ought not to be prolonged in order to give the Directors an opportunity to reimburse themselves by anticipated profits for the

money they may have advanced it. But certainly the State ought not to act as a cruel tyrant, who invites his friends to a feast only to make their deaths more bitter. An institution of this kind, from its very nature, cannot, for three or four years, realize profits sufficient to meet all its liabilities on demand, and there must necessarily be for that time an excess of expenses over profits; if, then, forfeiture must follow for this, where would be the justice or humanity to incorporate an institution which must, from its nature, be unable, if its credit is temporarily destroyed, to meet all its liabilities on demand!

There would be no policy in thus forfeiting the charter either as to the Directors, the public or depositors. It would be a direct injury to the laboring classes, for it would prevent the establishment of similar institutions.

It is also urged, that a judgment of forfeiture "would involve in losses consequent upon the liquidation, all the depositors and others connected with this institution." Yet this is only what would always be the case with every Savings Company, if it was obliged, after being in existence but two years, suddenly to wind up its affairs, for, as it is alleged in the statement of the Trustees, "few establishments of this kind have ever earned their expenses within the first three or four years."

It is also averred, that there was great carelessness in the manner in which the books were kept, because there were mistakes made as to the *Garland* account; but in the lower court there was no attempt to show that the affairs of the company had not been managed with skill, and the Attorney General relied alone in his petition on the notice of the 3d of March. If one mistake proves extraordinary negligence, where is the bank or mercantile house that would escape censure?

It is also objected, that it is not shown, that any inevitable or temporary misfortune occasioned the state of affairs exhibited by the notice of the 3d of March. In answer to this, we would say, that previous to and at the time of this notice, there was much excitement in the public mind. *Mr. Garland* had been President of the institution, great confidence had been reposed in him, and when such serious accusations were made against his reputation, it was natural to suppose that he might have made use of the bonds of the company or its notes, to which he might have had access. This panic caused the Bank of Orleans to withdraw an open credit that this institution had to overdraw, up to \$10,000, and depositors withdrew on the 1st of March, 1856, \$19,751 44, without notice, and although a part so withdrawn was upon interest. Which of our corporations or mercantile houses would not be in the same state as this institution was on the 3d of March, if their credits with the banks, and their friends in different parts of the world was suddenly stopped?

It is also asserted that it is not established, that the condition of the assets had improved at the time of the trial in the lower court, and that the public avowal of its insolvency has not been rebutted nor withdrawn.

This is answered by reference to the notice of 8th of March, 1856, which announces that the "institution is now fully prepared to resume business and to meet all its engagements, whether for its deposits on time or on call."

This is assuredly a rebuttal and withdrawal of the avowal of its insolvency; besides, the petition is based entirely on the notice and not on any subsequent action of the company, and the answer avers that since the notice of March 8th, the company continued to transact business, and to exercise its corporate

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privileges, and that by said notice of March 3d and the cessation of business, neither the public nor any individual depositor or creditor of the company suffered any loss, and notwithstanding this averment, the Attorney General did not attempt to contradict it.

Having thus answered some of the arguments in favor of the forfeiture, we shall now proceed to establish that the grounds upon which this forfeiture is demanded, are not sufficient to authorize it.

In order to succeed in this proceeding, the State must establish the violation of a law by the company, which requires the forfeiture on account of the infraction. If no ordinance or statute has been infringed, a tribunal of justice cannot then punish. Courts cannot create laws—their province is to interpret them and ordain their execution; the coalition of the legislative and judicial functions is adverse to our political system, to every republican principle, and to the weal of the people. This corporation cannot then be dissolved, unless it had done that which is forbidden, either by its charter, by some provisions of law, or which is of such a character and so detrimental to public good, that although there is no positive statute, the nature and essence of corporations demand that forfeiture should follow; but such tacit recognition of the necessity of forfeiture must be clear to the common sense of mankind and not the sequence of scholastic logic.

Let us first consider the nature of the charge; it is of a two fold character. The first part of it is, that the company closed its doors, or ceased paying and receiving deposits for seven days, to wit, from the 3d to the 10th March. The second part of the charge is, that it was in a state of insolvency.

The first part of the charge is no cause for forfeiture, for the charter has not ordained how many days in the week the institution must be opened; this is left to the Trustees, and they could, in their by-laws, have enacted their doors should be open but once a week. If then they could have adopted that this as a general rule, then the mere cessation of business for one week, by the notice of March 3d, cannot forfeit the charter.

The closing of the doors for seven days, under the circumstances is not such a *non-user*, or neglect to exercise corporate privileges, for which the charter ought to be forfeited; it is not in this case such an abuse of privileges and refusal to complete the conditions on which such privileges were granted, as is contemplated by Article 438 of the Civil Code.

The second part of the charge is, that the corporation was in a state of insolvency. As this alleged insolvency was not evidenced by any overt act, such as a return of "*nulla bona*," a judgment or even a protest, the true question for our present investigation is, whether a temporary suspension of payment under the circumstances of this case, is a sufficient ground of forfeiture?

The rigid rules of our laws relative to banking operations are not applicable to this case; they relate to offices of discount, deposit and circulation. This institution is not a "bank" in the sense of the statute, and it is clear, that the Legislature did not intend to incorporate a bank; the act authorises a corporation and calls it a corporation and not a bank, and it has no power to issue notes for circulation. It is evident that the statutes, regarding banking corporations, do not govern the case at bar.

When the nature of this institution is considered, temporary suspension of payment appears to be almost necessarily connected with its organization, and if so, it is not then an absolute cause of forfeiture. In order to comprehend its nature, its privileges must be examined. The act of incorporation grants no power besides those common to all corporations, except to receive money, from one dime and upwards, on deposit; to allow interest on it, in accordance with the by-laws of the institution, and to loan the said deposits. No special condition is annexed by the Legislature upon which the privilege is to depend, or for the non-performance of which, the charter is to be revoked.

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This company may, in one sense, be considered as necessarily unable to meet, in full, its engagements for a long period after its organization, for it had no funds with which to commence operations—was obliged to hire an office, also officers, and to incur many incidental expenses, before sufficient interest could accrue, from money loaned, to meet its engagements. The business of the company was also of such a character, that temporary suspension of payment must have been contemplated by the Legislature, and by the depositors as incidental to the institution.

The business of this corporation was to receive money on deposit, loan the same, and pay an interest on the deposits. The depositors knew that the corporation had the right, by its charter, to loan its money, and that this was the way for which it was able to pay interest on deposits. These laws might be made with the greatest prudence, yet the company might fail to collect the notes at maturity; violent convulsions in the monetary affairs of the city, might often prevent those who were deemed the most solvent at the time of borrowing the money from meeting their obligations with punctuality; those then, that deposited money with this institution, did it with a full knowledge it was to be loaned; that money lent, is not always punctually paid, and that temporary suspension of payment appertained almost naturally to this corporation. Such temporary suspension of payment must have been contemplated by the Legislature and depositors, as incidental to the corporation, and cannot then be a sufficient cause for forfeiture.

The principles decided in this case, must not be considered as applying to an institution like this, which should fraudulently suspend payment, for such conduct might be placed under the provisions of Article 438, of the Civil Code, and considered an abuse of the privileges of the corporation and a refusal to complete the conditions on which said privileges were granted; gross negligence in loaning money without sufficient guarantee, by which temporary suspension of payment might ensue, might perhaps also subject the charter to forfeiture. In this case, the Directors appear to have been actuated by laudable motives in giving the notice of 3d of March, and ceasing their operations. Their conduct does not appear to be polluted with fraud, nor to have been followed by injury to the depositors, for so far as the record shows, no creditor has ever instituted proceedings against the corporation. It ought also to be remarked, that we decide this case on principles peculiar to the nature of the charter of this company.

Considering then, the circumstances of this case, and the nature of the charter, it is evident that the closing of the doors, the cessation of business, and the temporary suspension of payment of this company for a few days, are not sufficient cause for forfeiture. Vide *People v. Bank of Hudson*, 6 Cowen,

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217; *People v. Washington and Warren Bank*, 6 Cowen, 216; *State v. Gas Light and Banking Company*, 2 Rob. 529; *Angel & Ames on Corporations*, 745; *Revised Statutes*, 116, 1, 12.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below, be avoided and reversed, and proceeding to render such judgment as ought to have been rendered by said court, it is, ordered, adjudged and decreed, that the demand of plaintiff be rejected, with costs in both courts.

SPOFFORD, J., dissenting. I take it to be well settled that the misuse and abuse of corporate functions in Louisiana, as at the common law, are sufficient grounds upon which to declare the forfeiture of an act of incorporation. Indeed such is the express provision of Art. 438 of the Civil Code.

It is also settled, that it is a tacit condition of every act of incorporation, and that the violation of the tacit condition is a ground of forfeiture. The *State v. the New Orleans Gas Light and Banking Company*, 2 R. 522; *Angel & Ames's on Corp.* 510.

Whether a corporation, in a particular place, has violated this tacit condition upon which it was created, is a judicial inquiry, the solution of which depends first upon the object or end of the corporation, and secondly upon the mode in which the corporators have carried out their end, in other words, upon the proven facts of the case.

The object of a savings institution is not to enrich the corporators, or to provide them funds to speculate upon, but to benefit the poorer classes of society.

The preamble of the act in this case, intimates its design, "Experience having proven that savings institutions have been productive of great benefit to the laboring classes, by inducing habits of economy and industry, therefore be it enacted, &c.

The charter and the by-laws, in this case, show that inducements were held out to people of small means, to deposit their savings in sums from one dime upwards, with the corporation, upon the assurance that funds so deposited should be secured in the most ample manner; should be returnable on call or at a fixed period, as agreed upon at the time of the deposit, and pay an interest of three per cent. on sums deposited for a time longer than sixty days, five per cent. for a time between three and six months, and five per cent. for a longer period than six months.

It was therefore implied among the conditions of the continuance of the franchises of this company, that they should conduct their affairs with economy, prudence and skill, sufficient to ensure the safety of the entire capital deposited with them as a sacred trust, and to pay continually, and at the times stipulated in their contracts with depositors, the principle and the conventional interest. Any course of management which, after a fair and reasonable trial, should show that all this was not secured to the beneficiaries of the corporation, would justify a revocation of the grant for misuse, or for a violation of its implied conditions.

And now for the facts. After being about two years in operation under this charter, the directors of the Louisiana Savings Company published, in the gazettes of New Orleans, the following notice:

"The Commissioners of the Louisiana Savings Company are constrained to say that, after due consideration, they deem it their duty to place in liquidation, the affairs of the institution. We pledge ourselves that the assets shall be faithfully appropriated.

"The liabilities of the company do not exceed \$50,000. The assets will realize about \$45,000, although they are nominally more.

STATE  
v.  
L.A. SAVINGS CO.

(Signed) R. L. ROBERTSON, President, *pro tem*.  
J. N. PHILLIPS, Treasurer.

New Orleans, March 3d, 1856."

On the 5th of March, a carefully prepared statement was published, which was intended to assure the public that the insolvency was not so great as admitted by the previous notice. But in this statement, it is now proven by the company, that there was a remarkable error. Among their assets they classed a claim on *Wm. H. Garland*, for over-draft, \$1,542, which the treasurer testifies was a mistake, and that so far from being a creditor of *Garland*, the company owed him at that time, in cash, an amount of which is not stated.

The twelve bonds of the city of New Orleans, would seem to have been put in the list of assets at \$12,000, when it is well known that they never were at par, and the record shows that they had once been pledged to the Bank of New Orleans for a credit of only \$10,000. Counting these bonds at their market value, which certainly did not depreciate in the hands of the company, and deducting the erroneous claim against *Garland*, it appears that the assets of the company were, at the most favorable estimate, five thousand dollars less than their liabilities to depositors, exclusive of interest, house rent and the balance due *Garland*. The statement made by the directors on the 3d of March, that the institution was insolvent, is thus proved to have been true; after the more mature examination published on the 5th. This insolvency was not denied in the answer, and it is not pretended that, at any time since, the assets have become equal to the liabilities. Indeed the appellant's counsel, in his printed argument, has stated that "The directors must have made good the deposit, in their assets, out of their private funds," in other words, the corporation borrowed from Peter to pay Paul. This of course, could not change the real pecuniary condition of the company. But the step was taken, after a deliberation of several days, when the directors changed their minds, and concluded that they would rescind their resolution to go into liquidation, and endeavor to resume the corporate franchises which they had for a time abandoned.

They therefore gave notice that the institution would "resume business, and meet all its engagements, whether for its deposits on time or on call." Accordingly it is stated, that up to the time of trial in the court below, it had continued to receive deposits and pay claims on demand.

This was relied on, as the sole reason why the charter should not be forfeited.

It may be conceded, that if the resolution to go into liquidation on account of the acknowledged inadequacy of the assets to meet the liabilities of the company, was based upon a mistake as to that vital fact, the suspension for a week would not work a forfeiture. But if there was no mistake as to that fact, I apprehend that the company could not be permitted to play fast and loose, to suspend and go into liquidation one week, and then to resume upon a borrowed capital, with the hope of working out of embarrassment and real insolvency by fortunate investments or speculations.

And that is precisely what I understand the company contends it had a right to do. For it is not pretended that the assets of this company have ever equalled its liabilities. It has had a trial of about three years, surely a trial

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sufficiently long to test its capacity; no showing of any better condition than an ability to pay ninety cents on the dollar, (upon a full statement) has been made by the company. Indeed it is argued, in the printed argument, filed on its behalf, as a reason why indulgence should be extended to it, that a judgment of forfeiture now, "would involve in losses consequent upon the liquidation all the depositors and others connected with this institution."

And it is not shown that any temporary or inevitable misfortune produced this disastrous result. No depreciation of property is pretended to have occurred. The suspension is now attributed to the panic created by the flight of its President, *Garland*, for alleged defalcations. But, at the time, it was attributed to the inadequacy of the assets to meet the liabilities, an inadequacy which it amply proved in this record. There was no mistake as to that fact, and the only mistake the directors made at the time, was that they had a claim on *Garland*, when *Garland* had a claim on them; that is, they supposed the institution to be better off than it turned out to be. The repeated mistakes as to this account, shows that the business was, to say the least, negligently conducted.

After a fair and reasonable trial, I do not think this corporation has shown that it is in a sound and healthy condition, so as to meet the public wants out of its own resources. The commendable liberality of some of the directors, (who are not individually liable to the depositors,) in loaning to the company the means to resume payment for the time being, does not require that its life should be prolonged, in order to give them an opportunity to reimburse themselves by anticipated profits. An institution whose assets, after two years' operation, can only pay ninety cents in the dollar to its intended beneficiaries, but real benefactors, is not such a "savings institution" as was contemplated by the Legislature. It fails to satisfy the object of its creation, and, in my judgment, should be dissolved.

I therefore, think the judgment of the Third District Court should be affirmed.

Mr. Justice Voorhies, concurred in the above dissenting opinion of Mr. Justice Spofford.

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SUCCESSION OF F. M. PREVOST—The STATE, Appellant, LOUIS PREVOST, Appellee. \*

The treaty made in 1853, between the United States and France, confers on Frenchmen, in all the States of the Union, whose laws permit it, the right of possessing real and personal property by the same title and in the same manner as the citizens of the United States, and declares that, in no case, shall they be subjected to taxes on transfers, inheritance, or any others, different from those of citizens of the United States, or to taxes which shall not be equally imposed. *Held:* That the succession of a French citizen, who died before the treaty was made, will not be exempted from the operation of the Act of the Legislature of Louisiana, in 1842, imposing a tax of ten per cent. on successions falling to foreigners.

APPEAL from the District Court of Ascension.

J. H. Huley, for appellant. C. A. Johnson, for the appellee.

BUCHANAN, J. *Jean Louis Prevost*, a subject and resident of France, having been recognized as heir of his brother, *F. M. Prevost*, an inhabitant of Louisiana, the curator of the succession of the widow of *F. M. Prevost*, has rendered him an account of the estate of *F. M. Prevost*, which his widow possessed up to her death. To that account, *Jean Louis Prevost* has filed various grounds of opposition.

*First.*—He objects to the item of \$3,192 80, charged as a State tax of ten per cent. on successions in this State, falling to foreigners. The opponent contends that French citizens are exempted from this tax, by the effect of the consular convention between the United States of America and the Emperor of the French, concluded 23d of February, 1853, ratified by the United States the 1st of April, 1853, exchanged the 11th of August, 1853, and proclaimed by the President of the United States, 12th of August, 1853. The seventh article of which treaty, is in the following words:

"In all the States of the Union, whose existing laws permit it, so long, and to the same extent, as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property, by the same title and in the same manner, as those citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously, or for value received, by donation, testament or otherwise, just as the citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed."

We have decided in the case of *Dufour's Succession*, 10 Ann., 391; that this treaty, so far as it is inconsistent with our State laws of 1842, imposing a tax of ten per cent. upon successions devolving upon persons resident out of the United States, must be considered, under the provisions of the second paragraph of the sixth Article of the Constitution of the United States, as paramount to, and superseding the said State law. See, upon this subject, the case of *Mager's Succession*, 12 Rob. 588.

The present case however, differs from that of *Dufour* in the essential particular that *Prevost* died many years before the conclusion of the consular con-

\* This case was decided in 1855, and on a writ of error, from the Supreme Court of the United States, the judgment was confirmed in. See 19 HOWARD'S REP. p. 1.

SUCCESSION OF  
F. M. PREVOST.

vention with France, and the right of the State of Louisiana to this tax consequently attached, at a period when French citizens did not enjoy an exemption from the operation of the act of 1842. By the fiction of law *le mort saisit le vif*, the rights and obligations of the opponent, *Jean Louis Prevost*, as heir of *Francois Marie Prevost*, relate back to the death of the latter, which took place on the 18th of May, 1848. C. C. 934, 935; 3 L. R. 336; Ibid 561; 6 Rob. 504; 9 Rob. 357. *Blanchard's Succession*, decided at the December term of 1854. The language of the Supreme Court, in the case of *Mager*, 12 Rob. 588, referred to by the District Judge, contains nothing inconsistent with this view of the law.

There are two other grounds of opposition which have been argued before us, one concerning the valuation of improvements put upon the separate estate of *F. M. Prevost* during the existence of the marriage community; and the other, a charge for stock put upon said property by the widow *Prevost* after her husband's death. The decision of the District Judge, upon these points, seem conformable to the facts and the law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below be reversed, so far as concerns the charge made in the curator's account of three thousand one hundred and ninety two dollars eighty cents, for the State tax of ten per cent. upon the amount of the estate of *F. M. Prevost*, inherited by *J. L. Prevost*, which charge is hereby sustained; that in other respects, the said judgment be affirmed; that the account of curatorship of the succession of *Victorie Castelain*, widow of *Francois Marie Prevost*, filed by *Michael D. Gaudeb*, curator, on the fourteenth of June, 1854, be approved and homologated; and that *Jean Louis Prevost*, the opponent, pay costs of the opposition in both courts.

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CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF LOUISIANA,  
AT  
MONROE.

JULY, 1857.

PRESENT:

|                      |                              |
|----------------------|------------------------------|
| HON. E. T. MERRICK,  | <i>Chief Justice.</i>        |
| HON. A. M. BUCHANAN, | } <i>Associate Justices.</i> |
| HON. H. M. SPOFFORD, |                              |
| HON. C. VOORHIES,    |                              |
| HON. J. L. COLE.     |                              |

SOERY & CAMPBELL, for the use, &c. v. E. FRIEND.

A defendant examined on facts and articles, may answer as to a fact tending to his defence, when the fact is closely linked to the fact on which he had been interrogated.

APPEAL from the District Court of Ouachita, *Richardson, J.*

*McGuire & Ray*, for plaintiffs and appellants. *Morrison*, for defendant.

MERRICK, C. J. The plaintiffs, as acceptors, have instituted the present action upon an account stated upon a bill of exchange dated Trenton, May 5th, 1853, drawn on themselves at New Orleans and made payable twelve months after date, to the order of *W. H. Rogers*, by whom it was endorsed, for fifteen hundred dollars.

The defendant in his answer, alleges that the draft was given for the purpose of enabling the plaintiffs, who were commission merchants, to raise money after accepting it, by throwing it in the market, and the money raised on it was to be advanced to *William H. Rogers*, then a merchant at Trenton, La., to enable him to carry on his commercial business, and *Rogers* was to provide means to meet it at its falling due; that the plaintiffs shortly afterwards failed without having accepted, negotiated or paid said draft, and that the plaintiffs never having advanced anything to *Rogers* after the receipt of the draft, are fraudulently attempting to collect the same.

SOERY  
v.  
FRIEND.

The plaintiff, in order to rebut the presumption that he had funds of the defendant to meet this draft, propounded the following questions to defendant, viz:

1st. "Did you ever ship or consign any produce, goods, or effects of any kind to *Messrs. Soery & Campbell*, of New Orleans? If so, state when, what it was, and for what amount?"

2. "Did you ever deposit any amount of money in the hands of *Messrs. Soery & Campbell*, of New Orleans, for any purpose whatever? If so, state the amount when it was, and for what purpose?"

To the first interrogatory, defendant answered: "I did consign four bales of cotton to plaintiff about January, 1854, but no part of it was intended for the payment of the draft sued on, as it was well understood by plaintiffs and defendant, that *W. H. Rogers* was to provide for the payment of the draft sued on, and not defendant. Plaintiffs paid over to defendant the proceeds of the four bales of cotton, in the spring of 1854, in supplies and in money."

Answer to second interrogatory. "I never deposited any other funds with plaintiff except the few bales of cotton, and that was for the purpose of paying for some groceries furnished by plaintiffs to defendant, and in money, as stated in answer to first interrogatory."

The plaintiff moved to strike out a portion of the answer to first interrogatories, and propounded this further interrogatory, viz:

"Did you ever have any conversation with either of the plaintiffs in this case in relation to the draft sued on in this case? If so, when did such conversation take place? Where did it take place, and what was said about it, and with whom did you have such conversation?"

To this the defendant answered, "I did have a conversation with one of the plaintiffs in this case, in relation to the draft sued on, which took place, as near as I can recollect, about the month of July, 1854. It took place at Forkville, in the parish of Ouachita. The words used in the conversation I cannot remember exactly, but the substance of it was, that I would do what I could to induce *W. H. Rogers* to ship them cotton for his indebtedness to plaintiff, and that I did not consider myself bound for the draft sued on, and that plaintiff need not look to me for it. He then told me, that if I had not mentioned it to him, he would not have mentioned it to me, and that if I would ship them, the plaintiffs, my cotton crop of 1854, that no part of it should be applied as a payment on the drafts sued on."

The District Judge did not err in refusing to strike out all that part of defendant's answer to the first interrogatories, commencing with the words "but no part of it," and ending with the words "sued on and not defendant." The object of the interrogatory was to destroy the presumption that *Soery & Campbell* had funds of the defendant, out of which the draft was paid by them.

The reason why the defendant did not place the plaintiffs in funds, arising as it did from an understanding between the parties, was a fact tending to his defence, which was closely linked to the fact on which he had been interrogated. It was a matter standing as a partial answer to the supposed liability of the defendant, arising from his neglect to place the drawees in funds. *Haynes v. Heard*, 3 An. 648.

The defendant has filed an answer, praying that the judgment of nonsuit may be amended, and that he have a final judgment in his favor.

SORRY  
v.  
FRIEND.

We do not think the judgment should be disturbed. It is evident that the draft was drawn by the defendant for some purpose. If he were a drawer for the accommodation of *Rogers*, as he alleges, he would still be responsible to the acceptors in the event *Rogers* did not place them in funds. The answer to the first interrogatory does not clearly show 'that at the time the bill of exchange was drawn, that the defendant was not to be liable as between himself, and the acceptor for the amount of the bill in the event the principal debtor, *Rogers*, should fail to furnish the funds which it was naturally expected by all parties he would do. But the defendant has not said, that if *Rogers* did not furnish the funds, that he himself was not to be responsible for the failure. It appears to us that an accommodation drawer, who relies upon the payee of the draft to furnish the funds to take it up at maturity, must be considered as between the other parties to the instrument, as a principal remitting his funds through the agency of such payee. If the drawer would have been responsible to a *bona fide* holder had the draft been dishonored, we cannot see why he should not, in the absence of all agreement to the contrary, be in like manner responsible to the acceptors who have taken up the same at maturity.

If the defendant relies upon a release or remission of the debt by the plaintiffs, his answers do not establish this with sufficient clearness. They might have been very willing to receive and sell the defendant's crop as factors, and leave the question of indebtedness for the decision of the courts. C. C. 2200, 2201.

But the draft produced does not appear to have been accepted by the plaintiffs, although they have charged commissions for accepting the same. This circumstance, taken in connection with the defendant's answers to the interrogatories, creates a doubt whether the draft was ever put in circulation. If it remained in the hands of *Soery & Campbell* until maturity, it is at least incumbent on them to show that the amount of the draft was placed to the credit of *Rogers*. They could have no claim against *Friend*, until they had either paid the draft to the holder, or if they retained the same, placed it as above mentioned to the credit of, and thereby paid it to *Rogers*, the first endorser and payee.

On the whole, we are satisfied that the judgment of the lower court should be affirmed.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed, with costs.

## E. R. CORY v. A. W. EDDENS.

The Clerk's certificate being defective, the case was continued by the Supreme Court to enable the Clerk to complete it.

**A** PPEAL from the District Court of Franklin, *Barry, J.*, presiding.  
*T. S. Crawford*, for plaintiff. *W. H. Hough*, for defendant and appellant.

**SPOFFORD, J.** The plaintiff and appellee has filed a motion to dismiss the appeal in this case upon the ground that the Clerk's certificate is defective. The Clerk has not certified that the transcript contains "all the proceedings had, and documents filed, in the cause, and all the evidence adduced on the trial," but has qualified his certificate by adding, "*as on file and of record in this office.*"

In various cases, at the last term of this court, we held such a certificate to be defective. *Alcock, use, &c., v. McKoin*; *Barham v. Livingston & Co.* See also *Nettleton v. Stevens*, 6 L. 166; *Ib.* 303; 12 L. 537; 3 Ann. 592. But we also held that such defects not appearing to be imputable to the fault of the appellant, the cases should be continued to enable the Clerk to complete his certificate. See Act 1839, Revised Statutes, p. 279, sec. 20. A similar order must be made in this case.

Cause continued to perfect the certificate.

It is ordered, that the cause be continued to perfect the certificate of the Clerk of the District Court of the parish of Franklin.

## B. C. PEACE v. W. H. HEAD—WADE, Intervenor.

To enable a party to introduce secondary evidence of the contents of a lost instrument, it will be sufficient if it appear, from all the evidences, that the loss was advertised and the proper exertions made to recover it.  
 C. C. 2250. 2259.

**A** PPEAL from the District Court of Caddo, *Cresswell, J.*  
*Crane & Nutt*, for plaintiff and appellant.

**MERRICK, C. J.** The Articles 2258 and 2259 of the Code relative to lost instruments, do not require that the party offering secondary evidence of such instrument, shall state in the affidavit, that he has used *due diligence* to procure the original. It is sufficient, if it appears from all the evidence, that the loss was advertised and the proper exertions were made to recover the same. The proof of loss which will authorize the introduction of inferior evidence, must depend on the particular circumstances of each case. 7 N. S. 548; 2 Ann. 195. The District Judge was satisfied with those proven in this case, in connection with the affidavit of the intervenor, which stated, among other things,

that the instrument was lost, and that she was unable to produce it, and we cannot say that he erred in his conclusion.

Witnesses who were acquainted with *Dr. J. Peace's* handwriting, prove clearly the existence of the bill of sale from him to the intervenor, and although there are circumstances which throw a slight suspicion over the title produced, we think the testimony unexplained must conclude the administrator, as it would have done the intestate.

Judgment affirmed.

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v.  
HEAD.

### S. A. LEVERICH v. H. M. BOSSIER.

As a general rule, an executor who endorses a bill or note, although he does so as executor, is personally bound; he is, therefore, incompetent as a witness to fix a liability on a party to it.

**A**PPEAL from the District Court of Caddo, *Cresswell, J.*

*Hodge & Austin* and *Hood & Knox*, for plaintiff. *Crain & Nutt*, for defendant and appellant.

MERRICK, C. J. *S. Bossier*, of the parish of Caddo, on the 20th January, 1850, drew his draft for \$3,800, payable to his own order, twelve months after date, on *Messrs. Leverich & Co.*, of New Orleans. The draft, after being endorsed, was left with them as accommodation paper, or to cover future advances. *Edward J. Walsh*, who is alleged in the plaintiff's petition to have been the sole person interested in the firm of *Leverich & Co.*, through his agent, during his absence, procured *William E. Leverich* and *Samuel J. Peters*, as executors of the estate of *J. H. Leverich*, to discount the draft for his own benefit, before its maturity; the drawer not being in any manner credited with the proceeds or benefited by the transaction. The executors transferred the draft to *Mrs. S. A. Leverich*, the widow of *J. H. Leverich*, deceased, and she has instituted the present action.

At maturity, the notary charged with making protest, certifies, that he demanded (through his deputy) payment for said draft at the office of *Mr. William Luyster*, the surviving partner of the late firm of *Leverich & Co.*, acceptors thereof, and was answered by a clerk, that said *William Luyster* was not there, and had left no instructions in relation thereto. The notary further certifies, that he left notices of protest with *Mr. William Luyster* personally, for the drawer and first endorser, and, at his request, at the office of *William E. Leverich*; he left notices with *Luyster*, also, for *William E. Leverich* and *Peters'* executors.

The testimony of both *William E. Leverich* and *William Luyster* was taken, and was offered in evidence, the defendants, the widows and heirs of *Bossier* excepting.

The deposition of *W. E. Leverich* ought to have been excluded. As a general rule, an executor cannot draw or endorse bills of exchange for affairs arising after the death of the testator, so as to bind the estate. His endorsement, herefore, in such case, binds himself personally, notwithstanding he signs as

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v.  
BOWMAN.

executor. The witness appeared, therefore, directly interested in procuring a recovery on this paper against the prior parties, and his interest is not equally balanced between plaintiff and defendant. The objection to *Luyster's* testimony, goes more to its effect, than admissibility.

It is clear that the drawer of the draft was at least entitled to all the rights of drawers and endorsers of strictly commercial paper. It was, therefore, incumbent on the plaintiff to show that the bill of exchange sued on, was presented at the proper place at the maturity of the draft, and due notice of its dishonor given to the drawer and endorser.

In this we think the plaintiff has failed in her action. She has alleged in her petition, that *Walsh* alone composed the firm of *Leverich & Co.*, and has proved the same by her witnesses, and, moreover, offered the deposition of *Luyster* as a disinterested witness. She claimed that *Walsh* transferred the title to the paper to the executors, which the defendant has endeavored to defeat by an allegation in the answer, that both *Luyster* and *J. H. Leverich* were members of the firm of *Leverich & Co.* In the consideration of the case, therefore, we think we should give the benefit of the plaintiff's allegation, which is sustained by proof, to the defendant, rather than give the plaintiff the benefit of the defendants' allegation in their answer, which the plaintiff has disproved by her testimony. As it is established that *Luyster* was not the partner of *Walsh*, who composed the firm of *Leverich & Co.*, a demand upon him as surviving partner of the late firm of *Leverich & Co.*, was manifestly insufficient.

The authority cited in case of a demand at the place where a note is made payable in a suit against the maker or acceptor, is not applicable to the present case. The case of *Landry v. Stansbury*, 10 L. R. 484, if still law, establishes an exception to a general rule. The present case, while within the general rule, is not covered by the authority of the case cited. See 7 Ann. 493; 4 Rob. 276; 7 R. 13; 4 Ann. 483.

It is not pretended that any other demand than that upon *Luyster* has been made. We will, therefore, render a final judgment in favor of the defendants.

It is ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment against the demand of the plaintiff and in favor of the defendants. And it is further ordered, that the plaintiff pay the costs of both courts.

## T. WHALEY v. J. S. HOUSTON.

This action was against the drawers of a draft; one of the grounds of defence was, that it had not been properly presented for acceptance. The notary certified that he "had presented the draft to a clerk of the drawees at their office, the drawers not being in, and demanded acceptance thereof, and was answered that the same would not be accepted." *Held*: That this was a sufficient presentment, the defendants being merchants, having a counting room in New Orleans. *Held, also*: That it is questionable whether the drawer was entitled to notice, as he had no funds in the hands of drawees, and it did not conclusively appear that the agreement with them was such as to authorize the drawer to accept an acceptance.

If the day on which a draft should, by its terms, be presented comes on Sunday, it may be presented on the day previous. The court should take notice of the fact, that the date of its maturity is Sunday.

**A** PPEAL from the District Court of Bienville, *Drew, J.*  
*E. J. H. Jones*, for plaintiff and appellant. *H. Gray*, for defendant.

**SPOFFORD, J.** The plaintiff has appealed from a judgment in favor of the defendant, who was sued as the drawer of a bill of exchange upon *Messrs. Thornhill & Co.*, New Orleans, dated July 13th, 1853, and payable nine months after date to *R. N. Downing*, or order, for the sum of \$795 92.

The bill was protested on the 27th September, 1853, for non-acceptance, and on the 15th of April, 1854, for non-payment, and notices of both protests duly forwarded to the drawer.

On no ground assigned by the appellee's counsel in his brief, can the judgment of the District Court be sustained.

He urges that the presentation for acceptance was defective. The drawees were a firm of commission merchants, and cotton factors in New Orleans. Their business residence was of course their office, and that was the fittest place at which to present commercial paper drawn upon them in the course of their business. The notary certifies that he "presented the draft to a clerk of the drawees at their office, said drawees not being in, and demanded acceptance thereof, and was answered that the same would not be accepted." If a presentment for acceptance were necessary, this was sufficient, especially as the authority of the clerk to make the response he did, is recognized by *Thornhill*, one of the firm, whose testimony is in the record.

The District Judge excluded all the evidence, which is ample, of a demand and protest for non-payment, because the protest was made on the 15th of April, 1854, when it should have been made on the 16th, unless that were a holiday, of which no proof was offered. The plaintiff took a bill of exceptions. The ruling was evidently erroneous. The Judge should have taken notice of the fact, that the 16th of April, 1854, fell on a Sunday.

Although abundant diligence has thus been shown on the part of the successive holders of the bill, whose good faith is not impeached by evidence, and is therefore presumed, it is very questionable whether the claim was entitled to any notices of protest. He had no funds in the hands of the drawees, and his agreement with them is not conclusively shown to have been such as to authorize him to expect an acceptance under the state of affairs brought about by the mode in which he disposed of his drafts on *Thornhill & Co.*

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It is, therefore, ordered, that the judgment of the District Court be avoided and reversed. And it is now ordered, adjudged and decreed, that the plaintiff recover of the defendant, the sum of seven hundred and ninety-five dollars and ninety-two cents, with five per cent interest thereon, from the 27th of September, 1853, until paid, and five dollars costs of protest, and the costs of suit in both courts.

CULLEN EDWARDS, Executor, v. H. C. GLASSON et al.

In the absence of a special warranty against a particular redhibitory vice, the knowledge of its existence on the part of the vendor at the time of the sale, although nothing was said on the subject, will protect the vendor from liability.

**A** PPEAL from the District Court of Union, *Richardson, J.*

MERRICK, C. J. The defendants are sued upon a promissory note. They defend the action on the ground that the note was given as the price of a slave which was subject to the redhibitory vice of running away. The case was tried by a jury, who found a verdict for the plaintiff, and the defendants appealed.

On looking into the evidence, we do not find that the vice of running away was declared to the defendant at the sale, but there is abundant evidence from which the jury might infer, that he knew the vice existed at the time, although nothing was said on the subject. We think in the absence of a special warranty against the vice, that it is sufficient to show that the vendee knew that the vice existed, and that he was in fact in possession of all the information on the subject, which the vendor himself could communicate.

We cannot, therefore, say that the jury erred.

This is not a case for damages as for a frivolous appeal.

It is ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed, with costs.

## FRANK TAYLOR v. SIMPSON, Sheriff, et al.

Where the sale of specific property alleged to have been seized under execution is informal, and there had in fact been no sign of the property, it was error in the court below in dissolving the injunction to allow special damages.

The curator *ad hoc* appointed to represent several defendants, is only entitled to the simple tax fee of ten dollars, unless he has made application on proof, to have the allowance increased in proportion to the services rendered.

**A** PPEAL from the District Court of Caddo, *Cresswell, J.*

*Land & Winans*, for plaintiff and appellant. *R. Jones*, for defendant.

COLE, J. Some of the judgment creditors of one *Brooks*, caused a *fi. fa.* to issue against his property; plaintiff sued out an injunction, in which he represents that they had seized 1280 acres of land belonging to him, and within the Grappe reservation, and would proceed to sell the same, unless enjoined.

The Sheriff and said judgment creditors in their answer, expressly disclaim any seizure of the property claimed by plaintiff, and any advertisement of said land under the seizure made at the suit of *Daniels et als. v. J. Brooks*, and pray that the injunction be dismissed.

Plaintiff has failed to establish, as alleged in his petition, that his land was ever seized.

On the trial in the lower court, plaintiff took a bill of exceptions to the ruling of the Judge *a quo*, who refused to permit him to prove, by *Roland Jones*, that *Daniels*, one of the defendants, "claimed the land in controversy as the property of *Brooks*, and subject to the satisfaction of the judgment in the suit of *Daniels et als. v. Brooks*, and also that said witness had advised said *Daniels*, as his counsel, that said land was subject to be seized and sold under the *fi. fa.* issued in said judgment.

We think the Judge *a quo* did not err in deciding that the testimony offered was irrelevant and immaterial under the pleadings.

Plaintiff avers in his petition, that his land has been already seized and advertised for sale under the said writ of *fi. fa.*; and that the said *Daniels et als.* will proceed to sell under said writ, the said 1280 acres of land, as the property of the judgment debtor *Brooks*, unless enjoined from so doing, and he prays for a writ of injunction enjoining them from proceeding to sell said land under said *fi. fa.*, and for judgment declaring said seizure illegal and void, &c.

We are of opinion, that under the prayer of the petition, it was necessary to establish a seizure, and not the intention to seize.

The judgment of the lower court dissolved the injunction, dismissed the suit at plaintiffs' costs, and decreed that the defendant recover one hundred dollars for special damages proved, for counsel fees of defendant for defending the suit.

This judgment is erroneous in condemning plaintiff to pay one hundred dollars counsel fees as special damages.

The Acts of March 1, 1831 and March 29, 1833, allow special damages on the dissolution of an injunction, *only* when the execution of a judgment is enjoined, and not when, as in this case, the sale of specific property, which has not been seized, is exhibited by injunction.

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v.  
SIMPSON.

*Roland Jones*, curator *ad hoc* for the absent defendants, *M. P. Robbins*, *W. S. Ashe*, *F. W. Risque*, *J. P. Brown*, *F. Brown*, and *A. J. De Rosset, Jr.*, has prayed in this court to have the judgment amended by allowing him a fee of ten dollars for defending each one of the six absent defendants aforesaid, making sixty dollars in all; and that the same be ordered to be taxed as a part of the costs of this suit, under the Act of the Legislature of 1857, p. 84, No. 108.

We interpret this Act to mean, that a fee of ten dollars is all that the curator or attorney *ad hoc* is entitled to, without respect to the number of defendants, unless he has made application and proof to the court, to have the amount increased in proportion to the services rendered.

The first section authorizes the appointment of curators *ad hoc*, and attorneys *ad hoc*, by the Clerks of the District Courts out of the parish of Orleans, when the Judge of the District is absent from the parish, to represent absent defendants in any case before the court; and section 2 provides, that attorneys thus appointed shall be entitled to the sum of ten dollars, as a fee, to be taxed as costs, which, upon application and proof to the court, may be increased in proportion to the services rendered.

It is, therefore, ordered, adjudged and decreed, that the part of the judgment which dissolves the injunction at plaintiff's costs be affirmed; that the part which condemns plaintiff to pay defendants one hundred dollars for special damages for council fees, be avoided and reversed. It is further ordered, adjudged and decreed, that the judgment be so amended, as to allow *Roland Jones* ten dollars, to be taxed as part of the costs of the lower court; and that plaintiff pay the costs of the lower court, and defendants and appellees pay those of appeal.

#### G. B. ALEXANDER v. M. D. C. ALEXANDER.

One who is clerk and also in partnership in a particular business with his employer, may, where his duties as clerk and partner are distinct, sue for his salary due him in the former capacity, without resorting to a suit for the settlement of the partnership transactions.

A married man may serve his wife in her executorial capacity, for a debt due him by the testator. The institution of the suit by the husband will be considered as an authority to her to be sued.

**A**PPEAL from the District Court of Caddo, *Cresswell, J.*

*Land & Williamson*, for plaintiff. *C. M. Nutt* and *H. A. Druid*, for defendant and appellant.

**COLE, J.** This is to recover \$7,200, the aggregate amount alleged to be due for the salary of plaintiff for six years, and \$300 amount of hire of a slave belonging to him.

Plaintiff avers that he acted as clerk and general agent of one *Dr. Samuel Bennett*, from September, 1847, to the time of his decease, in September, 1853, a period of six years; that his services were reasonably worth \$1,200 per annum, and that said *Bennett* received during said six years, hire for a slave of petitioners to the amount of three hundred dollars, making a total sum of \$7,500 due plaintiff; that said *Bennett* left his testament, in which he made *Mary D. C. Alexander*, wife of petitioner, one of his testamentary heirs, and also appointed her executrix of his will.

Defendant sets up a general denial; also, alleges a verbal contract of partnership in the ice and butchery business, between plaintiff, his brother and *Dr. Bennett*; that the enterprise failed, and plaintiff seeks now to obtain an advantage from the circumstances of defendant—pleads the prescription of one, three, five and ten years; excepts to the right of plaintiff to sue her, because of their relation as husband and wife; and that plaintiff is indebted to the succession of *Bennett* in the sum of \$2,715, which is plead in reconvention and compensation.

In an amended answer, defendant pleads the indebtedness of plaintiff in various sums to *Bennett's* succession, and a further indebtedness for monies collected and unaccounted for, and for notes had in his possession, to be returned by order of court, or their amounts to be paid over to her; and lastly, she pleads a peremptory exception, that the plaintiff, his brother and the testator were partners in an ice and beef business, and that plaintiff's demand should have been for a settlement of the partnership affairs. This exception, by consent of parties, was ordered to stand as part of the answer.

It is admitted, that the plaintiff and defendant are not now, nor have they, since the death of *Dr. Bennett*, been living together as husband and wife.

There was judgment for \$4,800, and defendant has appealed.

The peremptory exception, that plaintiff should have sued for a settlement of the partnership affairs, instead of instituting this process, cannot be maintained; the duties of plaintiff as clerk and general agent were totally distinct from those as partner in the ice and beef business; his claim for salary in those capacities, has nothing to do with the settlement of the partnership.

Another exception of defendant was, that she is the universal legatee of all the property left by *Samuel Bennett* in the State of Louisiana; she is the actual party in interest in this suit, and that plaintiff cannot maintain any action against her, except for separation from bed and board, and settlement of the community of acquets and gains.

We consider that this exception is not well taken for the following reasons: She is sued in her capacity of executrix; the rights of husband and wife are not so entirely merged by our laws, as to prevent the husband from suing his wife in a representative capacity for claims due by a deceased person, whose estate she administers as executrix.

There is no law which prohibits the husband from instituting such a suit, and *ex necessitate rei*, the action must lie to prevent a failure of justice.

She is authorized by her husband to stand in judgment, by the mere institution of the action, for he cannot be supposed to sue her, without also intending that she shall be capable of standing in judgment.

There was also an order of court, authorizing her to stand in judgment.

Besides, there is nothing due the wife as legatee, until all the debts are paid.

This exception was then properly overruled by the lower court.

No proof was offered to establish the indebtedness of plaintiff to *Bennett's* estate, nor of any sum due by way of reconvention, compensation, or otherwise; and plaintiff also failed to prove the receipt of \$300 by *Dr. Bennett* for the hire of his slave.

There is no plea of payment and no testimony to show that any salary was ever paid to plaintiff, so that the sole questions remaining are: Whether plaintiff was employed by *Bennett*; in what capacity; the value of his services, and the plea of prescription.

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v.  
ALEXANDER.

The evidence fully establishes that *Dr. Bennett* was engaged in business of a diversified character; that he was often absent from the parish of his residence; that plaintiff performed the duties of clerk and general agent for him from September or October 1847, till his death in 1853. He attended his store; he superintended warehouses on both sides of the river; collected notes and other claims due *Bennett*, in connection with the business of *J. H. Caine & Co.*, and *Samuel Bennett* as successor; he represented *Bennett* as agent, in buying and selling in the multifarious and curious transactions in which he had an interest.

The lower court considered his services as general agent and clerk, worth a thousand dollars per year; that the plea of prescription must prevail as to the compensation due the plaintiff, as a clerk, from September or October, 1847, for the three years following, and for that time deducted \$400 per annum, the usual salary at that time, according to the evidence, for a clerk in a house of limited business, which left \$600 per year for salary as general agent. For the next three years the District Judge thought there was a sufficient acknowledgement of the debt due plaintiff to interrupt the prescription applicable to clerks, and that consequently he is entitled to the whole amount due as clerk and general agent, from September, 1850, although a small part thereof was prescribed.

We are of opinion, that the acknowledgment by *Bennett*, of a specific sum due plaintiff, is not sufficiently established by the evidence to arrest prescription.

It is also argued by plaintiff, that a continuity of services prevents prescription against claims for wages of a clerk.

It is true that it has so been decided (vide *Pressas v. Mendiburn*, 4 Martin, 129) but we are of opinion that a continuity of services as clerk does not arrest the prescription of three years; the contrary doctrine seems to have been overruled. Vide *Cresap v. Winter*, 14 L. R. 554.

Although we are of opinion that the District Judge erred in deciding, that the prescription of three years was arrested for a part of the time, yet we are not disposed to interfere with the judgment; for there is sufficient evidence of the value of the services in the record to justify the judgment, even if the time that is prescribed after the termination of three years from 1847, is considered; besides, it appears from the evidence that defendant is the reputed natural daughter of *Bennett*, and when a brother of plaintiff went to him for a settlement, *Bennett* told him: "That plaintiff wished to draw the money which he owed him, but that he thought plaintiff in this suit ought to let the money remain, and intimated, that all of his, *Bennett's* property, would eventually belong to plaintiff and his wife, and wished witness to advise his brother (the plaintiff) not to draw out his salary, and admitted that he owed plaintiff his salary for his services, and that the same was due and unpaid, and said that he (*Bennett*) would pay him liberally for his services, but wished him to wait for it."

In his will, he bequeaths nothing whatever to plaintiff, and the wife of plaintiff has been living separate from him since the death of *Dr. Bennett*.

It is very evident, that plaintiff did not insist on a settlement on account of having married the reputed natural child of *Dr. Bennett*, and of the expectation that *Bennett* would remember him in his will.

Under all the circumstances of this case, we do not feel justified in interfering with the judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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### SUCCESSION OF J. L. WILSON.

The creditors of the succession of *W.* opposed the homologation of the administrator's account on several grounds, the principal one of which was, that the administrator had not enjoined an order of seizure and sale of a large portion of the property, when the claim on which it issued was tainted with usury. *Held*: That *W.* in his life-time had resisted the claim on that plea which had been decided adversely to him, and that it would not have been proper for the administrator again to set up the same defence. \*

**A** PPEAL from the District Court of Ouachita, *Richardson, J.*  
*J. Gunett*, for the administrator. *McGuire & Ray*, for opponents and appellants.

*LEA, J.* *John L. Wilson* died in August, 1852, leaving a widow and four minor children. The widow renounced the community. The children are by operation of law, beneficiary heirs. *J. H. Wilson* was appointed administrator of the succession. In September of the same year, an inventory was made, and in November, 1853, the administrator filed his account.

Oppositions were filed by *H. Clore, H. Kendall, Carter & Co., C. G. Moore, Wyche & Hammet*, and *Deck & Atkin*, all judgment creditors. The widow of the deceased also filed an opposition. There was judgment homologating the account with the exception of one immaterial item. From this judgment *Carter & Co., Moore, Clore* and *Wyche & Hammet*, have appealed.

The elaborate and thorough review made by the District Judge of the facts put at issue on the pleadings and of the law applicable to the facts, relieves us from the necessity of making a detailed statement of the case, and we would consider it sufficient to refer to the opinion of the District Judge as conclusive upon the matters in issue, but for the fact that certain legal questions have been pressed upon the consideration of this court, which were not set forth in the pleadings, and which are now urged in the arguments of the counsel for the appellants as grounds for the reversal of the judgment appealed from.

The administrator shows that he had been divested by legal proceedings, on the nature of an order of seizure and sale of a large portion of the property of the succession. It appears that the plantation and slaves of the deceased were seized and sold in virtue of an executory process obtained by *H. R. W. Hill*, and the proceeds applied to the payment of the mortgage debt due to *Hill*, amounting to \$27,628 81. It is contended that the administrator was guilty of neglect in not opposing this sale; that a part of the debt had been paid; that an injunction might have been obtained and maintained; that a large portion of the demand was tainted with usury, and that under any circumstances the proceeds should have been brought into court and distributed under its orders, after due notice to creditors. It is further urged, that the estate being insolvent, a meeting of creditors should have been called to advise upon the terms of the sale of the property belonging to the succession.

\* Judgment rendered, April, 1857.

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WILSON.

If *Hill* was a mortgage creditor and was entitled under the law to an order of sale, we do not perceive how a meeting of creditors could have affected that right, and even admitting that there were irregularities in the sale, (which nothing in the record displays,) it would be necessary for the party complaining to show, that some injury has resulted from such irregularities, before he could hold the administrator liable in damages. The sale appears to have been made at a fair price, and, under the circumstances, the only question which we can entertain, is one affecting the proceeds, or a liability to account for the same.

We think it was not competent for the administrator, under the circumstances, as the representative of creditors, to have obtained an injunction on the ground of usury. An injunction involving the same matter of defence had been obtained by *Wilson* himself, and had been abandoned by him after a litigation which was terminated by a judgment in favor of *Hill*. That judgment was binding upon his succession and constituted *res judicata* as between *Hill* and the administrator. It is urged, however, that the administrator should account for the proceeds, precisely in the same manner as if they had been realized upon a sale made at the instance of the administrator himself.

A tableau of distribution, by its very name, implies a control of the fund to be distributed. If the administrator has a larger fund in hand than he proposes to distribute, this fact constitutes a legitimate ground of opposition. If by his neglect he has failed to realize funds which he ought to have in hand, this fact also may be urged by way of opposition.

In the case at bar, it is not pretended that the administrator actually received the price for which the plantation sold, and unless it can be shown that at the time of the sale there existed a valid defence to the action, which was known to the administrator, and of which he neglected to avail himself, it is impossible for us to imagine upon what legal or equitable grounds he can be made personally liable for the proceeds of the sale.

It does not appear from the evidence, that the grounds of opposition now set up by the opposing creditors, even assuming their validity, were known to the administrator. It has been held in the case of *Boguell v. Faille*, 1 An. 204, that a creditor having a special mortgage importing a confession of judgment, may obtain an order from a court of ordinary jurisdiction, for the seizure and sale of the hypothecated property, though the mortgagor afterwards died and his succession had been accepted by the heirs with benefit of inventory.

The effect of such a proceeding is necessarily to divest the administrator of his possession, and place it in the hands of the Sheriff. We concur with the District Judge, that there is nothing disclosed by the evidence which brings home to the administrator a neglect of duty, or which made it incumbent upon him to encumber the succession with costs, to be incurred in a fruitless litigation. We do not think that the portion of *Hill's* claim, which was paid by *Williams, Philips & Co.*, was extinguished by such payment, as it was made under an existing contract of subrogation.

Lastly, it is urged that the notes and mortgage having been merged in a judgment, they became extinguished by novation, though it is admitted that the judgment itself decrees that the mortgage shall remain in force to secure the payment of the judgment. If this doctrine were correct, the highest possible recognition of a right would virtually extinguish it.

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We shall not attempt any further analysis of the complicated issues presented in the pleadings and pressed upon us in the arguments of counsel. We refer to the opinion of the District Judge, as containing a careful and lucid statement of the facts, and a sound exposition of the law.

It is ordered, that the judgment be affirmed, and that the transcript of appeal, together with this decree, be forwarded to Monroe, to be there proceeded in according to law.

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WILSON.

### STATE v. SLAVE KING.

The accused, a slave, was prosecuted under the 6th Section of the Act of 1843, and convicted of stabbing, with intent to kill one Smith, a white man. The Act under which he was indicted, was re-enacted in 1855. (See Act, p. 50, Sec. 4.) The same Statute was re-enacted *verbatim*, by the Act of 19th March, 1857. By Section 43, of the latter Act, it was declared "That all laws, or parts of laws, conflicting with the provisions of this Act, and all laws on the same subject matter, except what is contained in the Civil Code, or Code of Practice, be repealed, and that this Act shall take effect from its passage." (Acts of 1857, p. 234, Sec. 18.) The crime charged, was alleged to have been committed anterior to the passage of the Act of 1857. *Held*, That the Statute, under which the Slave was prosecuted, was repealed by the Statute of 1857, and that the rule of law is, that when a law is repealed, before the final action of the appellant's court, the prosecution must be dismissed.

In construing penal Statutes, courts cannot take into view the motives of the law-giver, further than they are expressed in the Statute.

Where a Statute re-enacts a law, and repeals all other laws upon the same subject matter, the former laws will be considered as suspended. The promulgation of the re-enacted law, and the repealing provision at the same time, will not have the effect to continue the old law in force, until the new law goes into operation.

**A**PPPEAL, from a Justice's Court of the Parish of Morehouse.

*F. P. Stubbs*, District Attorney, for the State. *C. H. Morrison*, for defendant.

*Colt, J.* The slave, *King*, having been found guilty of stabbing one *Elias F. Smith*, a white man, with intent to kill, was sentenced to be hung, and has appealed.

The judgment must be reversed, for the following reasons:

This prosecution is under the 6th Section of the Act of 1843, p. 92, re-enacted in 1855, R. S. p. 50, Sec. 4.

The same Statute is re-enacted *verbatim*, by the Act of 19th of March 1857, and Section 43, of this last Act, declares, "That all laws or parts of laws, conflicting with the provisions of this Act, and all laws on the same subject-matter, except what is contained in the Civil Code, or Code of Practice, be repealed, and that this Act shall take effect from and after its passage." Vide Acts of 1857, p. 234, Sec. 43.

The alleged illegal act of this slave, was committed anterior to the passage of the said Act of 1857, and by the repealing clause therein, all Statutes, relative to the crimes of slaves, were repealed.

Appellant has then been prosecuted and found guilty under a Statute, which

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has ceased to exist, and the general rule of law is, that when a law is repealed, before the final action of the appellate court, the prosecution must be dismissed.

In 12 L. 547, *State of Louisiana v. Johnson, et al, Martin, J.*, says: "It is true that when an act creating an offence is repealed, even after judgment in the inferior court, the judgment must be reversed, if it has not been affirmed before the repeal. The reason of this is, that a Legislative pardon is presumed to have been intended. It is otherwise when the remedy only, is changed."

The Legislature has given its sanction to this judicial interpretation, by Sec. 127, of the Act relative to crimes and offences, p. 134, R. S. "This Act shall not operate as a discontinuance of any prosecution already commenced, nor as a bar to prosecutions for offences committed against any law in existence, at the passage of this Act."

This section would not have been enacted, if the Legislature had not believed that it was necessary, in order to give authority to courts to act on prosecutions commenced under the Statutes, that were repealed by this Act.

Besides, as the offence is charged to have been committed anterior to the Act of 19th of March, 1837, its prosecution is now barred by the prohibitions relative to *ex post facto* laws, in the Constitution of Louisiana, Art. 105, and in that of the Constitution of the United States, Sec. 9.

The Civil Code, Art. 8, declares, "A law can prescribe only for the future."

It is a well recognised doctrine, that laws regulating the form of judicial proceedings, relate to the remedy, and where, before a final decision, a new law changes the form, it must take effect at once, unless it expressly declares, that the preëxisting form shall continue to be followed in cases then pending. *Scott v. Duke*, 3 A., 253-693.

*A fortiori*, if the law is repealed, prosecutions under it must at once cease. Vide *State v. Johnson*, 12 L. 547; *Arnaud v. Executors*, 3 L. 337; *Bouvier's Law Dictionary* *verbo* Repeal, and the cases there cited; *Curtis' Digest of Decisions in the Courts of Common Law and Admiralty*, 3 vol., p. 77.

It is urged by the District Attorney, that the reënactment *verbatim* of the former law, cannot be construed into a repeal, and that the repealing clause was only intended to repeal all laws inconsistent with this, and to revive and simplify the Statutes then in force on the subject.

Nothing would be more dangerous to the liberties of the people, than that courts should consider as the law, not Statutes in actual existence, but the motives of the Legislature.

If such was the rule, there would then be no certainty in the administration of justice: different courts would vary as to the motives of the sovereign power; in one part of the State, particular actions would be viewed and punished as crimes, and in other parts, they would be justified.

Judicial tribunals derive their power of condemnation from the Legislature, and have no more right to condemn without authorization of law, than any private individual.

Personal rights would never be secure, if courts were guided by a desire to punish and prevent crimes, without regard to the law and the legal power.

It is also argued by the District Attorney, that the reënactment and repeal, were in the same Statute, and when the Statute embracing them was approved by the Governor, and duly promulgated, they then became the law at the same moment, and there was no space of time, which elapsed between the enactment of the new and the repeal of the old law.

This may be true, but the repeal caused the old law to cease its existence: the old law had a being up to the moment of its repeal by the new Statute; after this, it was blotted from the statute book, and was without life or effect; how then can a prosecution which was commenced under the old law, before its repeal, be now conducted under it, when it is without vitality; how can this court punish by virtue of a dead Statute?

The reenactment of a Statute communicates life and vitality to it from the time the reenactment goes into effect, and the repeal of a Statute takes away all its life, vitality and effect, from the passage and promulgation of the Act in which it is contained.

If this new Statute merely provided a change of the mode of procedure in the trial of slaves, and had not provided that prosecutions already commenced under the old mode, should be carried on to their end, then the new law would only cause the prosecutions begun under the ancient mode to cease, and prosecutions could be again instituted under the new mode, unless barred by prescription or some legal cause.

But in the case at bar, the law itself has been repealed, which denounces as a crime, the alleged act of appellant.

We regret to be obliged to set the prisoner at liberty, but it is far wiser and safer for society, and the rights of the citizen to allow him to be liberated, than to violate a great principle in the interpretation of Statutes, which has had the sanction of the most learned and enlightened members of the judiciary.

It is, therefore, ordered, adjudged and decreed, that the verdict of the jury, and the judgment of the lower court, be avoided and reversed, and it is further ordered, adjudged and decreed, that the prosecution be dismissed, and the prisoner and appellant be discharged.

SPOFFORD, J., Concurring. I concur in the conclusion that the repeal of a penal Statute, pending a prosecution under it, without a saving clause, puts an end to the prosecution, although the penal Statute may *uno flatu* with the repeal, be substantially reenacted. Such is the current of English and American authority, by which, in criminal matters, we must be guided.

The reasoning in the case of *Holmes v. Wiltz*, 11 Ann., was predicated upon a civil case where doubt hung over the true construction and meaning of a Legislative Act; and to ascertain that meaning, we held ourselves at liberty to look at the history of the legislation upon its subject-matter, the mischief which was sought to be remedied, and the mode of remedy which the Legislature had avowedly adopted. The "Revised Statutes" were finished and published before the Act of March 19th, 1857, was passed. This Act stands alone to be interpreted by its own language. It is a criminal Statute, and must be construed strictly. It declares (Sec. 2, p. 229,) "That any slave who shall, with a dangerous weapon, and with intent to kill, cut, or otherwise wound any person, or who shall attempt maliciously to kill by drowning or strangling, on conviction thereof, shall suffer death."

"Sec. 4. That if a slave shall shoot at, or stab any person with intent to kill, such slave, on conviction of either of such offences, shall suffer death."

The same Act (Sec. 43, p. 234,) declares "That all laws conflicting with the provisions of this Act, and all laws on the same subject-matter \* \* \* \* \* be repealed."

It is charged that the slave, *King*, on the 13th of August, 1854, with a dangerous weapon, called a butcher-knife, did cut, stab and wound, one *Elias F.*

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*Smith*, with intent to kill. The laws upon this subject, in force at the time of the alleged offence, and which alone he could be charged with having violated, were the Acts of 1816 and 1843. "If any slave shall shoot at, or stab any person, with an intent to kill him or her, such slave, on conviction of either of said offences, shall suffer death: provided, always, that the presumption as to the intent, shall be against such slave, unless he prove the contrary." "Any slave, who shall, with a dangerous weapon, and with intent to kill, cut or otherwise wound any person, or who shall attempt, maliciously, to kill by drowning or strangling, on due conviction thereof, shall suffer death." *Pierce, Taylor and King's Digest*, 543. These laws are upon the same subject-matter, as the Sections two and four, of the Act of 1857, and being repealed without any saving clause, the prisoner accused under them, must be discharged without delay.

#### STATE v. McKEOWN.

It is not a sufficient reason to dismiss an appeal, "that the appeal was asked and granted, and the appeal bond given and approved before the judgment was signed, and at a time when there was no legal judgment thereon," for it is usual in the country to apply for an appeal before the judgment is signed. The appeal is considered as taken *nunc pro tunc*.

The insertion of the name of the former instead of the present executive, as the obligee of a bail bond, will be regarded as a mistake, and will not vitiate the bond.

Where the Sheriff takes an illegal bail bond, he may abandon it and take another bond.

It cannot be objected to the validity of an appearance bond, that it was taken without authority, where it appears that the Sheriff accepted the bond, and that he was authorized to take and approve it by the court.

APPEAL from the District Court of Bossier, *Drew, J.*

*J. D. Watkins*, District Attorney, for the State. *B. L. Hodge*, for defendant.

*COLE, J.* This appeal is taken by *McKeown*, as principal, and *Vance & Spyker*, as his securities, from a judgment against them *in solido*, for five thousand dollars, the amount of a bail bond given by said principal for his appearance to stand his trial on an indictment for manslaughter, before the District Court in the parish of Bossier.

The District Attorney has moved to dismiss the appeal on the ground, "that the appeal was asked and granted, and the appeal bond given and approved before the judgment was signed, and at a time there was no legal judgment thereon."

We are of opinion, that this motion ought not to prevail. It is usual in the country to apply for an appeal before the judgment is signed. The appeal is considered as being taken *nunc pro tunc*.

The first ground on which appellants rely for a reversal of the judgment, is the refusal of the lower court to permit them to prove the allegations of their answer, filed on the 4th of March, 1857, for the reason, that the matter therein contained had been previously adjudicated by the court between the parties in the motion of defendant filed on the 3d of December, 1856.

The lower court appears to have considered the motion of December 3d, as an answer. It is in these words:

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"And now comes the defendant by his attorney, and moves the court to set aside the bond in this case, because the instrument purporting to be the bond of defendant on file in this case, dated 5th September, 1856, is made payable to *Paul O. Hébert*, and not the proper authority representing the State of Louisiana."

"Wherefore he prays, that said bond be set aside and cancelled, and for general relief," &c.

The following order of court appears on the minutes of the court:

"Motion to set aside bond, tried and overruled, and bond sustained."

The lower court was of opinion, that the objections to the bond in the second, or amended answer, had been substantially considered on the first motion; and refused to enter again into a consideration of its invalidity. An examination of the reasons alleged in the second answer, induces the belief that the Judge *a quo* did not err; besides, it is probable, that the additional reasons urged, had been verbally passed on the trial of the first motion. But, even supposing that the second motion ought to have been examined by the lower court, we can find nothing therein, which would justify a reversal of the judgment.

The first objection in the second motion to the bond is:

"Because the instrument purporting to be the bond, is not made payable to any person, who at the time was acting as Governor of the State of Louisiana, nor is it payable to the Governor of the State of Louisiana, but simply to an individual."

The insertion of "*Paul O. Hébert*" instead of "*R. C. Wickliffe*," is a mere clerical error of the Sheriff, who used probably a blank bond printed while *Hébert* was Governor, and omitted to change the name.

The bond clearly shows that it is payable to the Governor of the State of Louisiana; a mere mistake in the name of the acting executive cannot vitiate it.

The second objection is:

"Because the defendant, *Charles S. McKeown*, was already under arrest for the same offence charged, and the Sheriff had no right to make a second arrest, or take a second bond."

Appellant does not aver whether the bond sued on is the first or second one. But supposing the Sheriff had taken a bond which was illegal, he had the right to abandon the first and to execute a second one; because his duty was to accept none but a legal bond, and the first being void from its illegality, must be considered as not having been taken.

The third objection is:

"That the said instrument is generally defective and invalid in law, being taken without authority, and being made payable to improper parties."

The last clause of this point is embodied in the first objection. The answer to the first part is found in the following order of court granted after the presentation of the indictment:

"Whereupon, it is ordered by the court, that process issue thereon immediately, and that the appearance bond of the defendant be fixed at the sum of \$5,000, and that the Sheriff of the parish of Bossier, or any of his deputies, be authorized to take and approve the bail bond of the defendant in this cause."

The Sheriff of Bossier afterwards arrested *McKeown*, and he accepted the bond now sued on.

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The bond was then taken by the Sheriff, who was authorized by the court to receive it, and the third objection is without force.

The last point is :

"Defendants deny generally any indebtedness to the State of Louisiana."

This is too general in its character, and besides is contradicted by the premises.

The District Judge considered that nothing was averred in the second answer, which had not been substantially disposed of in the first, and we think he did not err.

Even, then, if defendants ought to have been heard on their second motion in the lower court, as we consider there is nothing therein which could cause a reversal of the judgment, it would be unnecessary to remand the cause.

It is also objected, that the lower court erred in giving judgment for the State, because there was no evidence offered to justify the judgment.

The evidence in the record conjoined with the bill of exceptions and answer of defendant were sufficient to justify the judgment on the bond. The judicial averments of defendants, showed that the bond had been executed; and it is evident from the judgment and other parts of the records, that the bond was in evidence and before the court when the judgment was rendered.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the lower court be affirmed, with costs.

#### EDITHA W. CLARK, v. A. T. NORWOOD.

Where a wife in community takes the title to immoveable property in her own name, she must clearly show that it was paid for with her separate funds to rescue it from the community.

**A**PPEAL from the District Court of Ouachita, *Richardson, J.*

*J. D. & J. McEnery*, for plaintiff and appellant. *C. H. Morrisson and Baker & Harris*, for defendant.

**SPOFFORD, J.** The plaintiff seeks to enjoin the sale of certain slaves seized by order of the judgment creditors of the husband. She asserts that the slaves are her paraphernal property, not subject to seizure for her husband's debts.

The slaves were purchased in the name of the wife pending the existence of a partnership of acquêts and gain between her and her husband. Indeed she does not appear to have had the control and administration of a separate estate, as she petitioned for a divorce and dissolution of the community about the time the seizure in question was made.

The community "consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations, made jointly to them both, or by purchases, or in any other similar way, even although the purchase be only in the name of one of the two, and not of both,

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because in that case the period of time when the purchase is made, is alone attended to, and not the person who made the purchase." C. C. 2371. There being then a legal presumption that the slaves now in dispute are community property, and as such, liable to seizure for the husband's debts, it was incumbent upon the plaintiff, who asserts a separate right to the property, to make strict proof thereof. *Ford v. Ford, et al.*, 1 La., 206; *Fisher v. Gordy*, 2 Ann., 762.

The case thus resolves itself into a question concerning the sufficiency of the proof adduced by plaintiff. We are not prepared to say that the District Judge erred in considering that the plaintiff had failed to make out her case with the certainty which the law requires. The hire of her negroes is not shown to have constituted a paraphernal fund; her commissions as administratrix fell into the community. The mode in which she paid, if indeed she has paid, the *McFall* note to *Clyme's Succession*, is not sufficiently explained. When a wife in community takes the title to immovable property in her own name, she must clearly show that it was paid for with her separate funds to rescue it from the community.

We do not think this a case in which the amendment prayed for by the appellee, should be allowed.

Judgment affirmed.

### J. C. CLEMENT v. J. T. WAFER et. al.

A married woman is responsible *civiliter* for her wrongful acts, even when done in the presence of her husband.

Plaintiff objected to defendants filing an amended answer. *Held*: That he was properly allowed to do so. The matters set up in it having an important bearing on the merits of the case.

The marriage of a minor, and domicilled in Louisiana, contracted in another State, in fraud of our laws, does not emancipate the minor, and her tutor cannot be held responsible for affording shelter and protection to his ward, and even counselling her in her difficulties.

A person who, without the consent of the tutor, persuades a minor to elope with, and marry him, in fraud of our laws, acquires no right to administer her estate, and, perhaps, no right to her person and to her society, except, so far as voluntarily yielded to him.

Granting leave to defendants who have been joined in an action for damages, to have separate trials, rests in the discretion of the Judge who tries the case.

Alleged co-trespassers, who have been sued in another Parish for the same cause of action, may be received to testify on behalf of a defendant charged also, as a co-trespasser; his position may possibly affect his credibility, but not his competency.

This was an action for damages. The jury found for the defendant; although the court did not consider the defendant free from blame, yet, in affirming the verdict, much stress is laid on the fact that plaintiff had not only acted in a manner grossly improper, but in palpable violation of law.

**A** PPEAL from the District Court of Claiborne, *Drew, J.*

*J. M. Thomasson*, for plaintiff and appellant. *E. H. Jones* and *H. Gray*, for defendants.

MERRICK, C. J. "In his petition, filed Nov. 1855, plaintiff alleges that, on the 11th Sept. 1855, he was lawfully married in the State of Arkansas, to *Sarah A. T. Wafer*.

"That soon after his said marriage, *J. T. Wafer, Jr.*, and *Mary Owen*, his wife, *J. P. Owen* and *L. F. R. Rennolds*, all of Claiborne; and *J. W. Sim-*

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*mons* and *Louisa Wafer*, his wife, *Margaret Wafer*, and *Cicily Wafer*, wife of *J. W. Dabbs*, all of Bossier Parish, entered into an agreement and conspiracy to entice, abduct and carry away his (plaintiff's) wife, and to effect a permanent separation of her from him, so as to forever deprive him of the pleasure and enjoyment of her society and the value of her services.

"That in pursuance of their said conspiracy, defendants, *Wafer* and *Owen*, waylaid the road and intercepted him and his wife on their return from Arkansas, after their marriage, seized plaintiff's horse by the bridle, threw him (plaintiff) from his buggy on the ground, and, after abusing him, compelled him to go, against his will, to the house of *Wafer*, &c.

"That some eight days after, while plaintiff and his wife were living together in connubial affection, *Margaret Wafer*, one of the conspirators, at the instance of, and by agreement with the others, went to plaintiff's and represented that *Mrs. Simmons*, one of his (plaintiff's) wife's sisters, was at the house of defendant, *Wafer*, sick, and wished to see her (*Sarah*); and, not suspecting their wicked designs, plaintiff assented, and his wife went to *Wafers*; and that soon as they had, by their false representations and artifices, got his wife away from him, they falsely and maliciously misrepresented his character and prospects to her, and persuaded and enticed her to leave him.

"That they afterwards took her off to Red River and kept her so confined and guarded, that plaintiff could not have an interview with her; that he took some of his friends, and went to the house of *Dabbs* where she was kept, in order, if practicable, to have an interview with her, and get her away from under the pernicious and wicked influences of her abductors; that this visit resulted in an agreement between them all, that *Sarah* was to go in company with friends to the residence of her uncle, Rev. *J. T. Wafer*, Sr., in Claiborne Parish, and there remain a few days, and under his advice determine her future course—whether or not she would live with plaintiff; at the end of which time she was to go either with plaintiff or her relations, as she might choose.

"That, as agreed upon, they came to the house of her uncle, where they were followed by defendants and others, whose purpose was to take *Sarah* off again, but failing in this, defendant, *J. T. Wafer*, made affidavit, procured a warrant, and had plaintiff and his friends arrested for kidnapping plaintiff's wife; and on the next day he made another affidavit, and had a writ of habeas corpus issued by the Hon. *H. A. Drew*, Judge 17th District, commanding plaintiff to bring before said Judge, instant, the body of his wife, &c.: and before plaintiff could do so, at the instance of said *Wafer*, he was arrested for a contempt of the authority of said Judge.

"That all of said affidavits were false, and the said proceedings wholly unfounded, malicious and vexatious, and instituted without any probable cause. That by reason of the said slanderous and false accusations and representations, the assault and battery, false imprisonment, abduction, &c., of his wife from him, and, of the said malicious, vexatious and unfounded prosecutions, plaintiff had sustained damages to the amount of \$50,000 00, and prayed judgment against those residing in Claiborne Parish, in solido, for \$30,000."

To this petition, defendant excepted,

1st. Because different and distinct defendants are joined for distinct causes of action.

2d. Because defendants have no joint interest in defence of this suit.

3d. Because *Mary Owen* is a married woman, not alleged to be separate in property, or person, and cannot be made liable for damages; that the acts charged, are charged to have been done in the presence, and by concurrence of her husband, and she is not liable, &c.; and

4th. Because she is not sued on account of any separate right or interest.

The exceptions being overruled, the defendants answered separately by way of a general denial, and prayed for separate trials. Subsequently, the defendant, *James T. Wafer*, obtained leave to amend his answer. He alleged that, at the time of the pretended marriage, he was the tutor of the said *Sarah A. T. Wafer*, an orphan minor, under the age of sixteen years, the sister of respondent, who was under his personal care and protection, and residing with him at his house; that, by false representations and devices, said plaintiff clandestinely procured the said *Sarah A. T. Wafer*, the ward of defendant, to accompany him to the State of Arkansas, against the consent and without the knowledge of respondent, where, in fraud and evasion of the laws of Louisiana, the plaintiff endeavored to contract marriage with said *Sarah A. T.*, and immediately returned to Louisiana; that said *Sarah* was induced to live with him a short time under the impression that the attempted marriage was valid, when, in fact, it was not so; that plaintiff was aided in the perpetration of his fraudulent designs by other persons, between whom and plaintiff, a conspiracy to bring about said pretended marriage, was engaged in and carried out. The defendant, *J. T. Wafer*, prayed that if said pretended marriage should be established, that the same be decreed to be null and void *ab initio*. This answer was severally adopted by each defendant.

A separate trial was allowed *J. T. Wafer*.

The suit seems to have been most obstinately contested on both sides in the court below, and, after occupying its attention for about three weeks, it resulted in a verdict and judgment in favor of the defendant, from which the plaintiff appeals.

Four hundred and fifty-eight pages of record, and twenty-two bills of exceptions, testify to the industry and zeal of the parties and their counsel.

The scenes of violence which have been detailed by witnesses, seem rather to belong to a remote border settlement, than to the law abiding community, with its magistrates, courts and eminent bar, in the midst of which they occurred. A jury of the vicinage, acquainted with localities and witnesses, has found for the defendant, and the plaintiff, exercising a constitutional right, demands that we shall revise the proceedings of the lower court, the evidence and the finding of the jury, and pronounce upon the legality of the same.

The first question which naturally arises in the case is presented by the defendants' exception. We think all the charges of abduction, and of enticing away plaintiff's wife, the alleged malicious misrepresentations, the false imprisonment, slander and assault and battery, are substantially laid in plaintiff's petition, as done in pursuance and in consequence of a conspiracy among all of the defendants. The petition is not, therefore, obnoxious to the charge that distinct causes of action against different persons are joined in it. A married woman is responsible *civiliter* under our law for her wrongful acts, even when done in the presence of her husband. *Brown, tutor, v. Crockett*, 8 Ann. 34. The exceptions were properly overruled.

We discover no error in the allowance of defendants' amended answer. It did not authorize the defendant to demand a dissolution of the marriage it is

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true, but matters were set up in it having an important bearing upon the merits of the case, if they were not a complete justification to a portion of plaintiff's action. As a marriage of a minor domiciled in Louisiana, contracted in another State, in fraud of our laws, does not emancipate such minor, (4 Ann., 375; *Babin v. Lablanc*, 12 Ann.) the tutor of such minor cannot be rendered responsible for affording shelter and protection to his ward, and even counselling her in her difficulties. The person who, without the consent of the tutor, persuades a minor to elope with him and marry him in fraud of our laws, acquires no right to administer her estate, and perhaps, no right over her person and to her society, except so far as voluntarily yielded him. The amended answer was, therefore, properly received.

The Judge did not err in awarding a separate trial to the defendant, *James T. Wafer*.

The Judge, in the exercise of a reasonable discretion, has the power to direct a separate trial as to one or more of the defendants. In this case, the Judge may have suspected, perhaps, that some of the defendants were merely made parties in order to exclude their testimony, and that the purposes of justice would be best attained by ordering, first, a trial of the defendant, who was mainly charged with an agency in all the transactions. 9 Martin's Rep., 397; 5 N. S., 264; 17 L. R., 419.

The court did not err in allowing the testimony of the alleged co-trespassers who had been sued for the same causes of action in another Parish, to be given in evidence in favor of the defendants. The plaintiff, by his mere allegations in another suit, cannot discredit a witness or render him incompetent. Such charge may possibly go to his credibility, under some circumstances, but not to his competency.

On the merits of the case, we observe that the plaintiff does not come before this court in the attitude of a suitor with clean hands. The evidence shows that the plaintiff is a man of mature judgment, being thirty-five or forty years of age; that he cannot be presumed ignorant, for he belongs to one of the learned professions; yet, regardless of his position and the duty he owed the laws of his adopted State, he induced an orphan school girl, hardly grown to womanhood, clandestinely to leave the house of her tutor and accompany him to a neighboring State, and there, in a public highway, caused himself to be married to her by a clergyman who, like himself, was a resident of Louisiana, to the violation of whose laws, he also had lent his holy office.

Again we find him with a band of sixteen or seventeen armed men invading the house of a brother-in-law of his bride, to which she had gone, and there, by violence, compelling a consent that she should accompany him a long distance to another relative; we find him driving away her sisters and relatives, guarding her on the way with sentinels armed with loaded guns, and finally, in order to evade the process of our courts, sending her, in the night-time with an armed guard, to Arkansas, where she appears also to have been detained several days before she was finally permitted to return to her friends.

The jury might well suppose that if the wife would not become reconciled to him when she was entirely among his friends, (and in whose company she resolutely persisted in refusing to live with the plaintiff,) that it was not probable that she was acting under an improper influence of the defendant who had constantly said that she might live with the plaintiff if she wished.

The conduct of the defendant cannot, in all respects, be commended, but it

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must be observed that he was the natural protector of the young lady who had not become emancipated by her marriage, and whose property, at least, was to remain under his charge as her tutor until her majority. The jury do not seem to have credited the proof tending to establish the alleged assault and battery near Terryville, on the plaintiff's return from Arkansas, from his fugitive marriage.

We think the court erred in excluding a part of *Sandefor's* answers to the 9th, 10th, 14th, 15th and 17th interrogatories, but under the view we take of the case, we do not think it would materially aid the plaintiff's case were a new trial to be granted. Moreover, the testimony of *Sandefor*, has been attacked as unworthy of credit. It is unsustained by counter evidence, and it would be trifling with justice to remand the case upon his testimony upon a point which could have very little or no weight against the present defendant, and the impression created by the consideration of which is insufficient to incline us to set aside the verdict.

In the matter of plaintiff's arrest, the want of probable cause, has not been established.

Upon the whole, we think that the interest of the public as well as of these parties, requires that there shall be an end of this litigation.

If the plaintiff has failed in his proceedings, he must remember that the minor, as well as any other person, is under the protection of the law, and that his own fraud upon the laws which he now so earnestly invokes, his disregard of the rights of others, and his armed violence in asserting his supposed rights, as well as the evasion of the process of our courts were not only the primary and principal causes of the difficulties between himself and the defendant, but are also circumstances calculated to throw discredit upon his cause.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed with costs.

#### LAWSON'S HEIRS v. LAWSON'S Executors.

When the law requires certain forms to be observed in the *confection* of a will, the party who relies upon any want thereof, should expressly allege such informality. MERRICK C. J. and COLE, J. The law does not require in nuncupation testaments by public act, that mention be made in the will that it was *dictated* by the testator to the notary in the *presence* of the witnesses. It is sufficient if express mention be made that it was dictated by the testator and written by the notary as dictated. MERRICK, C. J. and COLE, J.

It appears by Art. 1571 C. C. that express mention is required to be made, in nuncupation testaments by public act, of the facts that the will was dictated by the testator and written by the notary, as it was dictated—but no such *express mention* seems to be required of the fact that it was "written in the presence of the witnesses." By the next clause of Art. 1571, it appears that the presence of the witnesses when the will is *read* to the testator, must be expressly mentioned. It would seem to follow that the presence of the witnesses at the *dictation*, (which has been uniformly held to be necessary in a will of this form—*Langley v. Langley*, 12 La. 114; *Moulton v. Cameau*, Ann. 566.) may be implied from the general tenor of the will. SPOFFORD, J.

Where it is fairly deducible from the tenor of the will that the witnesses were present during its dictation, the burthen of proof to establish the contrary is upon those who attack the validity of the will. Temporary absence of one of the witnesses, and for the purpose of getting a drink of water, in a passage opening upon the room where the Act was received by the notary, will not be sufficient to invalidate the will. SPOFFORD, J.

## SUPREME COURT OF LOUISIANA.

Temporary cessation during the confecton of a will, occasionally induced by the weakness of the testator, does not constitute such an interruption as will vitiate the will.

**A** PPEAL from the District Court of Bossier, *Egan, J.*  
*Watkins & George and Hood & Knox*, for plaintiff and appellant. *R. L. Hodge* for defendant

**SPOFFORD, J.** The heirs at law of *Andrew Lawson* seek to set aside his last will for informality. The instrument purports to be a nuncupation will by public act.

1st. The first objection to its validity urged, in argument, although not very distinctly alleged in the pleadings, is that the will does not *expressly* state that it was dictated by the testator to the notary *in the presence of the subscribing witnesses*. "The nuncupative testaments by public act must be received by a notary public, in the presence of three witnesses residing in the place where the will is executed, or of five witnesses not residing in the place.

"The testament must be dictated by the testator, and written by the notary as it is dictated.

"It must then be read to the testator in presence of the witnesses.

"Express mention is made of the whole, observing that all those formalities must be fulfilled at one time, without interruption, and without turning aside to other acts."—C. C. 1571.

It thus appears that express mention is required to be made of the facts that the will was dictated by the testator, and written by the notary as it was dictated, but no such *express mention* seems to be required of the fact that it was "written in the presence of the witnesses." By the next clause of the Art. 1571, it appears that the presence of the witnesses when the will is read to the testator must be expressly mentioned. It would seem to follow that the presence of the witnesses at the dictation (which has uniformly been held to be necessary in a will of this form, *Langley v. Langley*, 12 L. 114. *Mouton v. Cameau*, 5. Ann. 566.) may be implied from the general tenor of the instrument. And Paillet, commenting upon the Art. 972 of the Napoleon Code, analagous to our Art. 1571, remarks: *Il n'est pas requis, à peine de nullité, qu'il soit fait mention expresse de l'écriture du testament, par le notaire, en présence des témoins. La mention exigée par l'article 972 du code civil ne doit s'appliquer qu'aux formalités prescrites par cet article même.*" The inference that the witnesses were present, like an express mention, is liable to be rebutted by parol evidence. In either case, if it be proved that any of the necessary witnesses were not present *at the dictation*, the testament will be set aside.

It is a reasonable inference from various clauses and expressions in the testament before us, that the witnesses were present when the will was dictated. It is expressly stated that they were present when it was *read* to the testator. The clauses from which it may be implied that the witnesses were present at the dictation, are as follows: "In testimony whereof, I have caused the said *Andrew Lawson* to acknowledge and sign this as his last will and testament after reading the same in an audible voice in his hearing in the presence of the subscribing witnesses, whom I have caused to sign as such, I the said notary having written this Act in my own proper hand, at and by the dictation of the said *Andrew Lawson*, without turning aside to other business. Thus done and signed in presence of the subscribing witnesses all of lawful age residing" &c., &c.

There was no clearer statement of the witnesses being present at the dictation of *Macarty's* will, which was held in 7. Ann. 485, to announce that fact by legal implication from the expressions used, although it was not distinctly and expressly stated in terms. The presence of the witnesses at the dictation, was also inferred from the general expressions of the will in *Pégerot v. Mouillon*, 3 M. 114, under a textual provision of the old code similar to that contained in the Art. 1571 of the new.

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2. In the next place it is contended that the proof is sufficient to show that the attesting witnesses were not present all the time during the dictation of the will. The burden of proof was upon the plaintiffs, as they alleged and assumed to establish, in opposition to the influences fairly deducible from the language of the will, that one or more of the witnesses was absent during a part of the dictation. The witnesses upon whom the plaintiffs rely, defeat the allegations of their petition. *Boon*, on cross-examination, says, "he does not think that any part of the will was written or dictated during his absence from the room." His absence was but temporary, and for the purpose of getting a drink of water in a passage open upon the room where the Act was received by the notary. *Homit*, on cross-examination, says, "the will was entirely dictated by said *Lawson* to *Robert J. Looney*, and written by said *Looney* as dictated, and read aloud by said *Looney* to said *Lawson* and the witnesses, and signed by said *Lawson* and said witnesses, all in my presence, to the best of my recollection."

The bill of exceptions reserved by the plaintiffs to their answer upon the cross-examination, was untenable, because the matters elicited upon the cross-examination were pertinent to the examination in chief. The plaintiffs sought to impeach and contradict the public Act; the defendant merely sought to sustain it against this attack, and to explain or rebut the evidence offered by plaintiffs.

3d. The appellants again contend that there was an interruption and a turning aside to other Acts during the confection of the will. Such a temporary cessation as was occasionally induced by the weakness of the testator, does not constitute a legal interruption which would vitiate the will. *Chardon's Heirs v. Bonque*, 9 L. R. 470. And as to the conditional bequest in favor of *Harriason*, erroneously styled a codicil, although the attention of the testator was called to the subject by an interrogatory put to him after the main dispositions of the will were made, we are unable to say that it was foreign to the legitimate business in hand.

4th. It is also said that the will is defective for the uncertainty of the objects bequeathed; in other words, the legacies are said to be imperfectly described. So far as this record informs us, we think there is a sufficiently accurate description of the property donated by the will, to enable the Courts to identify it. *Id certum est quod certum reddi protest.*

5th. The formal objections to the will being overruled, one or two incidental questions are presented by the argument of counsel in submitting the cause, and by the appellee's prayer for an amendment of the judgment. We consider this prayer to amend properly before us, under the facts of the case as disclosed by the document on file. The right to file an answer with the brief of appellee seems to have been expressly reserved when the cause was submitted.

In the answer of the appellee there is a prayer that the judgment be so amended as to allow him one-half of the property depending upon the com-

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munity between the deceased *Lawson* and his wife, herein represented by the appellee as his universal legatee. No such amendment is necessary. Upon the death of *Andrew Lawson*, one-half of the community property vested in his surviving widow, subject to the payment of her half of the community debts. This interest does not purport to be bequeathed by the will and cannot be affected by it. It would be superfluous to reserve to the defendant what has never been claimed by the plaintiffs.

The appellee further prays that the judgment be so amended as to decree that the debts due by the succession of *Lawson* be paid out of the property acquired by said *Lawson* after the 20th July, 1850, the date of the will, it appearing that the testator survived more than three years after that date, and accumulated further property.

We concur with the District Judge in the opinion that the will speaks not from the death of *Lawson*, but from its date; it disposes only of property owned by the testator when it was written, not of subsequent acquisitions. C. C. 1713, 1714, 1715.

As to property acquired after the date of the will, or not embraced in the terms of the will, the deceased died intestate, and his heirs at law inherit such portions of his estate, after the debts are discharged according to law. We are of opinion that the testator's wife, *Mary Elizabeth Harail Talliaferro*, was a particular and not an universal legatee, nor a legatee under universal title. C. C. 1599, 1604, 1618. "Toute disposition qui ne rentre pas dans les définitions ci-dessus nommées des legs universels et à titre universel, constitue un legs particulier. Ainsi celui qui lègue tous ses immeubles, mais comme biens déterminés, et non en masse; celui qui lègue même en masse et dans leur assemblée, toutes ses maisons, tous ses bois, tous ses immeubles des colonies ou de tel département et qui exclut ainsi ses autres immeubles, ne fait que les legs particuliers." 4 Marcadé No. 119. C. N. 1010. And "the legatee by a particular title shall not be liable to the debts of the succession, except the reduction of the legacies as is before provided, and except the action of the mortgage of the creditors." C. C. 1635.

As already intimated, the community debts must be paid out of the community property, and the share of *Mrs. Lawson* is equally burthened with that of *Lawson's* succession, for the discharge of these debts. If *Lawson* left any separate debts, they must be acquitted out of his share of the acquisitions, made after the date of the will, or out of his property not embraced by the will, rather than out of the property bequeathed by him to the particular legatee. Of course the mortgage creditors, if any, are to be paid by preference out of the property hypothecated to them.

It is therefore, ordered that the judgment of the District Court be so amended as to order the community debts to be paid by preference out of the property heretofore held in common between the deceased *Andrew Lawson* and his wife *Mary H. L. Talliaferro*, in equal proportions out of the share of each spouse; and that, after the payment of such community debts out of the community estate, any separate debts due by the said *Andrew Lawson*, if such there be, shall be acquitted out of his interest in property acquired subsequent to the date of the will, or not embraced within its terms, before going upon any property specially bequeathed to his legatees; and it is further ordered and decreed that the judgment appealed from be, in all other respects, affirmed, the costs of this appeal to be borne by the plaintiffs and appellant.

MERRICK, C. J. I think we can only consider those nullities which are expressly alleged. If the law requires certain forms to be observed in the *confection* of a will, the party who relies upon any want thereof should expressly allege such informality.

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LAWSON.

In this case it is not objected that the will was not *received* in the presence of the witnesses. It is merely alleged that it does not "on the face of the will show that it was dictated *in the presence or hearing of the witnesses* by the testator to the notary."

The law only requires that express mention should be made of the following formalities, viz :

1st. That the will was received in the presence of these witnesses, residing in the place, &c.

2d. That it was dictated by the testator and written by the notary as it was dictated, and

3d. That it was then read to the testator in the presence of the witnesses. As no objection is made to the will on the first ground, it must be considered as waived.

If then the witnesses were present when the will was received, they must have been there when it was dictated, for the dictation is a part of the act of receiving the will. But it is objected that it is not mentioned that it was *dictated in the presence of the witnesses*. The law does not require it to be so mentioned in the will. If it be conceded that the will was received in the presence of the witnesses (and it is not objected to, that it was not so received) then under the law it is sufficient on this point if express mention be made that it was dictated by the testator, and written by the notary as directed.

The District Judge was of the opinion that it sufficiently appeared that the witnesses were present at the dictation of the will, among other things from the concluding clause, "thus done and signed in the presence of the subscribing witnesses" &c., and I am not prepared to say, under plaintiffs, allegations, that he erred in his conclusions. I therefore concur in the decree in this case.

COLE, J. Concurred in this opinion.

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### W. H. HOLLOMON, et. al., v. W. HOLLOMON.

The character and effect of a deed to slaves, made in Alabama, must be construed by the laws of that State although the parties afterwards remove to Louisiana.

H. in consideration of love and affection, and the further consideration of one dollar, the receipt of which he acknowledged, did give and grant with warranty, to W. H., (his son) and his heirs and assigns "at the death of H. and the wife of H" certain slaves. *Held* : That by laws of Alabama this was a deed of gift to the son with the reservation of a life estate in the slaves to H. and his wife.

**A** PPEAL from the District Court of Bienville, *Egan, J.*

*Watkins* for plaintiff and appellant. *McGuire & Ray*, for defendant.

COLE, J. The plaintiffs brought this suit as heirs of their father *Bunel Hollomon*; alleging that *Bunel Hollomon* and this defendant *William Hollomon*, were the only children of *Harmon Hollomon*.

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HOLLOMON.

That their father, *Bunel Hollomon*, died before their grandfather *Harmon Hollomon*, who died in this State just prior to the institution of this suit.

They claim as forced heirs, one-half of the property left by their grandfather *Harmon Hollomon*, who died intestate.

They sue for a partition and for one-half of eighty acres of land and four slaves, and one-half of the hire of said slaves from the death of *Harmon Hollomon*.

The defendant sets up title to said slaves under a deed of gift from *Harmon Hollomon*, bearing date 26th of December, 1839. The deed of gift is as follows :

"THE STATE OF ALABAMA,  
Pike County."

"Know all men by these presents, that I, *Harmon Hollomon*, of the State and County aforesaid, for and in consideration of the natural love and affection which I have," or bear toward my son, *William Hollomon*, of the State and County aforesaid, as well as for the further consideration of one dollar to me in hand paid by the said *William Hollomon*, at or before the sealing and delivery of these presents, the receipt whereof I do hereby acknowledge, have given and granted, and by these presents do give and grant unto the said *William Hollomon*, his heirs and assigns at my death, and my wife, *Jane Hollomon's* death, the following described negroes, namely, to wit : Rachel, a woman about thirty-five years of age ; Jem, a boy about eight years old ; Willis, a boy about five years old ; Jacob, a boy about three years old, and Claiborne, a boy about one year old. To have and to hold the above named negroes unto him, the said *William Hollomon*, his heirs and assigns, forever, and I, the said *Hollomon*, my heirs, executors, administrators and assigns, to warrant unto the said *William Hollomon*, his heirs and assigns, the said title of said negroes before named against the claim of myself, my heirs and assignees, after my death, and after the death of my wife, *Jane Hollomon*, as aforesaid, and against the claims of all and every person or persons whatsoever, I will warrant and defend by these presents.

In witness whereof, I have hereunto set my hand, and affixed my seal, in presence of these witnesses, this 26th day of December, in the year of our Lord, 1839.

[Signed]

his  
HARMON X HOLLOMON, [L.S.]  
mark.

[Signed]

" A. C. TOWNSEND, J. P.  
SILAS B. TOWNSEND."

STATE OF ALABAMA, }  
Pike County. }

"I, Andrew C. Townsend, an acting Justice of the Peace for said County, do hereby certify, that on the 26th day of December, 1839, *Harmon Hollomon* personally appeared before me, and acknowledged the foregoing instrument to be his voluntary act and deed.

Given under my hand and seal, this 26th day of December, 1839.

[Signed]

A. C. TOWNSEND, J. P. [L.S.]

"Recorded in Book B. pages 113, and 114, January 13, 1840."

[Signed]

JNO. D. CUTTS, Clerk County Court.

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It was agreed by the parties in the lower court, that the said instrument may be used in evidence as genuine, and it is admitted as such.

There was a consent judgment rendered during the progress of this cause, by which plaintiffs recovered of defendant one hundred dollars in full satisfaction of their interest in the land sued for, and this decree was made without prejudice to the rights of plaintiffs to prosecute their claims as to the other matters in their petition, and this judgment was not to affect the costs of the final decision. It is admitted that plaintiffs have been paid this judgment.

This cause was first tried by a jury who found a verdict for the plaintiff.— There was a new trial granted, and the jury having been waived, there was judgment for defendant, and plaintiffs have appealed.

The consent judgment rendered in this case limits the inquiry into the merits of the cause to the question of title to the slaves named in plaintiff's petition.

The plaintiffs claim as heirs at law of *Harmon Hollomon* deceased, a former owner; while the defendant sets up title in himself, derived from said *Harmon* (his father, and the grandfather of the plaintiffs,) by means of said deed of gift, and it is upon the validity or invalidity of this deed, that the case depends.

This deed is, by the laws of Alabama, a donation of the property in the slaves to defendant, with a reservation of a life estate in the donor; or a gift of the property subject to a loan for use to the grantor, by which fee present passed to the donor at the date of the instrument.

Vide, *Golding v. Golding's Administrators*, vol. 24. Alabama Reports, N. S. p. 126.

The character and effect of this deed must be interpreted and governed by the laws of Alabama, and a subsequent removal of the parties to Louisiana, cannot affect anterior and vested rights of property.

This case is very similar to that of *McColl v. White*. 10. A. p. 577.

Defendant had a right of property in these slaves, subject to the life estate of the donor previous to the removal of the parties to this State; he is therefore entitled to a judgment in his favor.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be affirmed with costs.

### SUCCESSION OF PARMELIA SLOANE—Opposition to appointment of Administrator.

The beneficiary heir, of age and present in the State, has a preference for the administration over the tutor of co-heir who is a minor.

The term, beneficiary heir, applies to one who may accept, as well to one who has accepted with the benefit of inventory.

A woman may be appointed to administer a succession in which she is interested as heir.

**A** PPEAL from the District Court of Union, *Richardson, J. Baker & Harris*, for appellant. *Garnett & Benton*, for appellees.

**SPOFFORD, J.** *Robert Lassitee*, alleging himself to be the surviving husband of *Parmelia Sloane*, deceased, and tutor of their minor child, *Len Moore Lassitee*, applied for letters of administration upon her succession.

*William O. Jones* and *Delaware Young*, wife of *Hugh Young*, children and heirs of age of *Parmelia Sloane*, opposed the application, alleging a better right in themselves. Their opposition was sustained and *Robert Lassitee* has appealed.

In this court, the counsel for *Robert Lassitee* (who is now the provisional administrator under an appointment by the Clerk of the District Court) has suggested the death of the minor child, *Len Moore Lassitee*, and prayed that the case be continued to make the child's heirs parties to the suit.

So far as the claim of *Robert Lassitee* to the administration is based upon the fact of his being tutor to his minor child, it is obvious that it has lapsed by the death of the child. Instead of being a cause for continuing the suit, and citing in the child's heir, (that is the appellant himself,) the child's death is rather a cause for dismissing the application of *Robert Lassitee* altogether. But as he claims to be a dative tutor to certain minor children of *Parmelia Sloane*, by her alleged marriage with one *Wilson*, we deem it proper to examine the claims of the opponents to a preference over him in the administration.

It is only when *all* the beneficiary heirs are minors, that their tutors or curators can claim the preference for the administration. C. C. 1037.

But "in the choice of the administrator, the preference shall be given to the beneficiary heirs over every other person, *if he be of age and present in this State.*" C. C. 1035.

"If there be two or more beneficiary heirs *of age and present in this State*, the Judge shall select one or two from among them, whom he shall consider the most solid for the administration of the succession." C. C. 1036.

The opponents are acknowledged to be heirs of the deceased, of age and present in the State.

But the appellant contends that they are not "*beneficiary heirs*," because they have not yet accepted the succession with benefit of an inventory; and as the Statute of March 16, 1848, p. 84, makes the minor a beneficiary heir by operation of law, their representative has as good a right to the administration as the opponents, if not a better right.

It is true the Article 879 of our Civil Code declares, that "beneficiary heirs are those who *have accepted* the succession under the benefit of an inventory regularly made." Definitions are proverbially dangerous, and no where more so than in a code of laws. A reference to other Articles under the same title, will show how imperfect this definition is, or how soon the compilers of the Code forgot it themselves.

"By term for deliberating, is understood, the time given to the *beneficiary heir* to examine if it be for his interest to accept or reject the succession which has fallen to him." C. C. 1026. Here we find a person who has neither accepted nor renounced a succession styled the "beneficiary heir;" and these terms are undoubtedly used in the Article 1842, to embrace not only the heir who *has accepted* with benefit of inventory, but one who *may* do so.

We conclude that the opponents are beneficiary heirs within the meaning of Articles 1042.

But it is objected that *Delaware Young*, wife of *Hugh Young*, although a beneficiary heir of age, and present in the State, cannot take the office of administratrix by reason of her sex. The cases of *Carraby v. Carraby*, 7 New Series, 466, and *Cusa v. Calvane*, 4 Annual, 538, are cited to sustain this position. But it is now settled that although a woman is in general disabled from performing civil functions, (Civil Code, 25,) yet she may be appointed to administer a succession in which she is interested as heir. *Succession of Block*, 6 An. 810; *Succession of Penney*, 10 An. 290. See also *Succession of Williamson*, 3 An. 262; *Ferrar's Administratrix v. Lambeth*, 11 L. 108.

We are unable to say that the evidence concerning the habits of *W. O. Jones*, is sufficient to show his incompetency to act in the capacity of administrator.

Judgment affirmed.

#### SUCCESSION OF JOHN BOYD.

Orders rendered by the Clerk in the special cases authorized by law under the Constitution, have the same effect as they would have, if rendered by the Judge himself.

The executor, without seizin being given to him by the will, has full powers of administration, and unless the heirs furnish him with money to pay the debts and legacies, they cannot prevent him from taking possession of the property and leaving sufficient to be sold to settle up the estate.

The destitution of an executor cannot be demanded by way of opposition, but should be done, if there be cause, by direct action.

APPEAL from the District Court of Morehouse, *Richardson, J.*

*Mathews & McFee*, for plaintiff. *Todd & Brigham*, and *Ludeling*, for opponents and appellants.

MERRICK, C. J. "*John Boyd* died in Morehouse parish on the 28th day of April, 1857, leaving a large estate, consisting of lands, negroes and personal property. A will dated 25th October, 1850, was found, and it was probated on 30th of April."

"By this testament *Boyd* nominated *John V. Robertson* and *Thomas M. Jones*, his executors."

SUCCESSION OF  
BOYD.

"On the 2d of May, *Robertson*, one of the executors named in the will, declined the appointment, 'to obviate objections that might be made to him personally.' Thereupon, *Jones* applied to be confirmed as sole executor of the last will of *Boyd*, and the Clerk made the order confirming him as sole executor."

"On the 4th of May, *Thomas M. Jones* filed his petition, alleging that he and *Robertson* had been nominated as executors by the last will of *Boyd*, that he had been confirmed as such, that by the terms of the will *seizin of the property was not given to the executors*, and that the *appointment of an administrator* was necessary; and he prayed to be appointed administrator of the estate.

"*Joseph Boyd* filed an opposition to the appointment of *Jones*, and afterwards filed an amended opposition, and prayed that the order made by the Clerk confirming *Jones* as executor, be rescinded, and asking to be appointed in his stead."

"*William Maconchy*, a creditor, also filed an opposition, and prayed to be appointed curator, &c., of the succession of *Boyd*."

There was judgment dismissing the oppositions of *Boyd* and *Maconchy*, and recognizing *Jones* as sole executor, with full seizin of all the property of *John Boyd*.

From this judgment *Boyd* and *Maconchy* have both appealed.

The executor, it should also be observed, filed an amended petition after the opposition was filed, and alleged that he had erred in his first petition in stating that he had not seizin, and that he had seizin by the will.

Under this state of facts, the opponents contend that the executor, *Jones*, has not the seizin of the estate, as he has judicially admitted, and as *Robertson* has declined to act, the trust which the testator intended to confer on both *Jones* and *Robertson*, has lapsed.

The Constitution has authorized the Legislature to confer the power upon the Clerks to make certain judicial orders. Art. 76.

These orders, when rendered by the Clerk in the special cases authorized, have precisely the same effect as they would have, if rendered by the Judge himself under the same circumstances. The order of the Clerk appointing *Jones*, is not, therefore, the less effective, because made by the Clerk. Until annulled, it must be considered as conferring upon the executor the same power that the like order would do, if made by the Judge. The Clerk may have erred in appointing one of several executors, sole executor, without requiring him to advertise his application and give bond as a dative testamentary executor, (upon which, however, we express no opinion,) but the appointment once made, will confer upon such executor the power to administer the estate, as fully as if he were a sole executor by the will. Since the Act of 1837, we think the executor without seizin, has the quasi administration of the succession, as well as the power to apply to the courts for the sale of property to pay debts and legacies. Revised Statutes, 2, 222; 79, sec. 14. If the heirs and legatees are absent, he should take charge of the estate for their benefit, whether seizin has been expressly conferred by the will or not. If seizin is not given him, or if the heirs furnish him with money to pay the debts and legacies, he cannot, as between themselves, prevent them from taking possession of the property; but his power of administration will enable him to col-

lect the funds and cause property sufficient to settle up the estate to be sold. C. C. 1661, 1665; Revised Statutes, p. 2; C. P. 133; Ibid, 111; C. C. 1663, 1666.

The application for letters of administration by *Jones* was, therefore, an unnecessary proceeding, as in his capacity of executor, in the absence of the heirs or their agents, he had power to administer the estate, and whether the heirs were present or absent, he had power to collect funds, sell property, pay debts, and in fine to liquidate the affairs of the estate.

It was irregular, by way of opposition, to demand the destitution of the executor. It should be done, if there be cause, by a direct action.

We are of the opinion, that the appointment of an administrator was wholly unnecessary, so long as the office of executor continued, and that the estate ought not to be charged with the costs of two administrations. As the executor commenced these irregular proceedings, we think they should be dismissed at his cost.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and that the application of *Thomas M. Jones*, for letters of administration upon the succession of *John Boyd*, deceased, and the opposition of *Joseph Boyd* and *William Maconchy*, be dismissed; and that the said *Thomas M. Jones*, pay the costs of both courts.

#### J. A. FLUKER v. B. DAVIS and SHERIFF.

Successive injunctions upon different grounds which might have been put at issue in one proceeding, will not be allowed.

APPEAL from the District Court of Morehouse, *Richardson, J.*

*A. Todd & Brigham*, for plaintiff and appellant. *S. G. Parsons*, for defendants.

SPOFFORD, J. This is a second injunction sued out by this plaintiff to restrain the execution of a judgment against *Thomas H. Barham*, upon lands in his possession derived from *Barham*. See *Fluker, administratrix v. Bobo, Sheriff*, 11 Ann.

There are no grounds justifying a resort to the remedy of injunction pleaded in this case, which should not have been pleaded in the former suit. And it is inadmissible to hamper the execution of judgments by successive injunctions upon different grounds which might have been put at issue in one proceeding. Any other rule would open the door to endless litigation and delay. *McMicken v. Morgan*, 9 Ann., 208.

The mode of executing the judgment, so as to secure the respective rights of the parties upon the proceeds, has been provided for in the decree of the District Court, of which the plaintiff in question certainly has no reason to complain.

Judgment affirmed.

## R. E. ALCOCK, for the use, &amp;c. v. JOHN MCKAIN.

The special endorsee of a bill or note, may disregard all posterior endorsements, even though special, and avail himself of the possession of the instrument to sue the maker.

**A** PPEAL from the District Court of Morehouse, *Richardson, J.*  
*McGuire & Ray*, for plaintiff and appellant. *Todd & Brigham*, for defendant.

**SPOFFORD, J.** There was judgment in favor of the defendant in a suit upon a promissory note of which he was maker, and the plaintiff has appealed.

The defendant relies, in part, upon a plea of prescription. The plea is repelled by the testimony of two witnesses, disclosing acknowledgment by the defendant.

But it is contended that the evidence of one of these witnesses was inadmissible, because he failed to answer, fully, one of the defendant's cross interrogatories, and also to annex certain extracts from his commercial books. It does not appear that the witnesses' books contained any such entries as were sought to be extracted by the interrogatory. All the cross interrogatories purport to have been answered. If they were answered evasively, the fact would go to the credit of the witness, not to the admissibility of his deposition. But there is no evasion made palpable. Nor can we conclude that the witness is rendered unworthy of belief by the evidence that *Gribble & Montgomery* once sold a small lot of cotton for the account of *John McKain*. It does not necessarily result from that circumstance, that *John McKain* himself shipped the cotton to them, the point to which the witness was interrogated.

It is also argued by the appellee, that the plaintiff cannot recover, because, being himself a special endorsee of the note sued upon, he had endorsed it once in full to the cashier of the Louisiana State Bank, from whom no re-transfer, to himself, was shown.

The more recent doctrine of the court is, that under circumstances like these, the endorser of a bill or note, may disregard all posterior endorsement, even though special, and avail himself of his possession of the instrument to sue the maker, it being presumed that, upon protest for non payment, it had been re-mitted to him by the subsequent parties whom he was bound to indemnify. See *Squiers v. Stockton*, 5 Ann., 120; *Henrie v. Baily*, 17 La., 217.

It is, therefore, ordered, that the judgment of the District Court be avoided and reversed; and it is, now ordered, adjudged and decreed, that the plaintiff recover of the defendant, the sum of five hundred and fifty-three dollars and nine cents, with five per cent. interest thereon, from the 27th of February, 1850, until paid, and three dollars costs of protest and the costs of suit in both courts.

## POWELL &amp; HOPKINS v. M. HORSON et al.

An appeal from an interlocutory order, over-ruling a motion to dissolve an attachment, will be dismissed unless it appear that such order will work an irreparable injury.

**A**PPEAL from the District Court of Ouachita, *Richardson, J.*  
*Mathews & McFee*, for plaintiffs and appellees. *McGuire & Ray*, for defendants.

**SPOFFORD, J.** This appeal is premature and must be dismissed. It was taken from an interlocutory order over-ruling the defendants' motion to dissolve an attachment sued out in the case. It is only when an interlocutory judgment may work an irreparable injury to the party against whom it has been rendered, that an appeal will lie from it. C. P., 566. And the party who appeals from an interlocutory judgment, must show that such injury may flow from a refusal to entertain the appeal.

But in this case, it clearly appears from the record, that no irreparable injury can, in the ordinary course of things, result from having the interlocutory order to await the decision of the law upon its merits. No property of the defendants' appears to have been taken into his possession by the sheriff. Two persons, *Bussy* and *Douglass*, have been served with the garnishee process. *Bussy* has not answered, and it does not, therefore, appear that he owes anything to the defendants, or has anything of theirs in possession. *Douglass*, the other garnishee, has answered, and discloses that there is pending against him in the courts, an unliquidated claim in favor of *Matilda Hopson*, one of the defendants, for \$2,861 50, with interests and credits. If the garnishees owe the defendants, *non constat*, that they would pay immediately, but for the garnishment. And if they are delayed by it from paying, the damages would be only the interest upon the claim of less than \$4,000, which can be easily repaired, and is secured by the bond given by the plaintiffs to indemnify the defendants against all injury resulting from an illegal attachment. It is stated in the appellants' brief, the garnishee, *Bussy*, owes the defendants \$10,000, he can pay over to them all but the sum claimed by the plaintiffs, (less than \$4,000,) and the withholding of that for a time, cannot be an injury beyond remedy. The docket of this court is too crowded to justify us in needlessly consuming time devoted to the public service by trying cases piece-meal, where the law does not require it. This does not appear to be one of the cases that demands our summary interference.

Appeal dismissed.

## BRANDER, WILLIAMS &amp; Co. et als. v. BOBO, Sheriff et al.

The defendant, whose property has been seized under an execution, and who has given a delivery bond under the Act of 1842, (Rev. Stat., p. 528, Sec. 5,) may make a valid sale of the property. The judgment creditor cannot seize the property in the hands of the vendee; his remedy is against the parties to the bond. And when the sheriff has declared the bond forfeited, subsequent seizing creditors cannot complain of informalities in the declaration of forfeiture. It is an answer to them to say that the bond was rightfully forfeited.

**A** PPEAL from the District Court of Morehouse, *Richardson, J.*  
*A. Mathews & McFee*, for plaintiffs. *J. T. Ludeling*, for defendants and appellants.

MERRICK, C. J. We take the statement of facts in these consolidated cases from the brief of appellants' counsel, which we find sufficiently accurate.

On the 18th January, 1854, *Palmer & Co.* obtained judgment against *Thomas N. Barham*, for \$1,140 06, with eight per cent. interest from 16th of April, 1853.

On the 3d of February, 1854, execution was issued under the judgment. On the 7th of February, *Thomas N. Barham* pointed out "one town lot with the buildings thereon;" and afterwards gave a delivery bond for the property, with *Bales B. Billingsly* as his security. The property was offered for sale on the first Saturday of April, for cash, and there being no bid, the property was re-advertised for sale on twelve month's credit. This sale was enjoined; and in January, following, the injunction was dissolved.

In the meantime (9th June, 1854,) *Thomas N. Barham*, sold the property (pointed out by him to be seized, and released by delivery bond) to *Miltenberger*, for \$2,500.

On the 27th of January, 1855, the property was re-advertised, and on the day appointed, the sheriff offered the property for sale, notwithstanding the property had not been delivered to him; and *Thomas N. Barham* and *Mr. Todd*, the agent of *Miltenberger*, prohibited the sheriff from selling it, as it was the property of *Miltenberger*.

The sheriff acting under instructions from the attorney of *Palmer & Co.*, given before he had any knowledge of the sale to *Miltenberger*, bought the property for *Palmer & Co.*, and at the same time declared the delivery bond forfeited for the residue.

On the 7th of March, 1855, execution was issued on the forfeited delivery bond; and on the 8th the sheriff levied on two negroes, *Thornton* and *Westley*. *B. B. Billingsly* executed a delivery bond for the property. Before the day of sale, one *Green Shropshire*, to whom these and other slaves and property of *Billingsly* had been transferred before the seizure, sued out an injunction on the grounds that the negroes seized were his property. This injunction was subsequently abandoned by *Shropshire*.

On the same day that the negroes above mentioned, were seized under *Palmer & Co.*'s execution, the sheriff levied on a boy named *Bob*, about 14 or 15

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years old, to satisfy the execution of *Brander, Williams & Co.*, for \$464 98, with 8 per cent. from 8th July, 1854. This negro was sold to pay the said execution. The records do not show for how much.

On the 28th of June, 1855, the sheriff levied on a negro named *Charles*, in the cases of *Smith & Heard, Executor, v. Billingsly*, and *John G. Williams v. Billingsly*; and on the 27th of June, he levied on the negroes, *Thornton, Westley and Bob*, under an execution in the cases of *R. B. Briscoe & E. Farrie*; and on July 5th, he levied on *Thornton and Westley*, under the execution of *Brander, Williams & Co.*

One of the houses or buildings on the lots seized, bonded for and transferred to *Miltenberger*, was burnt at the time of the sale, and notwithstanding the opposition of *Barham and Miltenberger*, the property was sold and a credit of \$382 was made upon the execution, and the bond was declared forfeited for the residue on the ground that the house was not delivered.

The principal question raised in this case, is the effect of the forfeiture of the forthcoming bond.

The Statute of 1842 reenacted in 1855. Rev. Stat., p. 528, Sec. 5, is in these words, viz: "Sec. 5. The defendant in execution whose property has been seized, shall have the right to retain the property in his own possession from the time of such seizure until the day of sale, on condition that said defendant shall execute his bond in favor of the plaintiff in execution, in solido, with one or more sufficient securities domiciliated in the Parish, for the amount one-half over and above the estimated value of the property seized, conditioned for the faithful delivery of the property at the time of the sale, which bond shall be filed in the office from which the writ issued within ten days after the date thereof; and upon forfeiture of said bond, which fact shall be made to appear by the certificate of the officer charged with the execution of the writ, the same shall have the same effect as a twelve months' bond, and execution shall issue thereon, on application of the plaintiff or his attorney, against all the parties to said bond."

The appellees contend, under this Statute, that the execution of the delivery bond does not release the seizure, though it permits the property to remain in the custody of the debtor, and that the debtor can no more legally sell or dispose of the property than if no such bond had been executed. The appellants contend that the sale to *Miltenberger*, after the execution of the bond, was a valid sale, and the sheriff was justified in declaring the bond forfeited.

The Statute evidently confers upon the debtor the option to continue the possession of the sheriff, (in which event he would be the agent of the sheriff,) or to defeat the seizure and possession of the sheriff altogether. For it is obvious, that if the debtor refuses to produce the property, the sheriff has no power to seize it again, and that if the sheriff has no power over the property, and no control, the debtor, correlative, must have entire control, and can as easily defeat the possession of the sheriff by selling and delivering the movables and executing his written conveyance of the immovables to a third party the day after executing the forthcoming bond, as on the day appointed for the sale.

The bond was violated when *Barham* put it out of his power to make a valid delivery of the property to the sheriff, and when he and his vendees, *Miltenberger & Co.*, forbid the sale, having no legal possession, the sheriff could not sell. There was then, a just cause on the part of the sheriff, to de-

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clare the whole bond forfeited, and having declared it forfeited for all but \$382, third persons cannot complain of informalities in the mere form in which the sheriff has made the declaration of forfeiture. *Barham* or *Billingly* may possibly complain, but not other subsequent seizing creditors. It is an answer to them to say that the bond was rightfully declared forfeited, and the form in which it was done, in no manner prejudices them.

*J. H. Palmer & Co.*, are therefore entitled to the proceeds of the sale of the slaves sold upon their execution, unless the opponents have superior privileges and mortgages.

We concur with the District Judge that *Brander, Williams & Co.*, as mortgage creditors, are entitled to be paid the balance of their judgment.

As to the other parties, they are entitled to be paid only in the event a surplus is left, and according to the date of their seizures.

The deed to *Shropshire*, as correctly observed by the District Judge, has no influence upon the decision of the case as between these parties.

We find, on examining the case to ascertain the costs and the rank of creditors, that there will only be sufficient to pay the costs, the judgment of *Brander, Williams & Co.*, and the execution of *J. H. Palmer & Co.*, disregarding the erroneous credit on the execution.

It is, therefore, ordered, adjudged and decreed, that so much of said judgment as decrees a preference to *Brander, Williams & Co.*, out of the proceeds of the slaves *Thornton* and *Westley*, for \$267 45, be affirmed, and in other respects said judgment be avoided and reversed. And it is further ordered, that the residue of the price of said slaves, viz: \$1,296 55, be paid to said *J. H. Parham & Co.*, to be credited upon their said execution for debt, interests and costs. And it is further ordered, that the oppositions of *R. B. Briscoe* and *Eugene Farris*, be dismissed, and that the costs of the appeal be equally born by the said *R. B. Briscoe, Eugene Farris* and *Joseph H. Palmer & Co.*, and that the costs of the lower court be also divided in the same manner.

#### BARHAM v. LIVINGSTON.

A Court of Justice will not enforce an obligation where it appears to be nothing more than a bet in disguise on a presidential election.

APPEAL from the District Court of Morehouse. *Richardson, J.*  
*R. B. Todd & Compton Brigham*, for plaintiff. *McGuire & Ray*, for defendant and appellant.

SPOFFORD, J. The defendant and appellant contests the correctness of the judgment appealed from, in respect of two items only.

The first, is a small sum of \$16 22, with reference to which we do not think the testimony sufficiently clear to require an amendment of the judgment.

The other is an item of \$1,250 and interest, evidenced by a promissary note executed by the plaintiff *Barham* in favor of *A. & R. D. Livingston* on the 28th October, 1852, payable March 1st, 1853. *R. D. Livingston* has assigned his interest in the note to the defendant *A. Livingston*.

The note was nominally given for a house and lot in Bastrop, pretended to

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have been sold by the *Livingston's* to *Barham*. The person who drew up the note and deed, says that, after the sale was made, the parties wished him to draw up an instrument of writing, depositing the deed and note to abide the result of the presidential election; that he refused to have anything to do with that part of the transaction, but after some inducement, wrote an instrument in relation to their proposed agreement which was signed by the parties after the sale and note were executed. Another witness, present during the whole affair, states that a proposition was made by *Barham* to *Livingston* to make a bet upon the presidential election, and they entered into writings in relation to the proposed bet. They went into *McFee's* office when the bet was reduced to writing. Another witness testifies that he had heard the defendant, *Livingston*, say that he had a note of \$1,200 or \$1,250 from *Barham*.

No deed from the *Livingston's* to *Barham* of the house and lot has been produced or shown to have been in existence at the time of this trial in the court below. At the date of the pretended sale, he was a tenant of the house under the *Livingston's*, and he gave his note to them for rent up to Feb. 1853, several months after the alleged sale, which is also claimed and allowed to the defendant. The *Livingston's* have contrived to act as owners of the property since as before the sale, and *Barham* has never set up any claim to it.

It is apparent that the pretended sale was only a bet disguised. The plaintiff staked his note for \$1,250, against the defendant's house and lot, upon the dubious issue of a presidential election. We cannot infer from the evidence, as the appellant's counsel does, that the sale was a *bona fide* sale, untainted by any illicit condition, and that the bet was an afterthought, wholly disconnected with the sale. Even if it were, the consideration of the note has wholly failed, for the alleged vendors still have their house and lot which is not shown to have been at any time conveyed and delivered to the plaintiff. There was no compliance on their part with the obligation which the law imposes upon a vendor.

The contract by virtue of which alone the defendant obtained possession of the plaintiff's note, was reprobated by the laws in force at the time of its formation. Although a penal statute against betting on elections then in force, has been since repealed, that repeal did not purge the contract of its original taint. Moreover, the article 2952 of the Civil Code, now furnishes, as it did then, an impassable barrier to the allowance of such claims as this in a court of justice.

"The law grants no action for the payment of what has been won at gaming or by a bet, except for games tending to promote skill in the use of arms, such as the exercise of guns, foot, horse and chariot racing. And as to such games, the judge may reject the demand when the sum appears to him excessive."

Judgment affirmed.

## J. B. HENDRICKS v. A. J. BOBO et als., securities of BARHAM.

The parish Treasurer is the depository of the School Fund due to his parish; he may demand payment from the collector, and on his default sue him to recover it.

**A**PPEAL from the District Court of the parish of Morehouse, *Richardson, J. Newton & Hall*, for plaintiff and appellant. *McGuire & Ray*, for defendant.

SPOFFORD, J. All that the defendants could require would be protection against a future demand for the same cause of action. If there is a plaintiff who is authorized to receive the money alleged to be due to the school fund by *Barham*, and whose receipt would screen the sureties of *Barham* from any pursuit hereafter, they have no reason to complain.

Before any decision was had upon the exceptions, *Robert B. Briscoe*, as Parish Treasurer, made himself a party plaintiff to the suit, without any objection on the part of the defendants. They do not pretend that he was not Parish Treasurer *de facto* and *de jure*, or that he had not given bond as required by law.

The Parish Treasurer is the depository of the school fund apportioned and collected for the use of his parish. Revised Statutes, p. 190, sec. 5. The sums due to each of the parishes in this State from the annual collection of the school tax, shall be paid quarterly to the Treasurer thereof, by the State Tax Collector, &c. Revised Statutes, p. 191, sec. 6. If the Tax Collector is bound to pay over the money to the Parish Treasurer, it would seem to follow that the Parish Treasurer may demand payment of the Collector, and, upon this default, sue for the money thus due to the school fund of his parish.

We are, therefore, of opinion that there was no error in overruling the exceptions, which were ordered to stand as part of the answer.

A plea of prescription has been filed in this court, which is wholly untenable. Even if the prescription of two years could run against such a claim as this, it has been interrupted.

There was error in awarding damages at the rate of twenty per cent per annum, from the 21st of August, 1853. These damages run only from the 3d of October, 1854, and are claimed from that date only in the petition.

It is, therefore, ordered, that the judgment of the District Court be amended as to award damages at the rate of twenty per cent. upon the principal sum recovered, only from the 3d of October, 1854, instead of the 21st of August, 1853. And it is further ordered, that in all other respects, the judgment appealed from be affirmed; the cost of this appeal to be borne by the plaintiff and appellee.

J. M. JONES v. J. A. ADAMS.

Where parties have entered into a contract for building a house and subsequently deviated from it, the contract price should, as far as applicable, indicate the measure of the value of the work done.

**A**PPEAL from the District Court of Bossier. *Drew, J.*  
*Watkins & George* and *W. J. Duncan*, for plaintiff and appellant.

MERRICK, C. J. The plaintiff has instituted the present action to recover of the defendant \$3,084 44, for materials furnished and certain carpenters' work done for the defendant.

It appears that the plaintiff contracted to build a dwelling house and certain other buildings for defendant. He agreed to build a house with rooms 16 feet square, and furnish the materials for \$1,000. After he had framed the same, the parties agreed to change the plan, by which the frame thus made was laid aside, and a new frame erected for rooms 18 feet square. This building was substantially completed, and is in the possession and occupancy of the defendant. The plaintiff contends that inasmuch as the first contract was not carried out, that he is entitled to recover as on a *quantum meruit*, and that he cannot be held to a contract which has been abandoned by the parties.

We think that where parties have entered into a contract for building a house, and subsequently deviated from it, that it should stand as a measure of the value of the work and materials as far as they correspond with and are applicable to such contract.

In this case the witnesses show that the house built would cost over the house contracted for, only about \$600 *extra*.

|                                                                |             |
|----------------------------------------------------------------|-------------|
| The plaintiff is therefore entitled to price of the house..... | \$ 1,600 00 |
| To the old frame.....                                          | \$129 00    |
| Less its value for the building.....                           | 50 00       |
|                                                                | <hr/>       |
|                                                                | \$ 79 00    |
| Out houses.....                                                | 180 00      |
| To building cribs, here introduced as in compensation.....     | 300 00      |
|                                                                | <hr/>       |
|                                                                | \$2,159 00  |
| The defendant has proven payments.....                         | 1,749 80    |
|                                                                | <hr/>       |
|                                                                | \$ 410 20   |

The plaintiff is entitled to recover a judgment for \$410 20.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the plaintiff and against the defendant for four hundred and ten dollars and twenty cents, and legal interest thereon, from January 1st, 1857, until paid, and that there be judgment against the defendants reconventional demand, and that the defendant pay the cost in both courts.

## JOHN B. STEWART v. DANIEL NEWTON, Administrator.

The creditors of an insolvent succession have a right to require that their debts should be paid before property, the recorded title and possession of which was in their debtor at the time of his death, can be recovered by one claiming to be the real owner and producing a counter-letter to defeat the apparent title in the succession.

**A** PPEAL from the District Court of Morehouse, *Richardson, J.*  
*S. G. Parsons*, for plaintiff. *McGuire & Ray*, for defendant and appellant.

**SPOFFORD, J.** The object of this suit is to recover from the administrator of the succession of *Joshua H. Pool*, certain lots in the town of Bastrop, parish of Morehouse. The plaintiff alleges that he was the original owner; that they were sold under execution against him; that they were bought in by one *H. Faulk*, for his benefit, the title in *Faulk* being a mere simulation as proved by a counter-letter to the plaintiff, and that afterwards, *Faulk* conveyed his title to *Pool*, who also kept up the simulation, and executed a counter-letter to the plaintiff. He also avversed, that he advanced the money for both these purchases to the apparent vendees. The plaintiff had a judgment and the administrator has appealed.

The Sheriff's sale to *Faulk* was in May, 1854, for the price of \$100, in the suit of *Pearce v. Stewart*. *Faulk's* sale to *Pool* was in September, 1854, for the nominal price of \$499 70, the vendor giving only a quit claim title. This deed was duly registered in the proper conveyance office.

In December, 1855, *Post* being then in New Orleans, and in bad health, wrote a letter to the plaintiff, and a power of attorney to *M. Todd*, of Bastrop. The letter states, in the outset, "Inclosed you will find a statement directed to *Colonel Todd*, in relation to your real estate in Bastrop, which will act as your security in case of accident."

The letter of attorney to *Mr. Todd* is as follows: "When *John B. Stewart* pays all of the notes which I left in your hands upon the said *Stewart*, he then is entitled to a deed from myself to him of all the real estate lying in the town of Bastrop, consisting of town lots, which I purchased of *Hannibal Faulk*, and I hereby authorize you, after the aforementioned notes are paid, to make the said *Stewart* a title," &c.

*Pool* died in January, 1856, and this suit was brought in May following.

The bill of exceptions taken to the evidence of the contents of a counter-letter from *Faulk* to the plaintiff, alleged to be lost, need not be noticed, as we consider that the written declaration of *Pool* acknowledged the simulation of his title, and bind *Pool* and his representatives to convey the apparent title upon a compliance on the part of *Stewart* with certain specified conditions.

The District Judge decreed the reconveyance absolutely.

But it is pleaded and proved, that if the property be taken out of the succession of *Pool*, in which it was inventoried, that estate will be insolvent. As the recorded title and possession of the lots were in *Pool*, from September, 1854, until his death in January, 1856, it is obvious that the latent claim of the plaintiff, based upon an avowed simulation, and we fear, indeed, by a de-

nire to secure the property, cannot supersede the claims of creditors who have, since that date, trusted *Pool* on the faith of his being owner of this property. The title set up by the plaintiff under this alleged counter-letter, is expressly subordinated by law to the rights of purchasers from, and creditors of, his simulated vendee. "Counter-letters can have no effect against creditors, or *bona fide* purchasers; they are valid as to all others." C. C. 2236.

It is not surprising when we examine the reports of adjudged cases, that simulation should carry with it a suspicion of fraud. And while parties to a simulated contract may be compelled, *inter se*, to treat it as a nullity, upon the production of a counter-letter which binds one of them to do so, still the law is careful to guard the interest of third persons against any injury from such a dissolution of an apparent title. Had it failed to do so, public confidence would have been destroyed, and judicial credit paralysed. If a private counter-letter could, at any time and as to all the world, defeat the most formal title in the archives of the Recorder's office, their authentic acts would be mockeries, and registry offices become pitfalls for the unwary. Creditors of *Pool*, since his apparent acquisition of the property sued for, who may have trusted him in consideration of it, are entitled to be paid out of it, if the balance of his estate is insufficient to pay them. It does not appear what their numbers and the amounts of their claims are. But it would seem that a reservation in their favor should have been made, which the District Judge omitted to make.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed. And it is now ordered, that the property sued for be declared liable to satisfy the debts of *John H. Pool*, contracted since the 1st of September, 1854, after the other property of the succession is exhausted; and that the defendant, administrator of the succession of *J. H. Pool*, be ordered to file immediately a settlement of such debts, and of the other assets of the succession, to be homologated contradictorily between the plaintiff and the administrator, or parties in interest. And it is further ordered, adjudged and decreed, that so much of the property sued for as may, upon the homologation of the statement and account aforesaid, be found necessary to satisfy the just claims of the creditors of *J. H. Pool* thereupon, be sold for that purpose; and that the balance of said property, if any, be reconveyed by the administrator of the said succession to the plaintiff. And it is ordered, that the cause be remanded for the purposes aforesaid; the costs of this appeal to be borne by the plaintiff and appellee, and the costs of the District Court to abide the issue of the investigation into the accounts and claims for which the property is herein declared liable.

## W. A. HOLLAND v. J. G. MILLER.

Although no sentence of interdiction may have been pronounced, yet it will be sufficient to vitiate a contract if it can be shown that insanity or imbecility of mind has been taken advantage of.

**A**PPEAL from the District Court of Morehouse. *Richardson, J.*  
*Todd & Brigham*, for plaintiff and appellant. *Newton & Hall*, for defendant.

COLE, J. Plaintiff is appellant from a judgment rendered against him to recover certain slaves described in his petition, in the defendant's possession, with their hire; or for the value of said slaves and hire; and to annul the judgment under it, by virtue of which, defendant claims title to the slaves.

The grounds alleged for annulling the judgment, are

1st. On account of the insanity of plaintiff at the time the confession of judgment was signed, and at the time the judgment was rendered thereon.

2d. That the judgment was fraudulently procured by taking advantage of plaintiff's imbecility of mind; and

3d. That the judgment was without consideration, and the account on which it was based entirely fictitious, or that if the debts therein stated to have been paid, were really paid, it was done with plaintiff's funds, as the defendant had previously thereto received a large amount of plaintiff's property and funds.

1. As plaintiff wishes to annul a judgment on the ground of insanity, it is incumbent on him to establish its existence at the time he confessed judgment. In this case there has been no judgment of interdiction, and the proof does not clearly establish the first point.

Art. 1781. C. C. declares, that the contract, entered into by a person of insane mind, is void as to him for the want of that assent, which none but persons, in possession of their mental faculties, can give.

It is not the judgment of interdiction therefore, that creates the incapacity, it is evidence only of its existence, but it is conclusive evidence. The fourth rule deduced from the principle of said article is, that, except in the case of death, no suit can be brought, nor any exception made to invalidate a contract on account of insanity, unless judgment of interdiction be pronounced before bringing the suit, or at least applied for before making the exception. This rule is modified by other principles in Art. 1781, but they do not affect the facts of this case.

Contracts would rest on a very weak foundation, if those of the most solemn character could be avoided on allegations of insanity when the proof thereof is contradictory.

It would be necessary for contracting parties, before the execution of the contract to inquire into their mutual mental soundness.

There is then much in favor of the rule that judgment of interdiction must be pronounced before instituting suit to annul a contract, except in the cases provided for by law, and this brings us to the second point of plaintiff, that the judgment was fraudulently procured by taking advantage of plaintiff's imbecility of mind.

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If plaintiff had established this position, he would have had a legal defence; for even where there is no interdiction, fraud will vitiate the contract, if it can be shown, that insanity or imbecility of mind has been fraudulently taken advantage of.

For, a person might be notoriously insane or imbecile, yet he might not have been interdicted, and advantage might be taken of it to induce him to transfer without consideration his rights. Plaintiff has not satisfactorily established his second position.

We will also observe, that if the fraud should appear plainly on the face of the instrument, it would be a sufficient cause to annul the contract, but such is not the case in the suit at bar.

The third point, that the judgment was without consideration is not proved.

This case was decided in favor of defendant by the judge *a quo*. He was better acquainted with the credibility of the witnesses than we are; and there does not appear to be sufficient grounds for reversing the judgment.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be affirmed with cost.

## STATE v. JOHN MUNCO.

The indictment charged, that the accused, on the second day of December, 1855, at &c., "upon the body of one Adam Lammert, a free white person, in the peace of the State, then and there being, with a certain dangerous weapon, called a shot gun, then and there loaded with gun powder and divers leaden shot, which the said John Munco, then and there, in both his hands, had and held of and against the said Adam Lammert, feloniously, wilfully and of his malice, aforethought, did shoot and discharge with intent, thereby, wilfully and of his malice aforethought, the said Adam Lammert, to kill and murder, contrary, &c." *Held*: That, although the indictment does not follow the language of the Statute, yet it sufficiently charges the accused. First, with an assault, by wilfully shooting at Lammert, &c., and Second, with an assault with an intent, in that manner, to commit murder.

Although the word "assault," may not be used, yet when the indictment charges the accused with shooting a gun, at and against another, with intent to commit murder, it will sufficiently imply an assault.

On the trial of the accused, the State offered to prove that L. was struck with shot; objection was made to the evidence, that "there was no allegation in the indictment that L. was shot or wounded." *Held*: That the testimony was admissible.

Where the proof offered in evidence supports the indictment, although it proves a more heinous offence, it is within the discretion of the Judge to receive it.

The District Judge charged the jury "That although death did not ensue from the act, yet the malice aforethought, was equally implied from the act, as though death did ensue." *Held*: The charge is erroneous, because it implies an opinion upon the act proven, which the Judge is now prohibited from giving.

It is not necessary, on a prosecution for shooting, &c., &c., that it should be shown how the gun was loaded. This may be presumed from all the circumstances.

**A**PPEAL from the District Court of Catahoula, Bary, J.

Dalty and W. H. Houston, for the State. McGuin & Ray, for the prisoner.

MERRICK, C. J. It is charged, in the indictment in this case, that the accused, on the second day of December, 1855, at &c., "upon the body of one Adam Lammert, a free white person, in the peace of the State, then and there

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being, with a certain dangerous weapon called a shot gun, then and there loaded with gun powder and divers leaden shot, which the said *John Mungo*, then and there, in both his hands, had and held at and against the said *Adam Lammert*, feloniously, wilfully and of his malice aforethought, did shoot and discharge with intent, thereby wilfully and of his malice aforethought, the said *Adam Lammert*, to kill and murder, contrary, &c."

The accused having been found guilty under the indictment, moved an arrest of judgment, on the ground that the indictment does not charge the accused with any crime or offence known to the law. The motion in arrest of judgment was overruled, and the accused was sentenced to *four* years imprisonment into the penitentiary.

His counsel urge the ground assumed in the motion in arrest of judgment, as a cause of reversal of the judgment here.

Although the indictment does not follow the language of the Statute, yet we think that it embraces, in the act charged, two of the offences provided for by the ninth Section of the Act 14th March, 1855. (p. 131,) viz: It charges the accused,

1st. With an assault by wilfully shooting at *Lammert*.

2d. With an assault with an intent, in that manner, to commit murder.

It is true the word "assault" is not used in the indictment, but the shooting of a gun at and against another with intent to commit murder, is certainly an assault. The offence prohibited by the Statute has, therefore, been substantially alleged.

The motion in arrest of judgment was, on the ground stated, properly overruled.

As we consider the lower court had a sufficient indictment before it, we will consider the regularity of the proceedings on the trial, and notice the bills of exception taken by the appellant.

I. The State offered witnesses on the trial to prove that *A. Lammert* was struck with the shot, and to prove the number and extent of his wounds, the testimony was received, notwithstanding the defendant objected, that "there was no allegation in the indictment that *Lammert* was shot or wounded."

Doubtless before the passage of the Act of 14th March, 1855, entitled an Act to regulate the mode of procedure in criminal prosecutions, which has been borrowed from the recent English laws, the testimony might have been admissible to show the manner in which the gun was loaded and the intent of the accused.

However that may be, we think it perfectly clear that the testimony was admissible under the ninth section of said Act. It is in these words:

"Be it enacted, &c., That if, upon the trial of any person for any crime or misdemeanor, it shall appear that the facts given in evidence amount in law to some other offence, he shall not, by reason thereof, be entitled to be acquitted of the offence charged, and no person tried for such crime or misdemeanor shall be liable to be afterwards prosecuted for such other offence on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for the offence shown to have been committed, in which case such person may be dealt with, in all respects, as if he had not been put upon his trial."

Before considering this Section, we will premise, by adverting to a distinction between the common law (which was the same in both criminal and civil proceedings,) and our own in civil proceedings.

Under our law, in civil cases, if the testimony is once received, we pass upon it whether it supports the allegations of the party offering it or not. At common law, unless the testimony when received corresponds with the allegation in the declaration or indictment, there is a variance and the party fails, notwithstanding the jury has heard evidence proving a demand or a crime though different from that alleged.

The usual mode, therefore, is to suffer the testimony to go to the jury, relying upon the instructions of the Judge to the jury, as to what constitutes a variance. 1 Greenleaf, p. 65; 1 Chitty's Pleadings, pp. 303, 304; 3 Starkie Ev., 1526.

As, at common law, all misdemeanors merge in the felony, a *quasi* variance takes place, when under an indictment for a misdemeanor the facts establish the offence charged, but because they also show an aggravation of that offence which, by its aggravation, is made a felony, the misdemeanor is merged in the felony, and the offence charged is considered as not proved. 1 Bishop Crim. Law, No. 543.

Mr. Wheaton remarks, that "It has been frequently held, in this country, that where, on an indictment for assault, an attempt or conspiracy with an intent to commit a felony, it appeared that the felony was actually consummated, it was the duty of the court to charge the jury that the misdemeanor had merged and the accused must be acquitted."

"It used to be supposed from the casual remarks of old text writers, that the common law rule was, that whenever a lesser offence met a greater, the former sunk into the latter: and hence, in a large class of prosecutions, the defendant would succeed in altogether escaping conviction by a subtle fiction having no origin either in common sense or necessity."

"Conceiving, however, (Mr. Wheaton proceeds,) the principle to be too deeply settled to be overruled, the courts of Maine, Massachusetts, New York and Pennsylvania, as has been seen, have held, that where a felony was proved, the defendant was to be acquitted of the constituent misdemeanor, and though the motion was sturdily resisted elsewhere, it has taken deep and general root." Wheaton Com. Law, 2d Ed., 197-8.

Now an examination of the statute of 1855, relative to the mode of criminal procedure, will show that it was intended to sweep from the criminal law, among others, this class of technicalities, and place the administration of criminal justice upon a more reasonable footing.

The first section of the Statute authorizes amendment of the indictment, in order to prevent acquittal from certain crimes.

Sections 1, 2, 3, 4, 5 and 6, directs that the mode of framing certain indictments in a more general manner than heretofore, in order also to avoid fatal variances which might otherwise arise from the proof.

Section seven, enables the jury, on an indictment charging the actual commission of an offence, to bring in a verdict charging the accused with an *attempt* to commit the offence.

By the eighth section, on an indictment for robbery, the jury may find the accused guilty of an assault with intent to rob.

By the tenth section, a person indicted for embezzlement, as a clerk, &c., may be found guilty of larceny, and *vice versa*.

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By the eleventh section, on a trial of two or more persons indicted for jointly receiving any property, any of the parties may be found guilty who shall be proved to have received any part of said property.

It is now seen that the ninth section, in furtherance of the design and general scope of this act, provides that where the testimony shows that a person charged with one offence has committed another offence, by reason of the proof containing aggravating or other circumstances, giving another name or complexion to the act, that he is not to be acquitted of the offence charged unless the court shall discharge the jury and direct the defendant to be indicted for that other offence. This section, therefore, remedies the evil complained of by Mr. Wheaton. It makes, in part, the converse of the rule recognized in *Steadman's* case, 6 Ann., 289, that "where the accusation of a crime includes an offence of an inferior degree, the jury may (under the proof,) discharge the defendant of the high crime and convict him of the less atrocious," and now the proof of the greater offence sustains the less.

Under the Statute in question, a person cannot now escape, because it turns out by the proof, that the offence which he has committed is more aggravated than that with which he is charged. If the proof sustains the indictment, the accused is not now to be acquitted, because the same proof would also sustain an indictment for another offence. The doctrine of *variances* still applies to indictments, and the accused cannot be convicted unless the proof corresponds with the indictment, but where it *does* correspond, the accused shall not escape, because the proof is in excess of the allegations, even by the aggravating circumstances, unless the Judge shall be of the opinion that the offence is so atrocious that the accused ought to be put upon his trial for the more aggravated offence.

It will therefore be seen, that if the proof offered in evidence supported the indictment, although it proved a more heinous offence, it was within the discretion of the Judge to receive it.

The proof did sustain the indictment on the well known principle that every battery includes an assault. 4 Mod. 405; Co. Litt., 253.

*Munco* could not have shot *Lammert* with intent to commit murder without assaulting him with like intent.

We think the testimony was properly received. The accused had no reason to complain, as a conviction upon the indictment, by the express provision of the Statute, would have been a bar to the prosecution for the more aggravated offence of shooting with an intent to commit murder.

II. This brings us to the last bill of exceptions which was taken to the charge of the Judge to the jury.

The bill of exception presents the charge of the Judge to the jury in a composed manner, but we think, notwithstanding the qualifications given by the Judge, that he ought not to have charged "that although death did not ensue from the act, yet that the malice aforethought, was legally implied from the act as though death did ensue." This charge is erroneous, because it implies an opinion upon the act proven, which the Judge is now prohibited from giving in criminal as well as civil cases. The jury are to judge of the intent from all of the surrounding circumstances. As a general rule, men are supposed to intend the usual consequences of their acts. The man who wilfully discharges a loaded gun at another within striking distance, is presumed to intend to maim or kill. If his act of shooting is accompanied by deliberation, it is presumed that he intended to commit murder. If he happen to be armed with a

gun, and he is set upon by armed men and he shoots in self defence, it is no offence at all, but an excusable act.

It is not necessary that it should be actually shown how the gun was loaded. This may be presumed from all the circumstances. It ought to appear that *Lammert* was within the range of the kind of gun used at the time the shooting took place, and if he were not, the offence was not committed, although the shooting was malicious.

The law of the case, or so much of the indictment as charges an assault with an intent to commit murder, was correctly embodied in the last point which the Judge charged, viz:

"That if the jury were of the opinion that had *Lammert* died of the wounds inflicted by the accused, that the accused would have been guilty of manslaughter and not of murder, then the accused should be acquitted."

But we have already observed that the indictment charges the offence of assaulting, by wilfully shooting at *Adam Lammert*, and if this appear, the indictment will be sustained, although it may not be proven that the assault was made with the intent to murder. 6 Ann. 289.

The judgment must be reversed, and a new trial awarded.

We remark, that should the accused be convicted under this indictment, he cannot be sentenced to a longer period, at hard labor, than two years.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be reversed, and that this cause be remanded to the lower court for a new trial, with instructions to be governed by the instructions herein contained, and otherwise proceed according to law; and that the opinion and decree of the court record be transmitted to the clerk of the Supreme Court at Monroe, according to the agreement of the parties on file.

SPOFORD, J. The best evidence that the prisoner shot at *Adam Lammert*, would be that he hit him. The evidence of wounding might, therefore, have been admissible under the allegations of this extremely defective indictment.

The prisoner could not have been surprised by the testimony, for it was alleged that he "shot at *Lammert* with intent to murder him."

The evidence touching the wounds may have been so interwoven with the evidence of the alleged facts, that it was impossible to separate it.

I, Therefore, concur in the view that the evidence was admissible.

But I do not understand the 9th Section of the Act of March 14th, 1855, as introducing any new rule as to the competency of evidence in criminal trials. The ancient rule which has its foundation in one instinctive sense of justice, that what is not alleged, cannot be proved if the party accused object, is not, I think, in the slightest degree impaired by any thing contained in the Statute of March 14th, 1855.

The 9th Section contemplates a single state of facts with a double complexion, one of which would constitute an offence of one grade, and the other offence of another grade; then the evidence is admissible, under an indictment charging one of these offences only, and for the reason that it corresponds to the *allegata*. But because the same facts also constitute an offence of another grade, it shall not be cause for acquittal of the offence charged.

I think the change is made in the rule as to the admissibility of proof, and a party accused has still the right to object successfully to all evidence of matters not embraced or implied in the indictment as exhibited against him.

In other respects, I concur in the opinion and decree prepared by Mr. Chief Justice Merrick.

## RAWLINGS, DUNCAN &amp; Co. v. T. N. BARHAM.

Sureties on an appeal bonds ought to relieve themselves from liability, on the ground that proper diligence was not used to make the money out of the principal debtor. *Held*: That it does not appear that by any act or even neglect of the creditor, a subrogation to his rights, mortgages and privileges, can no longer be exercised in favor of the sureties, and they are therefore bound.

**A** PPEAL from the District Court of Morehouse, *Richardson, J.*  
*S. G. Parsons*, for plaintiffs. *Todd & Brigham*, for defendant and appellant.

COLE, J. The facts of the case are as follows:

On the 20th of January, 1854, plaintiffs obtained judgment against *Thomas N. Barham*, for \$2,348 48; from which he took a suspensive appeal, and on the 21st of January, 1854, executed the appeal bond, with *W. H. Compton, Wiley J. Vester, R. C. Hendrick, F. N. Lewis* and, *H. B. Hill*, as sureties.

The judgment appealed from was rendered by this court, and affirmed for \$1,258 10.

On the 28th September, 1853, a *fi. fa.* issued against the defendant, *Barham*, which, on the 6th of November following, was returned in no part satisfied.

Plaintiffs then took a rule against the sureties on the appeal bond, to fix their liability, under the Act approved March 20th, 1839.

A trial of the rule was had, and judgment of non-suit rendered against plaintiffs, on the ground that the writ of *fi. fa.* was returned too soon, and before the expiration of the ten days.

On the 3d of July, 1856, plaintiffs caused an alias *fi. fa.* to be issued against *Barham*, which, on the 12th of September following, was also returned *nulla bona*.

On the 8th of November following, plaintiffs filed another rule against the sureties, out of which has grown the present controversy.

Two of the sureties, *Compton* and *Vester*, answered the rule, alleging the nullity of the appeal bond, &c., and pleading division.

Upon these issues a trial was had, and judgment rendered against all the sureties *in solido*, from which the defendant, *Vester*, appeals.

1st. Appellant contends that the judgment is erroneous, because proper diligence was not used to make the money out of *Barham*; that they did not exhaust his property, nor pursue their mortgage rights upon the same, and by their laches, they have deprived the sureties of rights, which they were bound to preserve for them in the event they had the debt to pay.

Plaintiff has done all which was necessary in order to proceed against the sureties: he has caused a *fi. fa.* to issue against *Barham*, and the sheriff has returned *nulla bona*.

If defendants wished to exercise any rights against the property of *Barham*, which the plaintiffs delayed to exercise, either because they did not know of such rights, or thought their pursuit would be fruitless. Defendants cannot then complain, because they might have paid the judgment, and been subrogated to the rights of their principal.

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Besides, it does not appear that by any act or even neglect of the creditor, a subrogation to his rights, mortgages and privileges, can no longer be operated in favor of the sureties. Vide Co. Art. 596; Amendatory Act, 1833, p. 170; 4 L. 302; 1 Ann. 123; *Alley v. Hawthorn*; C. C., Art. 3030.

2d. The appellant in his answer, claimed the benefit of division, in the event judgment should be rendered against the sureties, which was not allowed, but judgment was rendered against the defendants *in solido*. The claim to division was resisted upon the ground of the insolvency of the sureties.

We consider that the insolvency of all the sureties, except *Vester*, is established by the testimony, and the plea of division cannot prevail, when the co-sureties are insolvent. Vide 4 Ann. 273; *McCausland v. Lyons, et al*, 5 Ann. 523; *Holmes & Swanwick v. Steamer Belle Aire and owners*, C. C., Art. 3018.

In conclusion, we would remark, that the surety on an appeal bond is liable, if any part of the judgment is affirmed. 3 Ann. 37, *Diamond v. Petit*; Ib. p. 389, *Reiner v. Pendergast*; 5 A. 523.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

## EDWARD COOPER v. C. H. HARRISON.

The claim of an agent against his principal for services in the selling of lands, is not embraced in the words "open accounts," which, by the Statute of 1852, are prescribed against in three years. Ten years is the only prescription against such a demand.

The Act of the Legislature of 9th March, 1852, giving legal interest from the maturity of debts, does not affect debts contracted anterior to the passage of the Act.

APPEAL from the District Court of Union, *Richardson, J.*

*Ludeling*, for plaintiff and appellant. *C. H. Morrisson*, for defendant and appellee.

COLE, J. This suit is instituted to recover four thousand four hundred and ninety-six dollars and forty-four cents, the price of certain lands, alleged to have been sold by *W. W. Farmer*, as agent of plaintiff, who avers, that *Farmer* never accounted to him for any part thereof. This action is brought against the Administrator of said *Farmer's* estate.

The defendant admitted the agency of *Farmer* in selling the lands, and pleaded in compensation and re-convention, certain sums specified in his answer.

There was judgment in favor of the plaintiff, for the sum of \$2,148 99, with five per cent. interest, from judicial demand, (12th August, 1855,) and plaintiff has appealed.

There is error in allowing a credit of \$103 14, for taxes paid by *Farmer* on lands of the plaintiff: the correct amount is \$79 46, as contained in the receipts from No. 1 to No. 8, inclusive.

There are three other receipts for taxes in the record, but they are for taxes on *A. Dupuyster's* land.

There is also error in stating the amount of the sale to *Geo. Kilgore* to be \$220, whereas it is \$270 76.

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The notes of *Jesse and Lewis Tubb*, are \$302 10, instead of \$300 10. These notes were returned to *Cooper* by the administrator, but *Farmer* had received \$60 00 thereon on the 17th of August, 1853.

There is also an error in the amount alleged to have been received from *Calaway*. It is put in the judgment \$401 69, whereas it is proved that *Farmer* received \$591 76, being the amount of principal and interest.

It is objected by plaintiff, that the court allowed five per cent. commissions for selling on the amount of the notes of *G. & L. Tubb*, which were returned.

The District Judge was correct. *Farmer* was entitled to be paid a commission for selling the land; he was authorized to sell it on a credit, and it is just that he should be paid for selling in accordance with instructions.

The commission of ten per cent. on the balance of the amount of sale, is also opposed by plaintiff.

*Farmer* was at one time a surveyor, and it appears that he was selected as land agent of plaintiff, because it was supposed the peculiar knowledge derived from the pursuit of that profession would render him eminently useful in the sale of lands.

*Cooper* was a large land holder, and speculated in this region of country, but his residence was in the State of New York.

It may be that ten per cent. is a very liberal allowance for the sale of plaintiff's lands; but we do not feel disposed to interfere with the opinion of the District Judge on this point, because the present suit is against an estate, and it is impossible for the administrator to show all the services rendered by *Farmer* as fully as if he were living.

Plaintiff also avers there was no agreement to pay *Farmer* for his services. The letters of plaintiff to *Farmer*, which are in evidence, show that he was instructed by *Cooper* to retain his commissions, and it was left to him to retain what he considered a fair compensation.

There is an error in the judgment in allowing interest only from judicial demand; it is due from the death of *Farmer*. C. P., Art. 989.

Defendant has plead in this court, the prescription of one, three and five years, and avers, that this action falls within the meaning of the Statute of 1853, relative to prescription. No. 118, p. 90.

Section 2, of said Act, declares "That the prescription of all other open accounts, the prescription of which is ten years under existing laws, shall be prescribed by three years."

We are of opinion, that the amounts due by an agent for the selling of lands, cannot be considered as embraced, in the sense of the Statute, in the words "open accounts." And as they are not enumerated in the Articles in the Civil Code on prescription of one, three and five years, they are consequently subject to that of ten years.

Defendant has asked in this court to have the judgment amended by allowing him a further credit of one thousand dollars. We think he is entitled to the amendment.

The Judge *a quo* considered an admission on the second of February, 1850, by plaintiff, of the receipt of one thousand dollars, as alluding to an acknowledgement of the same sum on the 21st Sept., 1848.

The internal evidence of the record is entirely in favor of viewing them as two distinct payments.

In plaintiff's letter to *Farmer*, dated Sept. 21st, 1848, he says: "I received

in May last, a remittance, from *Messrs. Bogart & Foley*, of \$847; they having deducted \$153, for money advanced and commissions, &c., which I acknowledged at the time."

This thousand dollars was perhaps the product of the sale of land to *John M. Veale*, for one thousand and seventy-eight dollars and eighteen cents cash, on the 20th of April, 1848. *Cooper* acknowledges he received the thousand dollars, less commissions, in May, 1848; as the land was sold in April, of the same year; there was about a month between the time of sale and the receipt of the money from *Farmer*, which is a reasonable lapse of time between the sale by *Farmer* and the time when the money ought to have been received by *Cooper*.

In plaintiff's letter, to *Farmer*, of Feb. 2d, 1850, he says, "your favor of 24th May, informing me of a shipment of cotton on which about "eighteen hundred dollars would be realized," I think I informed you, that one thousand dollars had been remitted to me by *Messrs. Bogart & Foley*, of New Orleans, since then I have been looking for another remittance, but presumed there was some cause for its not coming. You will please inform me on receipt of this, what prospect there is of your making a further remittance, and how you settled the matter with the persons with whom you expected to have a lawsuit. Could you possibly make arrangements to forward the balance of \$1,800, say, eight hundred, if no more, by the latter part of March next."

About seventeen months elapsed between the first of three letters and the second, and it hardly seems reasonable to suppose, that he alludes, in the second letter, to an acknowledgment made so long ago.

In the first letter, he does not say he received, from *Bogart & Foley*, a thousand dollars, but only \$847, they having deducted \$153 for charges, &c., whereas, in the second letter, he declares that a thousand dollars had been remitted to him.

In his first letter, he declares that he received the remittance in May, 1848, whereas in the second letter he says "your favor of 24th May, (1849,) informing me of a shipment of cotton." Now, it is probable that *Farmer* informed *Cooper*, as soon as he made the shipment; it must then have been shipped about the 24th May, and there would not have been time for the cotton to arrive in New Orleans, and to be sold, so that a remittance for the price of the sale thereof, could have been received by *Cooper* in New York, in May. To accomplish this, it would have been necessary that in the short space of seven days, that is, from 24th May to the end of the month, the cotton should have arrived in the city, been sold and remittance sent from New Orleans and received in New York.

In the second letter, it is clear, that the thousand dollars remitted, were a part of the \$1,800, which *Farmer* expected to realize on the cotton.

This is evident from the context, and also from the latter part of the letter where plaintiff says, "could you possibly make arrangements to forward the balance of \$1,800, say eight hundred, if no more, by the latter part of March next." *Cooper* acknowledges in this letter that *Farmer* had written to him, that he expected to realize \$1,800 on the cotton; that he had received a thousand, and he asks for the balance to be sent to him. As then the \$1,000 in the second letter, was a part of the money made out of the cotton, and it was shipped, probably, about the 24th May, it is not reasonable to suppose that

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the \$847, received in May, could have been a part of the price of the cotton: if it was not, it was a payment entirely distinct from the thousand dollars acknowledged in the second letter.

Besides, we find there was sufficient money due before the date of the second letter, to have enabled *Farmer* to have remitted even more than two thousand dollars, for on the 20th April, 1848, he received \$1,078 18 cash. On the 1st of January, 1848, \$748 10, was due him by *George Lowery*, and a similar sum was due by him on the 1st Jan. 1849, both amounts bearing eight per cent. interest from the 3d October, 1846. On the 1st March, 1848, \$270 76, with eight per cent. interest from 3d October, 1846, was due by *G. A. Kilgore*; so that more than \$3,046, were due *Farmer* for *Cooper*, before the second letter was written.

There is nothing then, strange in the hypothesis, that *Farmer* had received enough funds to forward \$1,847, to *Cooper*, by the 2d Feb. 1850.

It should also be remembered, that the suit is against a deceased person. That plaintiff has not admitted in his petition any credits, although some are clearly established by the testimony.

We are of opinion, that from the evidence and circumstances of this case, defendant is entitled to the credit of a thousand dollars more than was allowed by the District Court.

It is urged by plaintiff, that legal interest is due to him from the time the money was collected by *Farmer*.

The whole therefore, except a trifling sum, was due before the 9th of March, 1852, the date of the Act, which gives legal interest from the maturity of debts.

This Act does not affect debts created anterior to its passage, even if it could affect those due by an agent to his principal.

The following is the basis of our judgment:

*Farmer*, as agent of *Cooper*, sold lands to the following persons, for the prices stated, to wit:

|                                                         |                      |                  |
|---------------------------------------------------------|----------------------|------------------|
| To <i>John M. Veale</i> .....                           | for \$1,078 12½ cash | .....\$1,078 12½ |
| " <i>Jessie &amp; Lewis Tubb</i> .....                  | " 302 10 credit....  | 302 10           |
| " <i>George Kilgore</i> .....                           | " 270 76 " ....      | 270 76           |
| " <i>Jessie Tubb</i> .....                              | " 274 28 " ....      | 274 28           |
| " <i>George Lowery</i> .....                            | " 1,496 20 " ....    | 1,496 20         |
| " <i>John Sholera</i> .....                             | " 975 43 " .....     | 975 43           |
| " <i>L. C. Calloway</i> .....                           | " 591 76 " ....      | 591 76           |
| Making the aggregate of land sold, say \$4,988 60½..... |                      | \$4,988 60½      |

#### CREDITS.

|                                                                                                                                                                |            |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
| 1. He is entitled to a credit of the <i>Tubb</i> notes which were returned by the Administrator to <i>Cooper</i> .....                                         | \$ 576 33  |
| 2. Commission of 5 per cent. for selling on \$576 33.....                                                                                                      | 28 80      |
| 3. " " 10 " " " " " \$4,412 27, which is the real amount of sales, after deducting from \$3,988 60½, the <i>Tubb</i> notes, \$576 33, which were returned..... | 441 30     |
| 4. Amount of taxes paid by <i>Farmer</i> on lands of <i>Cooper</i> .....                                                                                       | 79 44      |
| 5. Remitted through <i>Begart &amp; Foley</i> .....                                                                                                            | 2,460 68   |
| Three remittances, two of \$1,000, each, and one of \$468 68.                                                                                                  |            |
| Total amount of credits, say, \$3,594 47.....                                                                                                                  | \$3,594 47 |

Balance due \$1,894 13 $\frac{1}{2}$ , with 5 per cent. interest from the death of *Farmer*, to-wit: the 1st November, 1854.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed. And it is further ordered, adjudged and decreed, that plaintiff recover of defendants (\$1,394 13,) with five per cent. interest thereon, from the 1st November, 1854.

It is further ordered and decreed, that defendant pay the cost of the lower court, and plaintiff and appellant those of appeal, and that the judgment be paid in due course of administration.

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### J. D. CHRISTIAN v. J. MONETTE.

When the consideration of the assignment of a judgment by *A.* to *B.* was, that *B.* might avail himself of the judgment to compensate certain unmatured notes due by him to *C.*, the judgment debtor, and *B.* promised and undertook to pay the amount of said notes when they become due to *A.* Held: That the contract might be enforced by *A.* although the notes were not in his possession. Where a party is aware of the injury that may result to him from a compliance with his part of the contract, and yet voluntarily enters into it, he cannot afterwards require an indemnifying bond, and if a bond was given at the time of the contract, he can require no other, even if its amount is insufficient to protect him against loss.

**A** PPEAL from the District Court of Morehouse, *Richardson, J.*  
*McGuire & Ray*, for plaintiff and appellant. *Newton & Hall*, for defendant.

**COLE, J.** The points in this case will be more easily comprehended by an examination of the facts.

*James Monette*, defendant, owed *Charles J. Gee* two notes, each for \$375, one due 1st March, 1854, the other 1st of March, 1855, with eight per cent. interest per annum after maturity.

*Joseph D. Christian*, plaintiff, was the owner of a judgment against the said *Gee*, for \$1,696 30, with eight per cent. per annum interest, from the 27th of May, 1847.

*Christian* proposed to *Monette* to transfer to him the judgment, if *Monette* would pay him the amount of the two notes he owed *Gee*. This proposition was accepted.

*Christian* then transferred to *Monette* the judgment, and in the act of transfer *Monette* agreed to pay to *Christian* the several notes which he had executed in favor of *Gee*, as the same respectively fell due, &c. It was further stipulated in the act of transfer, it was the intention of the parties, that *Christian*, by this assignment, shall enable *Monette* to compensate the said notes against *Gee*, and *Monette* was to pay the two notes herein mentioned to *Christian*, at their maturity, in consideration thereof.

In document A, which was the written contract between the parties, there is nothing said about a bond to be executed by *Christian* to *Monette*, to guarantee his part of the contract.

It appears that on the same day of the execution of contract A, *Christian*, with *W. H. Gallaspy*, as his security, executed a bond in favor of *Monette* for

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\$500, which, after reciting and referring to the contract A, stipulates that "If the said *Joseph Christian* shall well and truly defend and save harmless the said *James Monette* against any suits, or actions at law, which the said *Charles J. Gee*, or any one else pretending to be his assignee of the said notes, may institute against said *Monette*, on account thereof, as arising thereout or therefrom, and shall assume and pay all the costs, damages and expenses of litigation of whatever nature and kind having relation thereto, then this obligation to be null and void, otherwise to be and remain in full force and virtue as a penal obligation."

*Monette* having failed to pay according to said contract, this suit was instituted against him by *Christian*, on the contract A, for \$750; the amount of the two notes given by *Monette* to *Gee* for \$375 each, with eight per cent interest from maturity.

It was tried before a jury, who rendered a verdict for the amount due, but affixed a condition that plaintiff should secure the defendant "with an indemnifying bond for double the amount at issue, with good and sufficient security in this State and parish to indemnify the defendant against those *Gee* notes, if ever presented; the date and amount of each note to be specified in the bond; that the bond to be executed in five days after the adjournment of court, or the contract be null and void and of no effect."

Plaintiff has appealed from the judgment on account of this condition, and we are of opinion, that the jury had no right to annex it to their verdict.

The rights and obligations of contracting parties must be determined by their contracts, and the law applicable thereto.

An examination of the contract A, shows that plaintiff did not have or expect to have the *Gee* notes in his possession at their maturity; but notwithstanding that, defendant was to pay plaintiff the amount of them, so no deception was practised by plaintiff or his counsel, on defendant. Besides, the question of off-set or compensation is one of law, and defendant cannot plead ignorance of the law. Besides, there is no stipulation in the contract A, that plaintiff was to give security to the defendant to insure the performance of his part of the contract; yet, as the bond B, was executed at the same time with the contract A, for the purposes therein stipulated, and left with said document A, in the possession of *Robertson*, by consent of both parties, it is justly to be presumed that plaintiff did give the bond B to defendant, and that it was accepted by him as satisfactory at the time.

*Robertson* testifies: "The documents A and B were written by me, and I saw the parties sign them; they were executed at the same time in my office; *Monette* was present when the documents were left by consent of both parties in my possession; they were obtained from me by the counsel of the plaintiff in this case."

The security on the bond resided in Arkansas at the time the bond was signed; defendant cannot then now object that he is a non-resident.

We would also observe, that defendant, by signing the obligation A, has acknowledged the transfer to him of the judgment therein spoken of, and agreed to pay the price stipulated.

A mere allegation of his, that the consideration has failed, unsupported by any evidence whatever, does not throw on plaintiff the *onus* of proving the consideration, or of showing it was what it purported to be on the face of the contract.

There is nothing to establish that "*Gee*" is not still the holder of the notes; on the contrary, it would appear that he is; at any rate, the evidence is such that *Monette* might defeat any action that *Gee* or any holder of these notes might bring against *Monette* on them, by having them compensated by the judgment transferred to *Monette*.

*Bobo*, a witness, shows that "*Gee*" sent him copies of the notes to have them collected after they were due.

It should also be observed, that the last of the "*Gee* notes" matured the last of March, 1855, and no suit has yet been instituted against *Monette* on either of them; so the contingency has not yet happened when defendant could call on plaintiff to defend him against said notes, as he obligated himself in the bond to do.

It is also objected, that after the agreement of transfer, defendant became dissatisfied with the arrangement; and plaintiff then brought suit in his own name upon the judgment against *Gee*, and made defendant, *Monette*, party as garnishee.

This suit was intended to reach the notes in the hands of *Gee*, or to effect a legal seizure of them, and to free *Monette* from any liability on them, upon paying the amount to plaintiff.

It was also instituted at the request and for the benefit and protection of defendant, as appears from the testimony of *Robertson*, who declares:

"When the defendant's first note mentioned in the agreement fell due, I applied to *Monette* for *Christian* for payment. *Monette* expressed an unwillingness to pay, because he did not consider himself safe in making that payment, because the note was not in my possession, and was understood to have been sent by *Mr. Gee* to *Mr. Archibald McJuer*. *Monette* suggested to me the propriety of instituting such an action as I afterwards did bring against *Gee*, for his protection. I then filed the papers in that suit, which is the suit of attachment against *Gee*, making *Monette* the garnishee for the amount of the note, propounding interrogatories to him as garnishee."

"*Mr. Monette* did not express any dissatisfaction with the first arrangements, but thought they were not safe enough for his protection, for the notes which he had given to *Gee*, referred to in the agreement."

This evidence shows that defendant cannot avail himself of this suit as a defence in the action at bar. It was instituted at his suggestion, and can only be regarded as a desire on the part of plaintiff to do any thing that defendant might propose for his protection.

We are of opinion, that when a party is aware of the injury that may result to him from a compliance with his part of the contract, and yet voluntarily enters into it, he cannot afterwards require an indemnifying bond; and if a bond was given at the time of the contract, he can require no other, even if its amount is insufficient to protect him against loss.

Plaintiff is then entitled to have the judgment amended as prayed for.

It is, therefore, ordered, adjudged and decreed, that the part of the judgment which requires plaintiff to furnish an indemnifying bond, be avoided and reversed; and that the judgment be in all other respects affirmed, with costs.

## VICKSBURG, SHREVEPORT &amp; TEXAS RAILROAD v. A. C. MCKEAN.

Parol declarations made by officers of a company on public occasions, if admissible at all to invalidate a subscription for stock, cannot avail a subscriber who does not show that such declarations amounted to fraud on the part of the company, inducing error on his own part when he subscribed. The Act incorporating the Vicksburg, Shreveport and Texas Railroad Company, required the company to commence the work in sections as nearly simultaneously as may be, and pointed out where the sections should begin, and in what direction the work should be carried on. It contained a proviso that the stock subscribers in each parish or corporation, or a majority in amount should have the right to designate on what section of the road they desired their stock subscriptions to be used. Defendant, when sued for his stock subscription, offered to prove that the company had abandoned the idea of working on one section, and had determined to appropriate the funds of the company to work on another section. *Held*: That the evidence was properly rejected for the defence set up, could not avail defendant.

A stock subscriber who had not paid his five per cent. at the time of subscribing, could not avail himself of the plea that the charter required it to be paid at the time of subscribing, and in default thereof, declared his subscription forfeited—for it was his duty to make the payment, and to sustain such a defence, would be to permit a party to avail himself of his own wrong.

**A** PPEAL from the District Court of Ouachita. *Richardson, J.*  
*McGuire & Ray*, for plaintiff. *Ludeling*, for defendant and appellant.  
 MERRICK, C. J. The defendant subscribed to forty shares of stock in the Vicksburg, Shreveport and Texas Railroad Company. At the time of subscription, the defendant did not pay the five per cent. upon the subscription as contemplated by the third section of the original Act, recited in the preamble of the Act of 28th April, 1853, incorporating said company. Acts 1853. p. 183.

The defendant being in arrearages on the instalments called in, to the amount of \$550 00, the present action was instituted to enforce the collection of the same.

The defendant resists the present action in this court, on three grounds, viz:

1st. That he never subscribed for the stock on the terms stated in the charter of the company, or in the petition of the plaintiffs.

2d. That the plaintiff has altered the contract (if there be a contract) without defendant's consent.

3d. That the defendant did not pay the five per centum which he afterwards learned was necessary to render his subscription valid.

I. On the first part, the defendant produces the testimony of *Patrick*, who says, "I was present at the Railroad meeting at Forksville, referred to in defendant's answer. The defendant made a speech against the Railroad tax. I have no distinct recollection what Col. Coleman, (the president) did say, as it has been a long time since, but *it is my opinion he said that if the tax was carried, the tax would be deducted from their subscriptions, and if it was not carried they would not have their subscriptions to pay.* He said so, as well as I recollect, a considerable time after waiting for persons to subscribe. *It was after Coleman said this that A. C. McKean subscribed.*"

This testimony was excepted to by the counsel for the plaintiff, on the ground that what was said at the time or before the defendant subscribed, the charter could not be received to vary the written contract, and that the president or the company could not, nor could any stockholder, or any other persons, alter the conditions for the subscription of stock.

If admissible, the testimony on this branch of the defendant's case, is very unsatisfactory. It is only a matter of opinion with his witness, while other intelligent witnesses heard nothing of the kind in the speech referred to.

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If parol declarations as understood by witnesses to have been made by officers of a company on public occasions, can be given in evidence to invalidate the subscription of stock, there will be very little security to those who loan money or render assistance to institutions of this kind. The defendant has not shown that fraud on the part of the company, inducing error on his own part which after this lapse of time will entitle him to relief.

II. The twenty-first section of the original Act, required the company to commence the work in sections as nearly simultaneously as may be; one section to commence on the Mississippi River and run west, one section to commence on the Ouachita River and run either east or west, or both, as may be thought best, and one section to commence on Red River, and to run east or west, or both, as may be thought best; *provided* the stock subscribers in each parish or corporation, or majority in amount, shall have the right to designate on what section of said road they desire their stock subscription to be used. On the trial the defendant offered to prove by a resolution of the company, that the board of directors "had abandoned the idea of working on the section of the road on the Ouachita River, and determined to appropriate the funds of the company to work the section of the road commencing on the Mississippi River," but on the objection of plaintiff's counsel, the testimony was excluded. The Judge of the District Court did not err, *non constat*, but the directors were instructed where to commence the work by the stockholders under the proviso above recited. If that were not the case, and the 1st section of the Act should be considered as imperative, instead of being simply directory, it would not benefit the defendant's case. It might possibly give rise to a proceeding on the part of the government to cause the charter of the company to be forfeited, but it could not relieve a stockholder from his subscription of stock. 2 Rob. 213.

III. We do not understand the charter of this company to declare the subscription of stock to be absolutely void for the non-payment of the five per cent, directed to be paid at the time of subscribing each share.

It was the duty of the defendant to have paid it, and it is a rule of law that no man should be permitted to take advantage of his own wrong. *Canal Bank v. Holand*. 5 Ann. 365. *Red River Railroad Company v. Young*. 6 Rob. 40.

The testimony of *Morrison* a stockholder, was under the statute admissible, and on the whole we think the case is clearly with the plaintiff, and that the judgment of the lower court should be affirmed.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed with cost.

## SCOTT, CARHART &amp; Co. v. SARAH E. JACKSON, et al.

The party who relies on an exception dilatory in its nature, although arising from the force of the proceeding, must specially plead his exception and point out the particular defect upon which he relies.

When a wife had obtained a judgment for separation of property against the husband, and under her execution had purchased a tract of land, but omitted to record the sheriff's deed to the same, until after a creditor of the husband had obtained and recorded a judgment against him. *Held*: That the sale to the wife, as to the judgment creditor of the husband was null and void, because not recorded according to law, and that the wife had the option to pay the creditor or suffer the property to be sold and assert her mortgage (and the valid mortgages to which she was legally subrogated,) upon the proceeds of the sale.

The court takes judicial cognizance of the signatures of recorders, and when no objection has been made to the introduction of the certificate, it must be held as proving whatever can be reasonably and fairly implied from it.

**A** PPEAL from the District Court of Jackson. *Richardson, J.*

*J. W. Steel*, for plaintiff. *McGuire & Ray*, for defendant and appellant. **MERRICK, C. J.** This is an hypothecary action against the defendant as third possessor. The exception that "the allegations in plaintiff's petition do not entitle them to any judgment against the defendants" is not sufficiently special to enable the defendant to raise the question whether the previous demands were formally alleged or not. The party who relies upon an exception dilatory in its nature, although arising from the form of the proceeding, must specially plead his exception, and point out the particular defect upon which he relies. The exception filed merely raises the question whether the plaintiff has a substantial demand against the defendant.

The defendant obtained apparently a valid judgment against her husband for separation of property in March 1851. In execution of her judgment, she seized the tract of land and slave on which the plaintiff's are now attempting to enforce their mortgage, and on the 1st day of May, 1851, she became the purchaser of the same. She did not cause her deed from the sheriff to be recorded until the 20th February, 1852. In the mean time the plaintiffs having obtained judgment against *Moore*, the husband of the defendant, caused the same to be recorded as a judicial mortgage on the 20th November, 1851, and the present suit is against the wife to subject the property purchased by her, to the plaintiff's judgment by reason of the recording of their judgment previous to the registry of the sheriff's deed to the defendant. The plaintiffs contend that under the Act 1813, re-enacted in the statutes of 1855, p. 385 (revised statutes 453,) the defendant's deed from the sheriff could have no effect against them as third persons. The defendant relies on the case of *Wolf & Clark v. Lowry*, 10 Ann. 272, and alleges that the sale extinguished any mortgage younger than her own. In the case cited, a junior judicial mortgage which existed at the time of sale and figured on the certificate of mortgages, was held to have been extinguished by the sale upon the superior mortgage of the wife, and that her subsequent neglect to record her sheriff's deed did not revive to her prejudice the mortgages which the sheriff was bound under Art. 708. C. C. to release. In the case before us, as in that case, the wife had caused her deed to be recorded before the seizure of her property was attempted. The only difference between the two cases is, that in the case cited, the judgment was

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recorded at the time of the seizure and sale of the property, in this, the judgment was recovered and recorded afterwards. It is probable that if the plaintiff's judicial mortgage had been in existence at the time of the sale, it would have been extinguished by it, and that the plaintiffs were not injured by the neglect to record the sheriff's deed to the defendant, for the property did not bring enough to pay the prior mortgages resting upon it including the defendant's, in full. Still it is possible they might, had they been in the situation of junior mortgage creditors, have themselves bid more for the property and thus secured a part of their debt. The argument therefore that the plaintiffs have no reason to complain that defendant's deed was not recorded because they have not been injured by the neglect, is not entirely conclusive. The case must therefore be decided upon the statute and the articles of the Code of Practice. At the sheriff's sale it was not in the power of the sheriff to release the plaintiff's mortgage because it was not in existence. Plaintiffs were not bound to attend the sale to protect themselves against the superior mortgage of the defendant, for they had none themselves. They were third persons. As to them by the very words of the statute, the sale made by the sheriff of the land and slave "was utterly null and void," because not recorded as required by law. In the eye of the law, as to them, the property was still the property of *Moore*, and the registry of their judgment was valid as a judicial mortgage against him. The plaintiffs who might have seized the property at once as that of *Moore* under an execution, until the deed was recorded, now very properly treat the defendant as a third possessor. Their mortgage is junior to that of the wife, and to those prior mortgages which she has assumed or paid, and she has the option to pay the plaintiff's demand, or suffer the property to be sold and assert her mortgage (and the valid mortgages to which she is legally subrogated,) upon the proceeds.

As to the objection made in this court to the certificate of the recorder of mortgages, it is proper to observe in conclusion, that we take judicial notice of the signature of the recorder of the parish of Jackson, and as the defendant did not object to the introduction of the certificate when offered, it must be held as proving whatever can be reasonably and fairly implied from it. Had defendant made the objection at the time the testimony was offered, it would doubtless have been obviated by a formal certificate under seal.

As it regards the cost, the defendant had the right to require the production of a bill detailing the items of the same. She waived this right by allowing the receipts for the costs to be offered in evidence without reference to the cost bills. The court did not err in enforcing the mortgage for the costs also. 2 Ann. 610.

Judgment affirmed.

## E. M. JENKINS, tutor v. GRIGSBY, et al.

Where plaintiff prays that defendant "be notified of his demand by service of citation and a copy of the petition," and defendant is cited in the usual way it will be regarded as an ordinary action. If plaintiff who has a right to an executory proceeding selects the ordinary process, the defendant has a right to answer, and after issue joined, the plaintiff is precluded from discontinuing the ordinary, and resorting to executory action.

**A** PPEAL from the District Court of Caddo. *Creswell, J.*  
*Landrum & Williamson*, for plaintiff. *Hodge & Austin*, for defendant and appellant.

MERRICK, C. J. The plaintiff being the holder, in her capacity of tutor, of paper secured by mortgage on property in possession of the defendant as third possessor, filed her petition in the District Court for the parish of Caddo, setting forth her cause of action and concluding with the following prayer:

"Wherefore petitioners pray, the premises being considered, that the said *John V. Grigsby* who is now present, and in the parish of Caddo, be notified of this demand by service of citation, and a copy of this petition, and that on his default to return the property above described, or to pay the sum heretore set forth and claimed, that an order of seizure and sale issue to the sheriff of the parish of Caddo, commanding him to seize and sell the said parcel of land, and to pay out of the proceeds, thereof, to petitioner, \$4,725 &c., and for all necessary orders and decrees, and for general relief."

Citation in the usual form issued and was served with the petition upon the defendant in January, 1857.

On the 30th of May, the cause was by order of the court set for trial on the 5th of June. On the 5th of June, an order was entered on the minutes granting a delay until June 8th, for defendant to answer and fixing the cause for trial on the 9th of same month. On the 9th day of June, the defendant offered to file his answer, which was objected to, on the grounds that action was *vide executiva*, and therefore defendant had no right to file an answer, and that he has no right to call *Lewis K. Grigsby* in warranty. The court refused to allow the defendant to file his answer on the first of those grounds, and defendant excepted.

The case was afterwards reassigned for trial and judgment rendered in favor of plaintiff, ordering the land to be seized and sold to satisfy the plaintiff's demand.

The first question presented by the defendant and appellant is, did the court err in refusing to allow defendant to file his answer?

In the answer, the defendant joined by his vendor and warrantor, sets up various defences to the plaintiff's action. If, therefore, he had a right to file the same in the lower court, the cause must be remanded, to allow him to prove his allegations.

The Code of Practice divides actions into three kinds, ordinary, executory and summary. Art. 97. The ordinary action is where citation takes place and all the delays and forms of law are observed. They are executory when the seizure is obtained against the property of the debtor, *without previous*

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citation in virtue of an Act or title imparting confession of judgment, or in other cases provided by law. They are summary when carried on with rapidity and without the observance of the formalities required in ordinary cases. Art. 98. According to the foregoing definition the action instituted in this case was an ordinary action. It was, at the prayer of the plaintiff, preceded by a citation calling upon the defendant under the mandate of the court to answer the plaintiff's demand within the delays allowed by law in ordinary cases. The plaintiff had the option to resort to this mode, or to obtain an order of seizure and sell without previous citation as allowed by Art. 734 of the Code of Practice. Having made his selection, the question arises is he so bound by it that he cannot recur to the executory process. Possibly so long as the *contestatu titis* had not been formed in this suit, he had the right to discontinue, pay costs, and commence *de novo* in the other form of the action. However, this may be, it is clear that so long as this suit was pending, the plaintiff could not resort to the executory process, as so soon as an issue had been tendered by the answer, the plaintiff's citation had become absolute and he was forever precluded from resorting to that proceeding. 3 N. S. 501, 504 *Gurtée v. Cognet*. 2 L. R. 547. *De Gruy Syndic v. Hennen*. 2 Ann. 489.

The defendant had, therefore the right to file his answer and to be heard upon his allegations therein as in other cases.

It is ordered, adjudged and decreed, by the court, that the judgment of the lower court be avoided and reversed, and that the case be remanded to the lower court with instructions to the same to receive and cause the answer of the defendant annexed to his bill of exceptions to be filed, and otherwise proceed according to law, the plaintiff paying the costs of the appeal.

#### STATE v. WINFREE'S SECURITIES.

The Act of 1857 which gave to the auditor of public accounts the remedy of a writ of distress against delinquent tax collectors and their sureties, merely provided a remedy of which the auditor could have availed himself while it was in force. But the failure of the auditor to exercise the remedy and enforce the demands of the State against tax collectors, cannot deprive the State of its right to collect the unpaid dues by another remedy provided subsequent to the delinquency; for when an obligation is due, a change in the mode of procedure does not affect it.

Where the obligation of the sureties on a tax collector's bond is solidary, the State may proceed against them before obtaining judgment against the principle obligator.

The case as presented by this action, is not inconsistent with the Code of Practice, it is not affected therefore by any repealing clause in the law of 1855, for there is a saving clause in the Act excluding from repeal the provisions of the Code of Practice on the subject.

Parties who sign a bond impliedly waive defects in its form.

Actions against tax collectors or their sureties, are not prescribed by 1, 2, 3, 4 or 5 years.

**A**PPEAL from the District Court of Morehouse. *Richardson, J.*  
*F. B. Stubbs*, District Attorney for the State. *McGuire & Ray*, for defendants.

COLE, J. This suit was instituted at the order of the Auditor of Public Accounts on the 15th September, 1852, against a number of persons, as securities in *solido* for *A. B. C. Winfrey*, State Tax Collector for the parish of Morehouse in the year 1848, for the taxes of 1847.

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The amount of State tax for said parish for 1847, was \$5,428 40, of which amount the collector paid to the accounting officer, \$3,555 03, leaving a balance due the State of \$1,873 37, for which amount, with two per cent per month interest, since the 1st January, 1849, this suit is brought.

There was judgment against the State as in case of non-suit in the lower court, and the State appeals from this judgment.

The answer of defendant admits the genuineness of their signatures to the bond sued on, but sets up several objections to this proceeding, and denies their liability. We will now consider the objections of defendants:

1st. That the Acts of 1847 and 1848, relative to tax collectors, provided that the failure of the collector to account and make payment within the time prescribed causes the balance standing against him on the Auditor's books, with a forfeiture of his commission and two per cent. per month interest on the sum withheld from the time it should have been paid, to operate a judgment against the delinquent and his securities, and that the 63d Sec. Art. 1847 p. 175, provided as follows: "And the Auditor of Public Accounts shall charge such delinquent accordingly, and immediately after such delinquency shall occur, issue a writ of distress, which shall have the force and effect of a writ of *fi eri facias* against the delinquent and his securities.

Defendant argues, that the effect of this law is to give to the balance standing on the Auditor's books, after the time for payment has expired, with two per cent. interest from that time, the force and effect of a judgment, and to close the matter between the parties, and that the State cannot by a subsequent act open it, nor commence and carry on this suit for a debt already liquidated by a judgment. We are of opinion that this objection is without force.

The section alluded to merely provided a remedy for the collection of taxes, which the Auditor could have availed himself of at the time it was in existence.

He did not exercise it, and his inaction cannot deprive the State of its right to collect the amount due by a remedy now in force.

Besides this law did not give the balance on the Auditor's books the effect of a judgment in such a way, that the amount, for which a writ of distress issued, must be considered as finally settled, as if by an ordinary suit and judgment. The sole object of the law in giving to the writ of distress the force and effect of a *fi fa.*, was to provide a speedy remedy for the collection of amounts due the State. And the existence of this remedy did not so merge the bond in the judgment, as to prevent this suit on the bond.

When an obligation is due, a change of the mode of procedure for the collection of debts, affects the remedy but not the obligation, and plaintiff was entitled to use the remedy, which was in force at the time of instituting this suit and which continues still in existence.

2d. That the 71st Sec. of the Art. of 1855, "to provide a revenue and the manner of collecting the same," R. S. p. 475, requires that the Auditor of Public Accounts "may require the District Attorney of the District, wherein such tax collector may perform his functions, to proceed against such tax collector and his securities by rule, before any competent court, after three days notice, for the recovery of the amount due by the tax collector.

Defendants urge, that the plaintiff was bound to have first obtained and executed judgment against the principal before proceeding against the securities.

This statute is merely directory, and does not deprive the State of the right of proceeding against the sureties, when they have, as in the present case, obligated themselves *in solido*.

*Vide.* C. C. 8014. *Ballew v. Andrews Executor*, 10 L. 219.

3d. That the repealing clause in the Act of 1855, must cause this suit to abate, because the modes of procedure previous to its enactment for the collection of bonds of Sheriffs' are repealed by this Act. This objection is not valid; the mode of instituting this suit is not inconsistent with, or antagonistical to the provisions of the Code of Practice, and as the repealing clause excepted the Code of Practice, plaintiff has then the right to carry on this cause, and his action is not abated by said Act.

4th. That the forms of law have not been observed to give effect to the bond sued on.

The objections under this branch of defendant's argument cannot be maintained, for in signing the bond, they impliedly waived them.

*Vide.* *State v. Hays, et al.* 7 A. 118. *State v. Securities of A. J. Law* 11 A. p.—; *Police Jury v. Haw*; 2 L. 47; 3 M. N. S. 594. *Whitehurst v. Hickey*; *Villere v. Armstrong*; 4 N. S. 35.

We do not consider the other objections as tenable.

As to the plea of prescription, we would observe, that claims of the kind now sued for, are not subject to the prescription of two, three, four and five years.

Plaintiff has established the amount to be due, as alleged in his petition.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed.

It is further ordered, adjudged and decreed, that plaintiff recover *in solido* of the defendants, *Joseph W. Westmoreland, Thomas M. Jones, Thomas F. Dennard, Thomas C. Mathews, Aaron Livingston, Nelson Delemar, J. W. Johnston* and *William Barnett*, one thousand eight hundred and seventy three dollars and thirty-seven cents, with two per cent. per month interest thereon since the first day of January, 1849, and the costs of both courts.

## D. Y. GRAYSON et al. v. A. L. SANFORD, Executor, et al.

The right of an heir to an inheritance is not a litigious right within the meaning of Article 2039 of the Civil Code. Such a right may be sold. C. C. 2426.

A. S. died, leaving a will in which was the following clause: "I will and bequeath to my wife A. L. S., the use of all of my property both personal and real, during her life." "However, if any of my children sue for a portion during her life, I then will and bequeath to her all of the property that I can dispose of by will, forever." A child sued for partition, and the question was what were the wife's rights under the will. *Held*: That the husband having made a will, his wife's rights must be fixed by it, and she has no usufruct of his share of the community under the Act of 1844. In the absence of proof to the contrary, the law presumes a community. After payment of the debts of the succession, the wife is entitled to one-half of the residue in her own right, and her husband having left three children, she is entitled to but one-third of his share of the community, and one-third of his separate estate.

**A** PPEAL from the District Court of the Parish of Ouachita, *Richardson, J. J. L. Ludeling*, for plaintiffs. *McGuire & Ray*, for defendants and appellants.

*COLE, J.* *Augustine Sanford* died in the parish of Ouachita, sometime during the year 1855, leaving an estate, which was estimated to be worth \$3,633 50, and seven children, issue of the marriage between him and his surviving widow, and two grand-children, issue of a deceased child, also the fruit of said marriage.

*Mary A. Langford*, one of the children of deceased, sold, for a valuable consideration, her interest in the succession of her father, to *D. Y. Grayson*, one of the plaintiffs.

*Grayson*, and *Dunett B. Sanford*, one of the children of deceased, sue for a definitive partition of the estate.

*Ann L. Sanford*, the surviving widow, in her answer, avers that *A. L. Sanford* left a last will, which has been probated and executed; that she has been appointed and qualified as executrix.

That by said will she is entitled to the use and usufruct of the estate, and to keep its effects in her possession during her life-time.

She avers that one of the plaintiffs, *Grayson*, purchased a litigious claim, and she has tendered him his purchase money.

The first question that arises is, was the interest of *Mary A. Langford*, in her father's succession, a litigious right?

The Civil Code, Art. 2623, says: "A right is said to be litigious whenever there exists a suit or contestation on the same."

The right of *Mary A. Langford*, as heir, was not contested at the time she conveyed her inheritance, and there was no suit relative to it. Her heirship is admitted by the defendant, and her rights in the succession of her father are definitively fixed by the will and the law.

Art. 2424 C. C. declares, that an inheritance may be sold. Art. 2620 C. C. says: "When a man sells his right to a succession, without particularly specifying the objects of which it consists, he only warrants his right as an heir."

*Mary A. Langford*, by the act of transfer to *A. Y. Grayson*, as one of the heirs of her deceased father, *Augustus Sanford*, sold her right, title and interest to his succession.

As she did not specify the objects of which her right to his estate consisted, she then merely transferred her prerogative as heir; she consequently only warranted her right as heir, and in as much as her quality of heir is admitted, and has never been disputed, she did not then dispose of a litigious right; for a right is only litigious when there exists a suit or contestation on the same. Vide 6 An. 238, *Pearson v. Grice*.

The principal point at issue in this cause is, whether the surviving widow is entitled to the usufruct of the half of the community belonging to the estate of her deceased husband, or whether she shall take the portion thereof, which her husband could dispose of by law.

The solution of this question depends on the interpretation of a clause of the will of *Augustin Sanford*, and the law applicable thereto. The said clause reads thus:

"I will and bequeath to my wife, *Ann L. Sanford*, the use of all my property, both personal and real, during her life." "However, if any of my children should sue for a partition during her life, I then will and bequeath to her all of the property that I can dispose of by law, forever."

If deceased had made no will, his widow, unless she married, would have been entitled, during her natural life, to the usufruct of his share of the community of acquets and gains. Acts of 1844, p. 99, s. 2.

If he had made a will and bequeathed but the usufruct which the law allows, then the donation in the testament of only what the law gave, would not have impaired her legal rights.

In the case at bar, however, the testator donates to his wife the usufruct, but qualifies and limits the donation by the last part of the clause just quoted, to wit:

"However, if any of my children should sue for a partition during her life, I then will and bequeath to her all of the property that I can dispose of by law, forever."

One of his children, and the assignee of another, have sued for a partition, the contingency contemplated by the testator has happened; and the rights of the widow are now fixed by the will to the disposable portion.

As the Act of 1844 only gives the right of usufruct in the portion of the community coming to the deceased, when he has left no will, it is clear that he can give, by his testament, the usufruct of said portion, which would belong to the surviving widow, without any will, or can declare that in the event of a particular contingency, his widow shall inherit the portion of his property, which the law authorizes him to bequeath.

*Augustin Sanford* has done this, and we are now to ascertain what constitutes the property that he could by law dispose of.

Art. 1480 C. C., declares: That "donations *inter vivos* or *mortis causa*, cannot exceed two-thirds of the property of the disposer, if he leaves at his decease a legitimate child; one-half, if he leaves two children, and one-third, if he leaves three or a greater number."

"Either of the married couple may, either by marriage contract, or during the marriage, give to the other, in full, property, all that he or she might give to a stranger." Vide Art. 21st March 1850, No. 300.

The testator left more than three children; therefore, his widow is entitled, under the will, to one-third of all of his property, and the remaining two-thirds belong to his children. C. C. 1482, 1485, 1708. She is also entitled, by effect of law, to one-half of the community, if any exists, for all the effects

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which both husband and wife reciprocally possess at the time of the dissolution of the marriage, are presumed common effects or gains, unless they satisfactorily prove which of such effects they brought in marriage, or have been given them separately, or they have respectively inherited. C. C., Art. 2374.

It does not appear from the record, whether all of the property inventoried belongs to the community or not. The law presumes it does, but the parties have the right to rebut the presumption of law. Instead of giving one decree, as if all of the property belonged to the separate estate of the husband, as the judgment does, we will merely declare the principles which must govern the partition.

The surviving widow of *Augustin Sanford* is entitled to one-half of the community by effect of law; to one-third of the other half which belonged to her deceased husband, and to one-third of his separate property; the children and legal heirs are entitled to the balance of the estate. The portions of said widow and children are, however, subject to the charges and debts of the estate, according to law.

The judgment of the lower court does not give to the widow her half of the community property. It may be that this is correct, but we cannot say, because the record does not inform us whether the whole estate is separate property or not. If it is community, then the judgment is incorrect in not allowing to the widow one-half of the community and one-third of the half of her deceased husband. We deem it safer to leave open the question of the nature of the property, and to decide only the proportion to which the widow and the legal heirs are respectively entitled.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be amended, so as to declare that the surviving widow of *Augustin Sanford* is entitled to one-half of the property which may formerly have been in community between herself and her said deceased husband; to one-third of the other half of the community, being the part which belonged to the testator; and also to one-third of the separate estate of her said husband; and that the children and legal heirs of said *Augustin Sanford* are entitled to the balance of the community and separate property of said deceased; the portions of said widow and heirs being, however, subject to the charges and debts of the estate, according to law. It is further ordered, adjudged and decreed, that the judgment be so amended as to order the notary in making the partition of the property to be divided among said widow and heirs, to follow the principles stated in the judgment of this court. And it is further ordered, adjudged and decreed, that the part of the judgment of the lower court, which is contrary to said amendments, be avoided and reversed; that the judgment so amended be affirmed; and the costs of this appeal be paid by the estate, and this cause be remanded to the lower court for the purpose of partition, and therein to be proceeded with according to law.

## CURTIS &amp; PHELPS v. PARISH OF MOREHOUSE.

Plaintiffs claiming to have a charter of the Louisiana legislature to construct a turnpike road from Point Pleasant, in the parish of Morehouse, to Bœuff River, in the same parish, alleged that the police jury of Morehouse had opened a road running some distance, parallel with their turnpike, and intersecting it at one point, thus diverting travellers from the turnpike and inflicting heavy damages in the way of loss of tolls. The action was for damages against the police jury. *Held*: The charter of the plaintiffs does not deprive the parish of the prerogative of making other public roads from other points even if these roads should cause a diminution of plaintiff's receipts.

**A** PPEAL from the District Court of Morehouse. *Richardson, J.*  
*Newton & Hall*, for plaintiff and appellant. *Todd & Brigham*, for defendant.

COLLIER, J. This is an action for damages based upon the allegations of the petition, in substance as follows:

It is alleged that by an Act of the Legislature of the State of Louisiana, approved April 30th, 1853, *Asabel Curtis*, one of the plaintiffs, procured a charter to construct a turnpike road from Point Pleasant in the parish of Morehouse to Bœuff River, in the same parish, a distance of about 25 miles.

That after obtaining said charter, the police jury of the said parish of Morehouse, "granted him the right to use for his said turnpike, and to construct the same upon the public road leading from said Point Pleasant, through Bastrop and Prairie Mer Rouge to Bœuff River."

That after obtaining this grant, *Curtis* sold half his interest in said road to his co-plaintiff, *Phelps*.

That they proceeded to make and to construct their turnpike, and expended ten thousand dollars in making the same, and had finished a large portion of the road, and had put up one or more toll gates upon the finished portion of the road, in order to charge and receive the toll allowed by said charter, when the police jury of said parish caused to be opened a new road from Point Pleasant to the Red Hill, a distance of some six or seven miles, running parallel with the turnpike, and intersecting it at the latter point named.

That by means of the new road, travellers were enabled to avoid the turnpike, and in consequence thereof, they had been damaged twenty thousand dollars in the loss of toll to which they were entitled.

To this demand defendant filed a peremptory exception, upon the ground that no cause of action was set forth in the petition. The exception was referred to the merits.

The answer of the defendant contains first, a general denial, and further alleges, that if the police jury of the parish ever made such a grant of the public highway to plaintiffs, as is claimed by them, that said grant was a nullity, because the police jury had no power or authority under the laws of the State to make such a grant, or to bind the parish by the same.

That even if said grant was a valid one, that it was conditional, and plaintiffs have failed on their part to comply with the conditions therein contained.

That they have not made a turnpike road, nor otherwise constructed said road in the manner required.

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That in consequence of their failure to comply with said conditions prescribed, and of their charging toll beyond the rates allowed by their charter, they have forfeited both their grant from the parish and their charter from the State.

That for said reasons the gates erected by them across the public highway were nuisances which should be abated, and that plaintiffs, by the trouble, inconvenience and expense caused by their said proceedings had damaged the parish ten thousand dollars.

It is further alleged, that the parish of Morehouse, or the police jury thereof, had full power and authority to cut out the new road complained of, or any other road they might deem necessary for the convenience of the public, and that plaintiffs, or no one else, had a right to question their authority or complain of their acts in the premises.

The answer concludes with a prayer for judgment in favor of the parish against the demands of plaintiff; that the gates erected by plaintiff upon and across the public highway be declared nuisances and ordered to be taken down, and plaintiffs be perpetually enjoined from again putting them up, and for damages in favor of the parish for ten thousand dollars.

Upon these issues and pleadings the parties went to trial before a jury, and from a judgment in favor of defendant, plaintiffs appealed.

We are of opinion that the police jury had the right to make the new road, if they deemed it necessary for the public convenience.

The charter of plaintiffs does not deprive the parish of the prerogative of creating as many other public roads from other points, as their wisdom may dictate, and the public wants require.

The parish cannot be deprived of its legal right to make this new road, because it may enable travellers to elude the toll gates on the road of plaintiffs, at points of intersection beyond the gates, and thus to use a part of their turnpike without paying toll; it is for the plaintiffs to prevent this by the exercise of their legal remedies against such travellers, if any such they have.

The grant by the parish of the old road to plaintiffs did not divest it of the privilege of making other roads from other points than those of the turnpike road, even if their creation should incidentally cause a diminution of the receipts of the latter.

We express no opinion on the legality of the grant of the old road to plaintiffs; if the police jury interfere with their vested rights, they can arrest their action by injunction.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be affirmed with costs.

LAVINIA CHEVALIER et al. v. JULIA ANN WHATLEY AND HUSBAND,  
Consolidated Cases.

Insanity, which of itself, is sufficient to strike an act with nullity, cannot be set up, unless the interdiction of the insane person had been pronounced or petitioned for previous to the death of such person, except in cases in which the mental alienation manifested itself within ten days previous to the decease, or when the want of reason results from the act itself which is contested.

But when the contract is sought to be set aside, the state of mind of the party at the time, may be proven, although the proof tends to show imbecility and there has been no interdiction.

Contracts made with weak-minded persons will be closely scrutinised, and a presumption of fraud will arise from circumstances, indicative of over influence or any advantage improperly taken, which would not arise in a strong-minded person.

APPEAL from the District Court of Catahoula, *Barry, J.*

*McGuire & Ray and Tailferro*, for defendants. *Smith & Spenser*, for plaintiffs.

SPOFFORD, J. The plaintiffs, in these consolidated cases, are the sisters and sole heirs at law of *William Simmons*, who died intestate in 1853.

The object of the suit is to annul two acts of sale executed by the said *Simmons*, one on the 26th February, 1848, conveying the slave *Nancy*, and one of her children, to the defendant, *Julia Ann Whatley*, and the other on December 28th, 1847, conveying the slave *Maria*, to the defendant, *Wooten Whatley*. *Julia Ann Whatley*, was the aunt, and her son, *Wooten*, the cousin of *William Simmons*. The expressed consideration of the former sale, was "the sum of five hundred dollars in stock in cattle and hogs, paid by the said *Julia Ann Whatley*." The other sale purports to have been "in consideration of the sum of two hundred dollars, cash in hand, paid to the said *William Simmons*, by the said *Wooten Whatley*."

The petition is not framed with technical precision and fullness. But it sufficiently appears that two distinct grounds are relied upon to set aside these sales: 1st, the idiocy or insanity of the vendor, *Simmons*: 2d, the fraud of the defendants, who are alleged to have practised upon the weak mind of *Simmons*, and contrived to procure these acts from him under the pretence of a purchase, when they really paid him no consideration whatever.

So far as the first ground is concerned, it is clear that the insanity which, of itself, is sufficient to strike an act with nullity, cannot be set up by *Simmons'* heirs, in this case. They did not provoke his interdiction, and it never was pronounced. "After the death of a person, the nullity of acts, done by him, cannot be contested for cause of insanity, unless his interdiction was pronounced, or petitioned for, previous to the death of such person, except in cases in which the mental alienation manifested itself within ten days previous to the decease, or in which the proof of the want of reason results from the act itself, which is contested." C. C. 396. See also Art. 1781.

But these rules apply to cases where the sole infirmity in the contract, necessary to be alleged, is the incapacity of the party to contract, *by reason of insanity*. When the contract is sought to be set aside upon another legal ground, to wit: for fraud, the state of mind of the defrauded party, at the time, may be proven, although the proof tends to show imbecility, and there has

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been no interdiction. Otherwise, frauds might be perpetrated upon weak-minded men with more prospect of impunity, in case of detection and exposure before the courts, than upon men of ordinary intellect.

Our law, upon the subject of interdiction, does not impair the force of the rule that contracts made with weak-minded men, will be closely scrutinized, and those who deal with them held to a strict standard of good faith. "In respect to this class of cases," says Story, "the law will raise a presumption of fraud from circumstances, indicative of any over influence, or any advantage improperly taken, when, if the case were of a strong-minded person, no such presumption would arise." Story on sales, sec. 182. The inquiry into the character of *William Simmons*' mind, was, therefore, pertinent and allowable in examining the question of fraud. See *Holland v. Miller*, decided at this term.

It is asserted by defendants' counsel, that no other fraud is charged than the bare fact of their having purchased of an idiot. If this were so, the inquiry would stop there. But we find a much more extensive and specific complaint of fraud than that; a complaint sufficient, we think, to have put the defendants on their guard, and, therefore, sufficient to justify the introduction of the evidence which was excepted to. The plaintiffs, in the first case, declare the sale to have been "a disguised donation, *without consideration, gotten up and artfully contrived by said Julia Ann and Archibald, acting on an idiot, their nephew, for the purpose of injuring and defrauding him.*"

Corresponding allegations are made in the other petition.

If these allegations are true, the deceased would have been entitled to relief against an imprudent bargain into which he had been decoyed, and his heirs are also.

It may be true, as said by the defendants' counsel, that *William Simmons*, is not shown to have been insane, or an idiot, in the true sense of those terms. But he is certainly correct in the opinion that *Simmons* was an excessively weak-minded person, most easily duped and deceived. These sales of all his worldly estate must, therefore, be carefully scrutinized, and if he appears to have been defrauded out of his whole property by them, the parties who defrauded him, must be decreed to make restitution. The defendants were his relatives, and he was living with them. Their influence, as relations and protectors, over one of his small mental capacity, is obvious. The act attacked in the first suit, purports to be a sale; but, even upon its face, it is evident that it could not have been a sale; the price fixed in money, was not to be paid in money; it was to be paid in cattle and hogs; there was to be an exchange of a negro woman, aged twenty, and her child, for five hundred dollars' worth of cattle and hogs; but how many cattle and hogs that would be, seems to have been left to the discretion of the stronger minded party. The evidence leads us to the conclusion that the number was never fixed; that the deceased was amused with the belief that he was the owner of an indefinite portion of the stock belonging to the *Whatley* place; that he was encouraged to boast about his cattle and hogs, and thus lend an air of plausibility to the pretended sale; that he, on one occasion, sold a hog to the trader with whom the *Whatleys* dealt, and received something in return for it; but that when he undertook to trade upon a more extended scale in his supposed acquisitions, the *Whatleys* refused to ratify his contracts, because he had exceeded his powers. In short, the *Whatley* stock continued as before, and as they always intended it should

continue, to belong to the *Whatleys*, and *William Simmons*, who seems to have worked faithfully enough for them to earn, at least, his living, died in their employ, and left nothing to put upon an inventory.

The two hundred dollars, the professed consideration of the other sale, it is proven, were never paid.

It seems from some testimony in the record, that shortly before his death, *Simmons* discovered and complained of the artifices by which he had been wheedled out of his property, and a conditional promise of restitution was made by his aunt. These suits were brought immediately after his death.

If the District Judge had not changed his mind on the question of the admissibility of the evidence of fraud, and told the jury to disregard it, we cannot doubt but they would have found a verdict for the plaintiffs in the other case, as they did in the suit against *Wooten Whatley*. We are satisfied with the proof of fraud in both cases.

It is, therefore, ordered and decreed, that the judgment in the case of *Lavinia Chevalier et al.*, against *Julia Ann Whatley* and husband, be avoided and reversed, and that the verdict of the jury be set aside. And it is now ordered, adjudged and decreed, that the act of sale described in the petition be vacated and annulled, and that the plaintiffs, as heirs of *William Simmons*, be recognised as the true and lawful owners of the slave, *Nancy*, and her child, and recover possession of the same from the defendants, *Julia Ann Whatley* and husband. It is further ordered, that the judgment of the District Court, in the case of *Lavinia Chevalier et al v. Wooten W. Whatley*, be affirmed. And it is further ordered, that the defendants, in these consolidated cases, pay costs in both cases.

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#### STATE v. JOHNSON DOYAL

Three persons signed a bond for the appearance of *D.*, charged with an assault with a dangerous weapon. Two of the sureties delivered *D.* in compliance with their obligation under the bond.

*D.* escaped, after the delivery, and the State sought to hold defendant, the other surety, liable.

*Held:* When one, of several sureties, on a single bond, avails himself of the privilege of surrendering the prisoner, it must be presumed to be done in the interest of his co-sureties, as well as of himself, and it absolves all, if it absolves one.

**A** PPEAL from the District Court of Franklin, *Barry, J.*

*W. H. Haugh*, District Attorney, for the State. *A. Bonner*, for defendant and appellant.

*SPOFFORD, J.* *Kinchen Lassiter*, *Philip B. Brown* and *Richard Doyal*, were accepted by the Sheriff of the Parish of Franklin, under judicial order, as bail for the appearance of *Johnson Doyal*, to answer a charge of an assault with a dangerous weapon. The usual appearance bond was given in the penal sum of \$1,000, conditioned that the accused should appear at a certain term before the District Court of Franklin Parish, and there remain from day to day and from term to term, until discharged by the court. All the parties signed the same bond.

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Two days before the arraignment of the accused, *Kinchen Lassiter* and *P. B. Brown*, two of the sureties appeared, "and in open court, surrendered and delivered into the hands of the sheriff, the defendant, *Johnson Doyal*, and asked to be released from his bond, which was granted, and they, *Kinchen Lassiter* and *P. B. Brown*, were released from said bond."

Afterwards, the prisoner escaped, and the bond aforesaid was forfeited against the remaining surety, *Richard Doyal*, who has appealed.

The bond was a single instrument. *Non constat*, that the sheriff would have accepted *Richard Doyal* alone, as sufficient bail for the prisoner, or that *Richard Doyal* alone, would have been willing to stand bail.

When two of the sureties availed themselves of the Statute and surrendered the accused "into the hands of the sheriff," he became again a prisoner, and the contract of bail was at an end. The sheriff could enlarge the prisoner only by taking a new appearance bond. It does not appear that any new bond was taken and the appellant was improperly held upon the old one which had been discharged.

It is true the Statute reads "any surety may be relieved from responsibility by making a formal surrender of the defendant, or party accused, to the sheriff, or his deputy, in open court, or within the four walls of the prison of the Parish, and not otherwise." Revised Stat., p. 170. But when one, of several sureties, on a single bond, avails himself of this privilege, it must be presumed to be done in the interest of his co-sureties as well as himself, and it absolves all, if it absolves one.

Judgment reversed. And it is ordered that the State take nothing by its motion.

C A S E S  
 ARGUED AND DETERMINED  
 IN THE  
 SUPREME COURT OF LOUISIANA,  
 AT  
 OPELOUSAS.

AUGUST, 1856.

PRESENT:

|                                                                                      |                            |
|--------------------------------------------------------------------------------------|----------------------------|
| HON. E. T. MERRICK, <i>Chief Justice.</i>                                            |                            |
| HON. A. M. BUCHANAN,<br>HON. H. M. SPOFFORD,<br>HON. C. VOORHIES,<br>HON. J. N. LEA. | }                          |
|                                                                                      | <i>Associate Justices.</i> |

These cases were not reported in the volume for 1856, in consequence of the Transcripts not having been received by the former Reporter, W. M. RANDOLPH, and they are now reported by him.—REP.

LYONS *v.* O. HINCKLEY. HINCKLEY *v.* LYONS.

Article 448 of the Civil Code does not establish against the proprietor of the soil, on the banks of navigable streams, a servitude in favor of the public at large, *for all purposes*, but only for such as are incident to the nature and the navigable character of the streams washing the land of such proprietor.

The Act passed Feb. 7th, 1829, relative to roads and levees, establishing a highway on the banks of bayous, &c. &c., does not apply to those streams or bayous running through a high country, not subject to overflow, and when the roads are made directly across the country and not along the winding of the streams.

**A** PPEAL from the District Court of St. Landry. *Dupré J.*  
*Morrough & Mouton* and *J. H. Overton*, for *Lyons*. *T. H. Lewis & Porter*, for *Hinckley*, appellant.

MERRICK, C. J. The defendants, *Hinckley*, and others, are in possession of a lot of a ground of about three acres in the town of Washington, situated on the bayou Courtableau. This tract of land was used as a tan yard as long ago as 1893, for which purpose it is still occupied. No public road was laid out previous to this controversy, or used on this part of the Bayou, except to go to defendant's tan yard. About the time of the commencement of this litigation in July, 1854, the plaintiff put up a saw mill on the small tract or lot on the bayou above that of the defendants. He claims that the defendants shall suffer a road to be opened in front of their tract of land, on the bayou. It is proved that the land on the bayou beyond the mill is broken, that the road is of no public utility further than to enable people to go to plaintiff's mill, that

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the mill stands partially in the line of the road and that there would be no cause or reason to extend the road up the bayou beyond the mill, and that the plaintiff has no egress for carriages to the public roads, except across private property, unless it be determined that the public have the right to a highway across the front of the defendant's land. It appears by so much of the plan of Washington as is in evidence, that no public street was laid out to intersect or touch the lot of the plaintiff, and the street forming the public landing of the town on the bayou, terminates at the lower line of defendant's tract of land. The land on the bayou in the town of Washington, appears to be high, and consequently not subject to overflow at any stage of water.

The defendants have enjoined the plaintiff in the second of these consolidated cases. Judgment was rendered in favor of plaintiff, sustaining his pretensions and for three hundred dollars damages, on account of the wrongful suing out of the injunction. The defendant in the first, and plaintiff in the second suit, have appealed.

It is contended on behalf of the plaintiff that inasmuch as the bayou Courtableau is a navigable stream and connected with the Mississippi river, that the plaintiff has a right to a road in front of the defendant's land lying upon the bayou, in virtue of the Act approved Feb. 7, 1829, relative to roads and levees, and Art. 446 and 661 of the Civil Code. The ninth section of the Act of 1829, p. 80, is in these words:

"That every owner of lands, situated on the banks of the river or bayous running to and from the same or other waters connected therewith throughout this State, shall be bound to give to the public, and to keep constantly in good repair, a highway at least twenty-five feet wide, on the whole front of his property, which highway shall be swelled in its centre, and be lined on each side by a draining ditch at least one foot wide, and one foot deep; provided that these two ditches shall communicate with each other by means of ditches at least two feet wide, which shall be made across the road at least one for every four arpents, and which shall be extended in the depth of the land so as to drain the said highway, and to facilitate the running off of the waters which filtrate through the levees; provided also that the portions of the ditches which shall cross the highway, shall be covered with bridges, each of which shall be at least twenty feet long and one-third wider than the ditch, and be made with planks two inches thick, nailed or pinned on five joists, placed level with the road in such a manner that by means of each being added on both sides, the height of said bridges be not so sensible as to hinder the free passage of carriages or carts; provided that the provisions of this section shall not apply to the parishes of West and East Feliciana and that part of the parish of East Baton Rouge lying above the town of Baton Rouge."

It is evident that the above section is broad enough to cover the case before us. But it is contended by the defendant's counsel, that the present case was not intended to be embraced by the statute, because the land bordering upon the bayou being high land, does not possess any of the characteristics of the land over which the roads mentioned in said section were expected to pass, and that as the lands now under consideration are like the excepted lands in Baton Rouge and East and West Feliciana they must, by a reasonable and fair construction of the statute, be considered as excepted from its operation.

To this it is replied that the Civil Code by making the banks of navigable rivers public, have given the public a right of way over them and the statute

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in question does not repeal the article of the Code, but is in aid of them by regulating the width of the road and manner in which the same shall be made." This reply is not well founded. Article 446 provides that "the use of the banks of navigable rivers or streams is public, accordingly every one has a right freely to bring his vessels to land there, to make fast the same to trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets and the like."

Nevertheless, the property of the river banks belongs to those who possess the adjacent lands.

The character of the servitude which is due from the proprietors of the soil is here described, and instead of being for the use of the public at large for all purposes, is only for that which is incident to the nature and the navigable character of the stream washing the land of such proprietor. 5 Ann. 36. This servitude is also confined to the *banks* of the navigable stream. It has been judicially determined that the banks of the Mississippi are that portion between the levees and the water. 8 Rob. 214.

As to those water courses which are enclosed, or bounded by high lands, the banks are those portions of land between the water's edge and the highest line attained by high water. *Ripa ea putatur esse quae plenissimum flumen continet*, Dig. 43, 12, 3, 1. The public cannot claim the use of the entire surface of the declivity of a hill or mountain, the base of which is washed by a navigable stream.

We think, therefore, that the articles of the Civil Code give no additional force at least to so much of plaintiff's demand, as applies to that part of the road sought to be made above the true bank of the bayou, and the case therefore depends upon the construction of the Act of 1829. The title of this Act is "An Act relative to Roads and Levees."

The first section of the Act shows what was intended to be embraced in it, and at once indicates its scope and object. It is in these words. Be it enacted &c., "That throughout all the portion of the State watered by the Mississippi and the bayous running to and from the same which are settled, where levees are necessary to confine the waters of that river, and to shelter the inhabitants against inundations, the said levees shall be made by the riparian proprietors in the proportions and at the time hereafter prescribed."

Here, then, the object of the Act is apparent. It is a matter of public necessity, and to shelter the inhabitants against inundations. As each proprietor was personally interested in his own protection as well as his neighbors, and as the roads must of necessity pass upon the front of the river or bayous, and the contribution of each land owner will be as equal as the same can be assessed, and as the property will be of no value without the levee, the legislature had the power to compel such riparian owners to make those levees and roads in front of their plantations without further compensation than the increased value which such works would confer upon their lands.

But this statute was not intended to apply to those streams or bayous running through a high country not subject to overflows, and where the roads are made directly across the country and not along the windings of the streams.

This being the character of the country about Washington, the reason of the law ceases, and the law itself must be held to have ceased particularly as otherwise it would be in direct conflict with Art. 105 of the Constitution,

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which declares that vested rights shall not be divested, unless for purposes of public utility, and for adequate compensation previously made.

This controversy, it must be borne in mind, is one in regard to the right of the plaintiff, *Lyons*, under the authority of the town of Washington to open and use a highway, or street, through the lands of the defendants, without making the indemnity required by the Constitution, and this decision must not be considered as an expression of opinion upon the power of the Corporation, if any, such it have, under the Act of 1852, p. 77, to regulate the landing upon such parts of the banks of the Bayou Courtableau, within the town, as may be public.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; that the said suit of *John Lyons v. Hinckley & Johnson*, numbered on the docket of the lower court as No. 7250, be dismissed, and the injunction therein dissolved; that in the suit of said *Oraniel Hinckley, William Offit, Nathaniel Offit and James Johnson*, against said *John Lyons*, there be judgment in favor of said last mentioned plaintiffs and against said *John Lyons*, and that said *Lyons* be perpetually enjoined from making a road across the said premises of said last mentioned plaintiffs, and from using their said premises for the purposes of a public highway, or private road, and it is further ordered that the said *Lyons* pay the costs of both courts.

#### A. M. TEMPLET v. J. BAKER.

The exclusion of warranty in an act of sale is not evidence of bad faith on the part of the purchaser. But where the vendee in an act of sale declares that he is acquainted with the title, and when it is exhibited, the title appears defective, there is made out against the purchaser a *prima facie* case of the want of that good faith necessary in order to prescribe.

**A**PPEAL from the District Court of St. Mary. *Cole, J.*  
*J. W. Walker*, for plaintiff and appellant. *J. G. Olivier*, for defendant.

MERRICK, C. J. This action is brought to recover of the defendant a slave which plaintiff claims as owner. Under our law, the question is, has the plaintiff a good title to the slave in controversy, and is it better than the defendant's title? The defendant claims title to the slave in suit by act of sale executed in Kentucky in favor of the defendant and his partner, made in August, 1841, and possession under his title in Louisiana, until 1844, when the slave ran away. He was taken from jail in 1851 by defendant. He had been lodged in jail as a runaway. The defendant, in December 1851, acquired the interest of his partner in the slave. One *John Saunders*, sold in 1841, in Kentucky, the slave in controversy to *Bayles*, the immediate vendor of defendant and his partner.

The plaintiff's title commenced in 1845. He presents an act of sale under private signature, bearing date May 25th, 1845, and acknowledged the same day before a Notary Public, wherein one *John Saunders* of Buchanan County, Missouri, professes to sell to *P. W. Johnson* a slave named *Carter*, about twenty-seven years of age, for \$400.

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On the 7th day of July, 1845, the slave having been for some time in the jail of the parish of Ascension as a runaway, *P. W. Johnson* by notarial act, sold the slave *Carter* to the plaintiff for \$400. The act of sale was made "without any kind of warranty as to title or redhibitory vices or maladies" and contains the following remarkable language, viz: and the vendee "further declared, that he is fully acquainted of the manner in which said *Johnson* became possessor of said slave, and the character of vices of said slave, and is satisfied therewith, and requires no description herein." The slave seems to have been in the possession of the plaintiff from the date of his purchase until 17th September, 1850, when he sold the slave to *Edward Gaudin*, with warranty, both as to title and redhibitory vices.

The slave ran away from *Gaudin* and was lodged in jail in Plaquemine about the 1st of December, 1851. The defendant having been informed by the jailor of the lodging in jail of the slave, obtained possession from the jailor in the usual manner. *Gaudin* retroceded the slave to the plaintiff, and the action was instituted.

It is evident that there is a failure in the plaintiff's claim of title, unless his possession for five years under his act of sale has given him title *acquirendi causa*. For it is not shown that *John Saunders* of Buchanan County, Missouri, had any right to the slave in jail in Plaquemine, in the State of Louisiana.

If the plaintiff has acquired title under his deed by his possession, it is because he was a possessor in good faith, under a legal and sufficient title. C. C. 3445. We are not prepared to say that the exclusion of warranty in the act of sale is evidence of bad faith on the part of the purchaser, for there are, doubtless, many honest men who are unwilling to incur the risk of an action of warranty against them at a remote day, and therefore may be unwilling to warrant what they believe belongs to them by a just title; nevertheless, we think where the vendee declares in the act of sale that he is well acquainted with the title, or in other words, the manner in which possession is acquired, and that title when exhibited, appears defective, that there is made out against him a *prima facie* case of the want of that good faith necessary, in order to prescribe. The burden of proof is then upon him, to show that he was in good faith, and that the title which was made known to him, was not the defective one which has been exhibited in evidence. There being no such proof in the record on this point, the plaintiff fails in his title and the slave must be left in the defendant's possession.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be affirmed with costs.

## HAVEN &amp; Co. v. B. HUDSON.

The highest rate of conventional interest for the loan of money, and two and a half per cent. in addition thereto for advancing, is usurious.

If a planter, for a consideration, engages to ship his crop to a factor, and violates his engagements, he will be liable for commissions on the crop.

**A**PPEAL from the District Court of St. Landry, *A. Voorhies, J.*  
*J. W. Walker*, for plaintiffs and appellants. *G. Breauz and H. Gibbon*, for defendant.

**BUCHANAN, J.** Plaintiffs sue for a balance of account current. The charges are for acceptances, cash advances, commissions and interest: and defendant is credited with proceeds of sugar and molasses, cash received, and interest.

Defendant pleads the general issue, and that the charges for interest and commissions are illegal.

The items of cash paid, and acceptances—also, the amount of cash and proceeds of crops received, are proved: and the questions really at issue may be reduced to two:

1st. Usury.

2d. Charges for commissions on crops not shipped by defendant to plaintiff, or their agent, *Hewes*.

I. As to the first of these questions, it is apparent that plaintiffs, in accordance with a commercial usage, very prevalent in this State, but which this court has frequently declared, is contrary to law, have charged defendant, not only with the highest rate of conventional interest, but with two and a half per cent. commissions upon cash advances. See *Lalande v. Breauz*, 5 Ann. 505.

We agree with the Judge of the District Court, that the commissions charged upon cash advances should be rejected; but we think that, as no contract for interest is proven, plaintiffs are entitled to recover legal interest. The counsel of plaintiffs, in this court, has appended to his brief, an interest account at five per cent. which we adopt as the basis of our judgment on this branch of the case.

We may observe, that no argument can be drawn in favor of the interest charged in the original account rendered, from the fact that defendant paid a large sum on account of the balance shown by that account. That payment must be imputed to the legal charges in the account, which exceeded the amount paid.

II. The charges for commissions upon crops of 1851 and 1852, are fully supported by the evidence. The defendant engaged, for a consideration, to ship those crops to plaintiffs or their agents in New Orleans, and violated those engagements.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that plaintiffs recover of defendant, thirteen hundred and forty-eight dollars and nineteen cents, with legal interest on ten hundred and forty-four dollars and eleven cents, from 28th April, 1856, until paid, and costs in both courts.

## T. MASKELL v. T. POOLEY—TROWBRIDGE, Opponent.

A credit appearing on a note, will not interrupt prescription, unless it is shown where and by whom the payment was made.

Where a judgment creditor seizes property on execution and a third opponent sets up a privilege on the thing seized, it is competent for the seizing creditor to plead prescription against the opponent, nor will the circumstance that the opponent, since the filing of his opposition, obtained a judgment on his claim in a different court, affect the seizing creditor's right to make the plea.

APPEAL from the District Court of St. Mary, *Voorhies, J.*

*A. S. Tucker* for *Trowbridge*. *J. G. Oliver*, for *Maskell*, Appellant.

LEA, J. The plaintiff, a judgment creditor of the defendant, having caused to be seized on execution, a twelve months' bond, the property of the defendant, is opposed by *Isaac Trowbridge*, who avers that he has a privilege upon said bond or its proceeds of a higher rank than that of the seizing creditor: the said bond being a part of the proceeds of a property upon which he has a recognized privilege as a furnisher of materials, as appears from the note of the defendant, which is in the following words:

\$404 65.

FRANKLIN, LA., June 20, 1848.

One day after date, I promise to pay to *M. Walker & Co.*, or order, four hundred and four dollars and sixty-five cents, for value received in lumber and nails and other materials furnished for school house, dwelling, kitchen and store house, on which *M. Walker & Co.*, have a privilege, and I hereby acknowledge their privilege to be good and correct on the same, bearing interest at eight per cent., from the first of June until paid. THOMAS POOLEY.

This note is credited with a payment of \$45 75, purporting to have been received on the 14th of January, 1853. To the claim thus set up, *Maskell* pleads the prescription of six months, as against the privilege, and that of five years as against the note. We think it material to examine, only, the validity of the plea of prescription of five years.

The third opposition of *Trowbridge* was not filed until the 2d of February, 1855, nearly seven years after the maturity of the note. On the same day that the third opposition was filed, the opponent instituted a suit upon the note, against the defendant, against whom he, afterwards, obtained judgment.

The only proof offered to establish an interruption of prescription, consists in the endorsement upon the note of the credit of \$45 75, purporting to have been made on the 14th of January, 1853; but there is no evidence showing by whom or when this endorsement was made. We think the District Judge erred in considering the note as relieved from prescription by the endorsement appearing upon it; proof should have been made of the payment and of the date when it was made. The fact that the third opponent, after the filing of his opposition, obtained judgment, in a distinct suit, against the defendant, in no manner impaired the right of the plaintiff, as a judgment creditor of the same defendant, to plead prescription against the note sued upon.

It is ordered that the judgment appealed from, be reversed, and that there be judgment in favor of *Thomas Maskell*, the appellant, and against *Isaac Trowbridge*, the appellee, decreeing that the demand contained in the third opposition of said *Trowbridge*, be rejected, and said opponent and appellee pay costs in both courts.

## ELODIE LAMBERT, wife, &amp;c. v. M. KING.

Plaintiff employed *K.* as her overseer and stipulated that he should receive a portion of the proceeds of the crop as compensation for his services. Plaintiff, on grounds deemed sufficient, dismissed him before his time was up. *Held*: That *K.* was entitled to compensation for the value of his services up to the time of his discharge, and that in estimating the value, reference should be had to the stipulations of the contract; to the probable amount which the defendant would have received, had there been no violation of the contract: and to the probable receipts of the plaintiff, had *K.* discharged his duty in every respect.

**A**PPPEAL from the District Court of St. Landry, *Dupré, J.*  
*T. H. Lewis and Partee*, for plaintiff and appellant. *J. E. King and Swayze & Moore*, for defendant.

**LEA, J.** The defendant was employed by the plaintiff as overseer of her plantation in November, 1853. By the terms of the contract, which was reduced to writing, the defendant was to have the exclusive management of the plantation, and was to "do all the work necessary on said plantation, such as fencing, &c.," for which he was to receive "ten dollars for every 1,100 pounds of sugar" he should make on said plantation, and "should there not be seed cane enough, said party (*viz: Michael King*,) should plant cotton, and receive one-fourth of the nett proceeds of the crop, according to the return of the sales." The defendant moreover agreed to plant corn and "to save such other provisions" as might be necessary for horses, such as hay, fodder, &c. The plaintiff, on her part, agreed to furnish to the defendant, at the date of the contract, nine slaves, and on the first of January, 1854, to add two others to the number; also, such mules, oxen and horses, as might be necessary to the working of the plantation. About the end of August, 1854, the plaintiff considering that the defendant had been guilty of mis-conduct in the management of the plantation, and the treatment of the slaves, as well as in his personal demeanor towards herself, notified him to leave the premises, and discharged him from her service.

The defendant disregarded the notice, and claimed the right under his contract of remaining on the place, whereupon the plaintiff brought suit, claiming that the contract be annulled; that the defendant be enjoined not to interfere further in the management of the plaintiff's plantation, and that he be condemned to pay \$2,000 damages. The defendant denies any violation of the contract on his part; alleges a fulfilment of all its obligations; claims compensation in accordance with its terms, and \$2,000 damages, with a trial by jury.

We think the evidence shows that the plaintiff was justified in dismissing the defendant from her service, and to that extent, we concur in the verdict of the jury. The defendant was also entitled to a fair remuneration for the value of his services up to the time of his discharge, in estimating which, reference should have been had to the stipulations of the contract; to the probable amount which the defendant would have received, had there been no violation of the contract; and to the probable receipts of the plaintiff, had the defendant discharged his duty in every respect. Considering these as demands in the ac-

assessment of the remuneration to which the defendant would be entitled, we think a larger sum has been allowed to the plaintiff, than is justified by the evidence, and that, under all the circumstances of the case, substantial justice would be done between the parties by a deduction of \$250, from the amount allowed by the jury.

It is ordered, that the judgment appealed from, be reversed, and that there be judgment in favor of the plaintiff, *Elodie Lambert*, decreeing that the injunction herein issued, be maintained and made perpetual, and that the defendant, *Michael King*, do have and recover of the plaintiff, *Mrs. Elodie Lambert*, the sum of three hundred and fifty (350) dollars, with interest at the rate of five per cent. per annum, from the 5th day of September, 1854, till paid; that the costs in the District Court, incident to the injunction, be paid by the defendant, *King*, and all the costs in said court, be paid by the plaintiff. It is further ordered, that the costs of the appeal be paid by said *King*, the defendant and appellee.

LAMBERT  
v.  
KING.

### M. WHITE v. C. BAILLIO et al.

Where husband and wife make a note during the coverture, judgment cannot be obtained against the wife, where there is no proof that she was not separate in property, and no evidence to show that the consideration enured to her benefit.

APPEAL from the District Court of St. Landry, *Dupré, J.*  
*T. H. Lewis* and *Porter*, for plaintiff. *J. E. King*, for defendants and appellants.

MERRICK, C. J. This suit was brought against *Cordie Baillio*, wife of *Appolinaire Baillio*, *Thomas C. Anderson* and *Thomas M. Anderson*, upon the following instrument, viz:

"WASHINGTON, LA., April 9, 1851.

\$2,500. Twelve months after date, please pay to the order of *Thomas C. Anderson & Co.*, twenty-five hundred dollars, for value received, and charge to account of *Cora* plantation, and oblige yours respectfully.

(Signed)

CORDIE BAILLIO.

APPOLINAIRE BAILLIO.

To Messrs. *Maunsel, White & Co.*, New Orleans."

(Endorsed)

"THOMAS C. ANDERSON & Co."

(Accepted)

"MAUNSEL, WHITE & Co."

The plaintiff alleged, in his petition, that the defendant, *Cordie Baillio*, is separate in property from her husband; that the "*Cora*" plantation is hers, and said draft was accepted for accommodation, and the money paid on account thereof, enured to her benefit and advantage, as owner of that plantation. There was judgment by defendant, in favor of the plaintiff, against all the parties to the draft *in solido*. On the trial, or the making final of the judgment by default, no proof was adduced that the defendant, *Cordie Baillio*, was separate in property from her husband, or that the proceeds of the draft enured to the benefit of her separate estate. She appealed.

WHITE  
v.  
BALLIO.

The judgment, by default, did not dispense with the proof that the draft enured to the benefit of her separate estate. C. P. 812. For, the case in which the wife may be responsible upon her obligations, is exceptional to the presumption established by Art. 2372, C. C., that the debt was contracted on account of the community, and to Art. 2412, of the Civil Code, which declares that "the wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him for debts contracted by him before or during the marriage."

The judgment of the District Court therefore, so far as it affects the appellant must be reversed.

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the lower court, as to the said *Cordie Ballio*, wife of *Appolinair Ballio*, be avoided and reversed, and that there be judgment in her favor and against the plaintiff or his said demand, as in case of nonsuit. And it is further ordered, that the plaintiff and appellee, pay the costs of both courts.

#### A DUPERRIER v. B. DAUTRIVE et al.

Remarks made by a slave, in conversation, and consisting merely of a detailed narrative of a past occurrence, should not be received in evidence, as forming part of the *res gestæ*.

Two members of a patrol company while on duty hailed a slave, at night, who was riding into a village. The slave attempted to escape, whereupon the patrol fired on him, and inflicted wounds of which he died. In an action by the master, against the patrol who shot his slave, for damages. *Held*: That the plaintiff could not, under the circumstances of the case, recover.

**A** PPEAL from the District Court of the Parish of St. Martin, *A. Voorhis, J. S. G. Olivier*, for plaintiff and appellant. *Simon & Gory*, for defendant.

LEA. J. The plaintiff claims from the defendants, *Bernard Dautrive* and *Joseph Borette*, the value of a slave who, he alleges, was unnecessarily and wantonly shot and mortally wounded by said *Dautrive*, assisted by said *Borette*, on the night of the first of August, 1855, of which wound or wounds his said slave died, on the ensuing day.

The defendants, in addition to a general denial, specially plead that, on the night in question, they were called out and summoned to compose the patrol of the town of New Iberia, in accordance with the police regulations and by-laws of the town council; that having been stationed on the upper limits of said town, and, while on duty, a negro man on horseback, unknown to respondents and to the patrol, made his appearance on the public road, and was about entering said town, when, on being ordered several times to stop and surrender, (the said negro being, by them, considered, and being in fact, a runaway slave,) he, the said slave, instead of surrendering himself, as he was bound to do, turned back and ran away from said patrol, galloping as fast as the speed of his horse would permit; and that respondents were ordered to fire upon said negro, who, though fired upon, escaped. They further aver that the death of said slave, was the consequence of the lawful act of those composing the patrol, for which, under the laws of the State, and the facts and circumstances of the case, they are not responsible.

DUPERRIER  
c.  
DAUTREIVE.

On the trial of the case, a witness was offered to prove the declarations made by the slave upon his return home after he was shot. These declarations were admitted as forming part of the *res gesta* of the transaction.

We think that remarks made in conversation consisting merely of a detailed narrative of a past occurrence by a person himself, incompetent to testify, should not have been received as forming a part of the *res gesta* connected with the occurrence itself. We therefore reject all that part of the testimony which consists in the declarations of the slave. From the statement of the facts as detailed by those who accompanied the defendants as belonging to the patrol, and as developed in the testimony of other witnesses, we consider it conclusively established, that the plaintiff's slave was not a runaway, but was a valuable and confidential slave; that he was going on horseback with the full assent and standing permission of his master, to the residence of *Mrs. Dubuclet*, with whom his wife resided, in the town of New Iberia, but, that while on his way, in the public road, at about 11 o'clock at night, when about entering the town, he was ordered to stop by the patrol. That the slave did stop as he was ordered to do, but, either for the purpose of escaping because of his apprehension of the consequences of an arrest, or in consequence of the shyness of an unbroken horse, he started back in a gallop, when the defendants, both of whom were armed with shotguns, fired upon him three times when at a distance of about thirty-five yards, after having previously called upon him to stop. The negro being mortally wounded, returned home and died the next day.

Under the circumstances, the defendants, who were charged with duties as members of the patrol, were authorized to infer that the defendant's slave was endeavoring to escape a lawful arrest. Recent disorders among the slaves in and about the town of New Iberia, had made it a matter of importance that the laws relative to the police of slaves, should be strictly enforced. The slave in question was repeatedly called upon to stop, and it was not until there was every reason to suppose that he would otherwise effect his escape, and that he could not be overtaken by pursuit, that the defendants fired upon him. In so doing, we think they were protected by the terms of the 65th section of the Act of 1855, which provides that if any slave shall be found absent from his usual place of working, or residence, without some white person accompanying him, and shall refuse to submit himself to examination, any free holder may be permitted to seize and arrest him, and if he should resist, or attempt to make his escape, the freeholder is authorized to make use of arms, but to avoid killing the slave; but should the slave assault and strike him, he is authorized to kill him. The "use of arms" without the desire, or deliberate intention of killing, necessarily implies at least a risk of killing, and this phrase was, we think, intended to embrace cases similar to that now under consideration.

It is ordered that the judgment appealed from be affirmed.

## JAMES G. HAYES v. VALENTINE C. CLARKE et al.

The facts of this case, it was *held*, establish simulation.

The original papers from other Clerks' offices will not be received to complete a record in the Supreme Court.

**A**PPEAL from the District Court of St. Landry, *Dupré, J.*  
*J. E. King*, for plaintiff and appellant. *T. H. Lewis and Porter*, for defendants.

MERRICK, C. J. The defendants seized under an execution, as the property of *Joseph E. Andrews*, against whom they had judgment, a tract of land and two slaves, in his possession. The plaintiff opposed the sale on the ground that the property had been previously conveyed to him by *Andrews*. It is proved that at the sale *Hayes* counted down the price in the presence of the Notary and the witnesses. But it was shown that he was the son-in-law of *Andrews*; that he was comparatively without means; that *Andrews* must have had funds in his hands as administrator, and could easily have produced that amount of money for the purpose of the simulation; that he was embarrassed in his individual affairs; that the property remained in his possession notwithstanding the plaintiff was in a condition to need the services of the slaves which he pretended to have purchased, and that the property sold constituted almost the only remaining property of *Andrews*, and that the sale was made during the pendency of the suit of *Clark* against him, and only thirteen days before the judgment was rendered.

We are not prepared to say that the District Judge, who probably knows the parties and witnesses, erred in concluding, on this evidence, that the sale was a simulated one. C. C., 1915, 2456.

Under the peculiar circumstances of this case, we have looked into the original records sent up and completing the record of the case. But as the original records are liable to be lost, when taken from the proper office, we take this occasion to say that hereafter the *original* papers of other offices will not be received to complete a record of a case pending in this court.

It is ordered, adjudged and decreed, that the judgment of the lower court be affirmed with costs.

## A. FERGUSON, Widow, &amp;c. v. GLAZE.

The cases of *Taylor v. Jeffrey's estate*, 10 La. , 435, decided in 1836, and *Michal v. Flotte's administrator*, 12 La. 129, decided in 1838, deciding that the functions of an administration of an estate, did not, like those of an executor, cease at the end of a year, but continued until the administration was finished, correctly declared the law.

A judgment against the principal debtor is *prima facie* proof of the amount for which the surety on an administrator's bond is liable, and until rebutted by sufficient evidence, no other proof is required.

An action brought against the principal debtor, interrupts the prescription on the part of the surety. C. C. 3518.

Neither the principal nor his surety can introduce parol evidence to vary a written contract.

**A**PPEAL from the District Court of St. Landry, *A. Voorhies, J.*  
*J. E. King*, for plaintiff. *J. H. Lewis and Porter*, and *Swayze & Moore*, for defendant and appellant.

**MERRICK, C. J.** This suit is brought against the defendant as surety on an administrator's bond, and was before this court last year on an exception to the jurisdiction of the District Court for the parish of St. Landry. 10 An. 635. It is a branch of the same case decided by our predecessors at Alexandria, and reported in 12 Rob. 215.

The administrator's bond, on which the defendant is sought to be made responsible, bears date May 1st, 1837, and was made payable to the parish Judge of the parish of Avoyelles, for \$29,120.

In 1840, the plaintiff instituted proceedings against *Patrick H. Glaze*, the principal in the bond, as administrator of the succession of *Silas F. Thomas*, to render his account and to pay petitioner eight thousand dollars, the amount of her interest in the estate as widow in community. The administrator having filed his account of his administration, it was opposed by the plaintiff in this action, by a formal opposition filed 21st of February, 1841. That suit appears to have been obstinately litigated by the parties, and resulted in a final judgment rendered on the 26th day of October, 1850, decreeing a balance to be in the hands of the administrator of \$8,661 12½, bearing five per cent. interest per annum from the 1st day of February, 1841, the date of the filing of the account, until paid.

This suit was commenced against the surety on the bond of the administrator, the 1st day of May, 1851.

It is contended, in substance, that the term of the office for which *P. H. Glaze* was appointed administrator, was from year to year; that at the end of the year, his administration not having been prolonged, terminated, and he was *functus officio*, and, that being out of office, after the first day of May, 1838, his subsequent acts were but those of an intermeddler, for which his sureties were not responsible.

It is contended further, that the Act of the Legislature, approved 15th of March, 1837, and which was not promulgated in the official gazette until April 8, 1837, and consequently was not in force in the parish of Avoyelles until 8th of May, 1837, could not effect or change the bond given eight days previously: the seventh section of this Act continuing in office all executors, administrators, curators and syndics, until the estate is wound up. Acts 1837, p. 96, 97.

FURCHSON  
v.  
GLAZE.

It is further contended, that by the Civil Code, Arts. 1197, 1199 and 1201, the office of the *curator* of a vacant succession terminates at the end of one year, and that Article 1042 of the Civil Code, and Articles 992 and 994 of the Code of Practice, prescribe that administrators shall have the same powers, and are subject to the same duties and responsibilities, as the curators of vacant estates; that administrators and curators of vacant estates having been placed on the same footing as regards their duties and responsibilities, the argument is as applicable in the case of the former as the latter; that if administrators have the same powers as curators, *their* powers cannot be *greater or less*; that "if the curator became *functus officio*, and could not act after the expiration of a year without a prolongation of his administration, neither can the administrator. If he can, then he has *greater powers* than the curator, and not the *same powers*—which is a contradiction." 10 R. 457; 7 R. 24.

"Whether the administrator becomes *functus officio* at the end of the year or not, he is certainly '*subject to the same duties*.' The Article 1199 of the Louisiana Code, *required a renewal of the security*, and commanded the Judge to exact it. If the Judge neglected it, the parties interested should have required it. At all events, the law, by requiring a '*renewal of the security*,' did not hold the first security any longer bound. Else why require a renewal of the security"?

It is a sufficient answer to this argument to say, that the question was considered by the Supreme Court, and settled after a full argument in the case of *Taylor v. Jeffries estate*, 10 L. R. 435, decided in 1836, one year before the Act of 1837 was passed, and the bond in this case signed, and "it was there held, that the term of office of the administrator was not limited to one year. In 1838, it was again decided in the case of *Michot v. Flotte's administrator*, 12 L. R. 129, that the functions of an administrator of an estate do not, like those of an executor, cease at the end of the year, but continue until the administration of the estate is finished." These decisions appear to have been acquiesced in by the profession and must now be held as conclusive. The surety on the bond was, therefore, responsible for the acts of said *P. H. Glaze* as administrator, after as well as before the expiration of the one year from the date of his appointment.

The defendant further contends, that it is the duty of the plaintiff to prove the amount of funds of the succession received by the principal, in order to recover against the surety, and cites the case of the *Succession of Johnston*, 1 Ann. 75.

In this case, the judgment against the principal debtor is *prima facie* proof of the amount for which the surety is responsible, and until rebutted by sufficient evidence, no other proof is required.

It is further contended, that the obligation sued on, is prescribed by the ten years which elapsed previous to the inception of this suit.

Proceedings were commenced against the principal debtor within about three years of his appointment, and interruptedly prosecuted until 1850. This interrupted the prescription as to the surety. C. C. 3518.

It is further contended, that the administrator is entitled to a credit of \$5,000, because it is urged, that "on the 5th day of June, 1835, *Patrick H. Glaze* sold to *Silas F. Thomas*, deceased, a tract of land on Bayou Boeuf, together with the improvements and the merchandize contained thereon.

"The consideration of the sale was five thousand dollars. *Patrick H. Glaze*, the administrator, in the contest between himself and the plaintiff, alleged

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v.  
GLAZE.

that the sale was simulated; that the price, although stated in the act to be paid cash, was never so paid, and that the transfer was intended to give *Thomas* credit, in order that he might the more successfully prosecute his mercantile business."

This point was fully considered in the case of this plaintiff against *P. H. Glaze*, (12 Rob. 217,) and it was there held, that the credit was properly rejected. The parol proof can no more affect the case, as to the surety on the bond, than it could his principal. There is no written evidence which gives a different complexion to this part of the case, from that which it bore when before our predecessors.

On the trial of the case against *P. H. Glaze*, in the parish of Avoyelles, certain large items of credit claimed by the administrator, were reduced one-half, as being the payment of certain joint obligations of the deceased and the administrator. A number of other items were rejected, because the payments thereof were not produced.

On the present trial the principal in the bond having been released by the surety, was placed on the stand as a witness, (to which a bill of exception was taken,) and testified: that he paid all the items charged in his account of administration; that certain items were the exclusive indebtedness of the deceased; and that the intestate assumed a note of \$2,239 39.

Even if it be conceded that the witness could be heard to contradict a judgment imparting absolute verity against him, we are not prepared to say that the District Judge erred upon testimony of this general character, and in the absence of the obligations, or at least copies thereof alleged, so to have been assumed or paid, in concluding that the testimony was insufficient and too uncertain to show error in the judgment rendered against the principal debtor, and now produced against the surety. C. C. 2257.

The judgment must be affirmed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed, with costs.

#### T. M. ANDERSON v. R. B. STILLE, Tutor.

The District Judge of the Parish in which the slaves are situated, has jurisdiction to try an action for their partition.

Plaintiff need not, in order to sustain a sequestration, swear that he fears defendant will conceal, part with, or dispose of, the property sequestered. It will be sufficient if he make oath of his interest in the property sequestered, and that he fears that defendant will send it out of the jurisdiction of the court during the pending of the suit.

APPEAL from the District Court of St. Landry, *Dupré, J.*

*J. L. King*, for plaintiff and appellant. *Swayze & Moore*, for defendant.

MERRICK, C. J. The plaintiff being the owner of the one undivided sixth part of the slaves in controversy, by the judgment of the District Court of St. Landry, brought the present action to effect a partition.

The slaves were in the possession of the defendant, in the Parish of St. Landry, and about being removed to the Parish of Sabine, where the defendant resides.

ANDERSON  
v.  
STILLE.

The plaintiff also sued out a writ of sequestration, to prevent the slaves from being removed beyond the jurisdiction of the court.

The defendant excepted to the plaintiff's action, which, being dismissed, plaintiff appealed.

It is contended, 1st. That the defendant's domicil being in the Parish of Sabine, this action ought to be instituted there; 2d. That no sufficient ground for the resort to the harsh remedy of a writ of sequestration, has been shown by the plaintiff in his affidavit.

On the first question, it is urged that the term "real property," used in Art. No. 165, No. 11 Code of Practice, is intended to embrace land; that the suit for a partition of slaves, is governed by the general rule, that one must be sued before the Judge having jurisdiction over the place where the defendant has his domicil. C. P. 162.

A judicial construction was put by our predecessor upon the term, real property, as used in the Article 162, C. P., in the case of *Scott v. Bowles*, 3 Ann. 637, and it was there held, that "slaves being immovable by operation of law, plaintiffs had their election to institute an action for their recovery, either in the parish where the property was situated, or at the domicil of the defendant."

We see no reason why a different construction should be put upon the same words occurring in the article under consideration, which provides, that in matters relative to the partition of *real estate* between co-proprietors, the suit must be brought before the court of the place where such property is situated, though the co-proprietors may reside in different parishes.

We have not overlooked the language of the French text, *d'un bien-fonds*, but we think the English text, which is in accordance with Article 1304 of the Civil Code, should govern. The article last cited from the Civil Code, is under the head of partition of successions, and is in these words: "All the rules established in the present section, with the exception of what relates to collections, are applicable to partitions between co-proprietors of the same thing, where, among the co-proprietors, any are absent, minors, or interdicted, or where the co-proprietors of age, present, cannot agree on the partition and on the manner of making it.

*But in these kinds of partitions, the action must be brought before the Judge of the place where the property to be divided, is situated, wherever the parties interested may be domiciliated.*

The District Judge for the Fifteenth Judicial District, for Parish of St. Landry, had jurisdiction of the action of partition.

It is further contended, that the affidavit for the sequestration, is insufficient, and that it does assert that plaintiff feared that defendant would conceal, part with, or dispose of the slaves.

It was not necessary in this action, that the affidavit should show such apprehension. It was sufficient, under the 2d paragraph of Article 275, of the Code of Practice, that the plaintiff should make oath of his interest in the property, and that he feared that the defendant would send the slaves out of the jurisdiction of the court, during the pendency of the suit.

No person can be compelled to hold property in common with others. C. C. 1215. The plaintiff had the right to institute his suit at any moment he saw fit, and having brought his action whilst the property of which he was a co-proprietor, was in the Parish of St. Landry, the jurisdiction of the District must be maintained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; that the defendant's exception be overruled; that the sequestration be maintained, and that this cause be remanded for further proceedings according to law, and that the defendant and appellee pay the costs of the appeal.

ANDERSON  
v.  
STILLE.

J. H. STOKES v A. FORMAN, Administrator.

A purchased property at the succession sale of F. and gave his note for the price. S. having married F's widow, and suit having been brought on the note, he plead in compensation the interest of his wife in the community of F. and herself. But held, the plea was bad, because the quality of debtor and creditor was not united in the same person, and because, also, the debts were not equally liquidated and demandable.

APPEAL from the District Court of Vermillion. *Voorhies, J.*

*D. O'Brien*, for plaintiff and appellant. *C. H. Mouton & A. De Blanc*, for defendant.

BUCHANAN, J. The plaintiff purchased a slave at the succession sale of *Neville Forman's* effects, and gave his notes for the price, secured by special mortgage upon the slave. At maturity the notes being unpaid, suit was brought *via executiva* and the slave was seized. Plaintiff now enjoins the sale on the grounds, 1st, That he is entitled to plead in compensation, the share of his wife (who had been the widow of *Neville Forman*,) in the community of acquets and gains formerly existing between her and said *Forman*.

2d. That there was no proof of the notes having been demanded of him, at the place where they were made payable.

I. In the case of *Thibodeaux's* succession, 10 Ann. p. 653, it was held that the administrator of a succession could not compensate the unpaid price of a purchase of succession property, against the share coming to the wife of the purchaser as an heir of the succession. The converse of the proposition is here presented, and must receive the same solution. It is evident that to effect compensation the quality of debtor and creditor must be united in the same person, which is not the case before us. Again, the two debts must be equally liquidated and demandable, which is not shown in the present instance.

As to the necessity of proving presentation at the place where the note is payable, as a prerequisite to recovery against the maker, this cannot be considered an open question since the case of *Ripka v. Pope*, 5 A. 61, in also 5 Ann. 188, *Ibid*, 720, 3 Ann. 90, *Ibid*, 131.

The appellee has asked for damages for a frivolous appeal, and we think him entitled to them.

It is therefore adjudged and decreed, that the judgment of the District court be affirmed, with eighty dollars damages for this frivolous appeal, and costs in both courts.

## JOHN DEVALCOURT v. M. E. DILLON—same v. same—Consolidated cases.

*A*, being indebted to *B*, deposits in his hands, merchandize to be sold, and the proceeds to be applied to the extinguishment of the debt. This constitutes a contract of mandate between *A* and *B*, which obliges the former to reimburse the latter, whatever necessary and useful expenses have been incurred in fulfilling the object of the mandate.

A nonsuit entered up against a party who does not appear when called in court, is not such an abandonment of the suit, as prevents it from interrupting prescription.

**A** PPEAL from the District Court of St. Martin, *Dupré, J.*  
*J. G. Oliver*, for plaintiff. *Martin Voorhies*, for defendant and appellant.

BUCHANAN, J. The receipt filed with this answer, does not prove a payment of the note, which is the basis of the first of these suits, as contended for by defendant's counsel. It shows that a bill of lading of certain merchandize had been put into plaintiff's hands, the proceeds of which merchandize to be applied in extinguishment of the note of defendant. But the depositions of witnesses examined under commissions, and the record evidence from New York, establish that this shipment of molasses and sugar, did not benefit plaintiff, but was, on the contrary, a source of great trouble and expense to him; and that, far from realizing anything from the proceeds of said shipment, he was compelled to disburse money in costs and charges; of which he claims reimbursement in the second of these consolidated cases.

The prescription of five and ten years, pleaded by defendant, has not been acquired. It is well settled, that a nonsuit entered up against a party who does not appear when called in court, is not such an abandonment of the suit, as prevents it from interrupting prescription: and in this case, the absence of plaintiff at the October term of 1854, is accounted for by the epidemic which then prevailed, and the death of his counsel.

Neither is the prescription of one year, applicable to the second of these suits. This is an action *ex contractu*, not *ex delicto*. *A*, being indebted to *B*, deposits in his hands merchandize to be sold, and the proceeds to be applied in extinguishment of the debt. This constitutes a contract of mandate between *A* and *B*, which obliges the former to reimburse the latter whatever necessary and useful expenses have been incurred in fulfilling the objects of the mandate.

It is not perceived that the article 3503, of the Code, has any application to these actions.

The amounts allowed by the court below, appear to us correct.

It is proved that the plaintiff paid a bill of exchange drawn upon him at one day's sight for the costs and charges incurred in New York by reason of the shipment of the molasses and sugar in question, and a witness, *John Compton*, proves that those costs and charges were actually incurred. The schedule or account, of those charges, includes a charge of interest at the rate of seven per cent. per annum, by *Compton*, in New York, which is believed to be in accordance with mercantile usage. The charge of half commissions on cargo was properly rejected.

Judgment affirmed, with costs.

## B. R. GAUTT v. GAUTT.

A party who offers proof, that would be inadmissible under our law, of a contract said to have taken place in another State, must show that such proof would be admissible, to prove the contract, in the State where it took place.

APPEAL from the District Court of St. Landry, *Voorhies, J.*  
*R. F. Linton and J. Dupré*, for plaintiff and appellant. *J. M. Porter*, for defendant.

BUCHANAN, J. This case is before the Supreme Court for the second time, having been remanded in order to enable the plaintiff to amend his pleadings. See 6 Ann. 677.

Plaintiff now claims,

1. For cash advances and hire of slaves, from the year 1840 to the year 1849.
2. For slaves sold by the mother of the parties, to pay defendant's debts.
3. Slave *Rachel* and two children.

I. There is a document in evidence which is regarded by us, as a settlement of the respective claims of these parties against each other, to the day of its date, to wit: December 7th, 1844. It is a notarial act, by which plaintiff sells to defendant, a slave named *Hiram*, four mules, a gin stand, and all the vendor's interest in the crop of cotton and corn, of the year 1844, upon the plantation where defendant resided, for and in consideration of the sum of three thousand dollars, which plaintiff acknowledged to have received in the proceeds of the crops raised on said plantation in 1841 and 1842, collected by and appropriated to the use of plaintiff.

The testimony on the subject of cash advanced by plaintiff to defendant, is vague, and refers, in a great measure, to dates anterior to the settlement aforesaid. The District Judge has allowed \$349 81 on this head of plaintiff's claim, and it is not clear to our mind that there is error in this allowance. As to the hire of slaves, it is barred by prescription, except for the three years preceding the institution of the suit. C. C. §503. The District Judge has allowed two years' hire of five slaves, *Hiram, Alfred, Daniel, Judith* and *Lina*, at one hundred and forty dollars per annum, for each. In this, we think there is error.

The title of *Hiram, Alfred, Daniel* and *Judith*, was in defendant, up to the 6th April, 1849, about which time they ceased to work on his plantation. *Lina*, alone, appears to have belonged to plaintiff, while at work there. Under the evidence, we allow one hundred dollars per annum, during three years, for the services of *Lina*.

II and III. The claim for the price of *Arthur* and *Aimée*, and that for *Rachel* and children, were properly disallowed by the District Judge. The proof on the first of these claims, is improbable and unsatisfactory. As to the second, it appears that plaintiff bought *Rachel*, without children, at a probate sale in 1840, but never paid her price; and that upon execution issued against him therefor, defendant became the purchaser of *Rachel* and her infant child in 1844, at sheriff's sale, for cash. The title of *Rachel* and child, consequently, vested in defendant.

GAUTH  
v.  
GAUTH.

Both parties appealed from the judgment of the District Court, and we find in the record, three bills of exceptions, taken by plaintiff, to the rejection of evidence.

The first bill of exceptions is to the rejection of parol proof of sale of a slave in Alabama, the plaintiff not having laid a basis for the admission of such proof, by proving the law of Alabama, in relation to the form of such sales.

There is no error in this ruling. It is clearly the duty of a party who offers proof, that would be inadmissible under our law, of a contract said to have taken place in another State, to show that such proof would be admissible to prove the contract in the State where it took place.

The second bill of exceptions is to the rejection of parol evidence to prove title to land and slaves in Louisiana, and a partnership in the fruits of such land and slaves.

The questions involved in this bill of exceptions were decided by our predecessor on the former appeal, (the depositions of the witnesses having been taken before that appeal, and their admissibility being the only matter passed upon therein.) See 6 Ann. 678. We have reason, therefore, to be surprised at the pertinacity with which the point is pressed. A slight variation in the form, does not disguise the identity of the substance of the question, with that already decided.

The third bill relates to the rejection of oaths taken by two of the witnesses in other suits, offered to sustain the credibility of those witnesses in this suit. This evidence was properly rejected.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; that plaintiff recover of defendant, six hundred and forty-nine dollars and eighty-one cents, with legal interest from judicial demand, and costs of the District Court: those of appeal to be paid by plaintiff.

#### W. & D. URQUHART v. E. B. SCOTT, Tutor—BEAUCHAMP, Intervenor.

In an action against a Tutor for advances, supplies, &c., furnished to the estate of his wards, the under-tutor, who alleges that the advances &c., &c., went to the benefit of the tutor, personally, and not to the wards, shows sufficient grounds to justify an intervention.

Where the Tutor has created an indebtedness without authority of law, the burthen of proof is thrown upon the creditor, to show that the indebtedness thus created, was absolutely necessary either for the support of the minors, or for the preservation of their property; and that the supplies thus furnished, actually enured to the benefit of the minors.

**A**PPPEAL from the District Court of St. Landry, *Dupré, J.*  
*Duncan & Overton*, for plaintiff. *Swayze & Moore and King*, for the under-tutor.

LEA, J. The plaintiffs have sued the defendant in his capacity of tutor to his minor children, for the sum of \$6,156 60, being for a balance of account due to the plaintiffs for alleged advances made, and supplies furnished to said *Scott* in his capacity aforesaid, for the use and benefit of a plantation belonging to said minors; alleging that said advances and supplies were absolutely necessary for the proper administration of the property, and the maintenance and education of said minors.

In this suit the under-tutor of the minors has intervened, alleging that there exists a conflict between the interests of the minors and that of their tutor, who is responsible, personally, for the payment of the plaintiff's demand against the minors. He denies the indebtedness of the minors as alleged; denies that the alleged advances and supplies ever enured to the advantage of the minors; denies the right of the tutor to incur obligations on behalf of his wards without the advice of a family meeting, duly homologated. The intervenor moreover avers, that if any supplies or advances have been made accruing to the benefit of said minors, that they have been more than repaid by the proceeds arising from the crops of the plantation.

The plaintiffs have excepted to the right of the under-tutor to intervene, on the ground that the petition sets forth no legal ground of intervention, and that there exists no opposition of interests between the tutor and the minors. We think the petition of intervention sets forth a sufficient ground of intervention, and that there does exist such an opposition of interests between the tutor and his wards, as justifies the proceedings of the under-tutor.

It is shown that in October, 1850, the defendant was qualified as tutor of his minor children. That they inherited a plantation and slaves from their mother.

It is not shown that the estate was embarrassed with debts at the commencement of the tutor's administration, nor does it appear that the revenues of the minors were inadequate to their support. The tutor is prohibited, under the stringent, but wise provisions of our law, from borrowing money on behalf of the minors. If their support, or the preservation of their property require an expenditure beyond their revenues, it is the duty of the tutor to cause to be convened, a meeting of the family or friends of the minors, to deliberate upon the propriety of making a loan. In the absence of such authority, the tutor can make no contract, binding as such, which creates an indebtedness on the part of his wards.

Those who deal with tutors, acting on behalf of minors, must do so at their peril.

Where the tutor has created an indebtedness without authority of law, the burthen of proof is thrown upon the creditor to show that the indebtedness thus created, was *absolutely necessary*, either to the support of the minors, or to the preservation of their property, and that the supplies thus furnished, actually enured to the benefit of the minors. The creditor's claim in such case would not rest upon any contract, but would be based upon the broad principle of equity, that no one has a right to be enriched at another's expense. Tested by this rule, the question to be determined in the case before us, is: To what extent over and above the proceeds of the crops received by the plaintiff, have the minors been actually benefited by the alleged supplies and advances made on their behalf? It appears to be conceded, that supplies to the amount of \$1,312, were actually furnished and used for the benefit of the minors, (a liberal concession when the evidence is considered.) On the other hand, the account is credited with the nett proceeds of sales of sugar and molasses amounting to \$2,579 70, from which should be deducted the proceeds of 25 hogsheads of sugar *bought* by the tutor and shipped to plaintiff, say \$589 21, leaving \$1,990 50, applicable to the payment of any claims legally binding upon the heirs.

The items of the account (with the exception of those for supplies furnished, and money actually advanced to the tutor) consist of the payments of certain drafts drawn by the tutor and paid by the plaintiffs.

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v.  
SCOTT.

The only items which are supported, even in part, by the evidence, are those for the payment of accounts alleged to have been owing to *T. C. Anderson, J. M. Johnson and Burbridge & Adams*.

As respects *Anderson's* account, the evidence wholly fails to establish an indebtedness exceeding the credit to which the minors are entitled, viz: \$2,281 05. A large portion of the account consists in drafts paid by *Anderson*, the consideration of which, with one or two exceptions, is not shown, and in loans of money to *Scott*. The supplies, except such as were absolutely necessary for the management of the plantation, are not chargeable to the minors, and those are not shown by the evidence to exceed the credits above referred to.

The same remarks are applicable, in part, to the account of *Burbridge & Adams*. It is not shown that the articles enumerated therein, ever accrued to the benefit of the minors. Even if the court were to give the plaintiff the benefit of a presumption to that effect, so far as respects the materials for the construction of a sugar house, it would not benefit the plaintiffs in their litigation, for allowing a credit for the assumed value of these materials, there would still remain a balance against the plaintiffs upon their account, and the allowance of a credit for the payments made to *Johnson*, would not alter the result.

An objection has been made to our consideration of the correctness of the judgment appealed from, on the ground that *C. H. Beauchamp* has appealed in his own name, and not in his capacity as under-tutor. It was as under-tutor, that *Beauchamp* intervened; it was as intervenor, that he appealed, and he is expressly so designated in the order of the court, and the appeal bond is signed by him as under-tutor.

We think he stands before this court as properly representing the minors.

It is ordered that the judgment appealed from be reversed; that there be judgment in favor of the intervenor and against the plaintiffs; that the plaintiff's claim be rejected, so far as it affects the said minors, *Paunel, Henry and Fanny Scott*, or their said tutor, in his capacity as such, reserving to said plaintiffs their claim against the said *Edwin B. Scott*, individually. It is further ordered that plaintiffs pay costs in both courts.

#### SUCCESSION OF W. IRWIN—Opposition of CASHEU.

There is no principle of law which forbids a man who is threatened with violence, or deems it necessary to his personal security, to employ about him persons capable of rendering him efficient assistance in time of need.

**A**PPEAL from the parish of St. Landry, *Dupré, J. Overton*, for opponent and appellant. *Martell & Hardy*, for the succession.

**MERRICK, C. J.** The testator, in the language of one of the witnesses, having been assaulted, and "having apprehensions for his life or great bodily harm," retained the opponent as his protector. He kept him about his person and was in the habit of sending away those who came to employ *Cashew*, who was a carpenter. He stated repeatedly, that he preferred paying five dollars a

day, than to let the opponent go. *Irwin*, by his will, bequeathed *Casheu* \$100, but it is shown that *Casheu*, who was present, stated that he did not wish to be put in the will.

The testimony leaves no doubt that *Casheu* was employed as a protector by *Irwin*, and that the latter expected to pay him the value of his services.

We know no principle of law which forbids a man who is threatened with violence, or deems it necessary to his personal security, to employ about him persons capable of rendering him efficient assistance in case of need. Wharton Am. Crim. Law, 389.

The opponent is not compelled to content himself with the legacy which is not shown to have been intended as a remunerative donation, but may recover for his services. The length of time he was in the employment of the testator, has not been established with much certainty, and, we think, two hundred and fifty dollars a sufficient allowance.

It is, therefore, ordered, that so much of the judgment of the District Court as rejects the opposition of *Henry Casheu*, be reversed; that the said *Casheu* be recognized as a creditor of said succession, for the sum of two hundred and fifty dollars, and legal interest thereon, from the filing of said opposition; and that said opponent be placed upon the tableau of distribution for said sum, as a creditor; and that the costs of the appeal, as well as of the lower court, on the opposition, be borne by the succession of said *William Irwin*, deceased.

#### STATE v. J. HOLLIN.

The proceeding against a person for retailing spirituous liquors, without previously obtaining a license, should be by indictment, and not by civil suit.

APPEAL from the District Court of St. Landry. The record does not disclose the name of the Judge, who tried the case. *W. Mouton*, for the State. *B. F. Linton*, for defendant and appellant.

BUCHANAN, J. This is a conviction under the 94th section of the Act of 1855, "relative to crimes and offences," for retailing spirituous liquors, without previously obtaining a license.

The appellant contends that the proceeding should have been by civil suit, and not by indictment.

The cases quoted by him (3 Rob. 55, and 12 Rob. 48) have no application to the present. Those were prosecutions under Statutes of 1806 and 1814, totally different in their objects and phraseology from that now under consideration. In both those Statutes, the penalty was nothing more than a fine, which, by the Act of 1806, was to be recovered by suit before any competent tribunal; and by that of 1814, on motion of the District Attorney.

In the present case, no such forms of proceeding are prescribed; and in case of conviction, the offender is not only fined, but is sentenced in default of payment of the fine to imprisonment.

Judgment affirmed, with costs.

## E. COLLINS v. J. HALLIER, Administrator.

The law does not prohibit an allowance of alimony, when a proper case is shown, to illegitimate colored children, out of the succession of their father.

**A** PPEAL from the District Court of St. Landry, *Dupre, J.*  
*T. H. Lewis, Porter & Martel*, and *Hardy*, for plaintiff. *B. F. Linton*, and *E. N. Cullam*, for defendant and appellant.

**LEA, J.** The defendant is appellant from a judgment against him in his capacity as administrator of the estate of *Julien C. Genor*, for alimony claimed on behalf of two illegitimate colored children of the deceased.

The appellees have not asked for any change of the judgment in their favor; they merely ask for an affirmance of the judgment granting the alimony. Our investigation is, therefore, limited to the sole inquiry, whether the evidence supports a judgment for alimony?

It appears from the evidence *received without objection*, that the deceased died, leaving two illegitimate colored children, who are destitute of the means of support, unless the title to a lot of ground, with improvements, of which a donation was made to one of the children, be recognized as valid, which is disputed by the appellant. Though the issue, with reference to the title to this lot of ground and the validity of the donation, was expressly made in the pleadings, it was wholly overlooked in the judgment appealed from, nor has any reference been made to this fact in the brief of the counsel for the appellant, the only one with which we have been furnished.

As the appellant denies title in the appellees to the lot in question, and no such right has been recognized by the judgment of the court, the case is presented of an application on the part of two illegitimate colored children, in apparently destitute circumstances, claiming alimony from their father's estate. Nothing in the law prohibits such an allowance. See Civil Code, Arts. 246, 247, 259. And the position of the appellee precludes an objection, on the ground that a sufficient maintenance had been provided by the donation referred to in the pleadings. So far as respects the amount allowed for alimony, we think it cannot be complained of as unreasonable.

It is ordered, that the judgment appealed from be affirmed.

## STATE v. JOHN JACKSON.

A party who excepts to the proceedings in a cause in which he is interested, must show in his bill all the facts, not otherwise of record, necessary to give the act complained of its erroneous complexion.

One accused of murder cannot show, as a justification, that the deceased bore the general character of a quarrelsome and vicious man. The effect of testimony, offered by the accused, that a previous quarrel existed between him and the deceased, would tend to aggravate rather than to mitigate the offence.

When the accused goes to trial without objection, it will be too late after conviction to urge, as error, that he had not been served with a copy of the indictment and a list of the jurors who were to try him.

If an imperfect copy of an indictment be served upon the accused, and he consent to go to trial, without insisting upon a perfect copy and the delay accorded to him by law, it will be too late to make the objection after conviction.

In the absence of a bill of exceptions, it will be presumed, that the accused accepted the jurors who tried his case, and it will be too late to object after verdict.

**A** PPEAL from the District Court of St. Martin, *A. Voorhies, J.*  
*M. Mouton*, District Attorney, for the State. *E. Simon, Jr.*, and *Deblanc & Fuselier*, for defendant and appellant.

**MERRICK, C. J.** The accused having been indicted for murder, on the trial was convicted of manslaughter. He has appealed.

The first question which he presents for our consideration, is one which he raises by the following bill of exception, viz:

"Be it known, that on the trial of this case, the defendant having offered evidence to the general character of the deceased as a quarrelsome and vicious man, and also that there had taken place a previous quarrel between the deceased and the defendant. The court having sustained the objections of the District Attorney to the admissibility of this evidence, the defendant, by his counsel, took this bill of exceptions to the opinion of the court."

The party who excepts to the proceedings in a cause in which he is interested, must show in his bill all the facts not otherwise of record, necessary to give the act complained of its erroneous complexion.

The bill of exception, overlooking its contradictions, presents the simple question, whether the accused on a trial for murder, as a general rule, may show as a justification, that the deceased bore the general character of a quarrelsome and vicious man? It is not necessary to invoke authorities to show that the proof is inadmissible. The bill of exceptions also shows, that the court refused to allow the accused to prove a previous quarrel between the deceased and the defendant. The tendency of this last mentioned evidence, if admitted, would have been to aggravate the homicide and make that appear to be murder, which, under other circumstances, might perhaps be considered as manslaughter. Had the proof been offered by the State, for the purpose of showing a previous grudge and the malice aforethought, it might have been admissible. The prisoner certainly cannot complain that testimony unfavorable to his case has been excluded. Wharton Am. Crim. Law, p. 377; Ibid, 234-5; 5 Ann. 489.

It is further urged, that the accused was not served with a list of jurors who were to pass upon his trial, and with the indictment, two entire days before the trial.

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The prisoner went to trial for all that appears, without making any objection on account of sufficient time not having elapsed between the service of the list of persons and copy of the indictment upon him, and the trial to enable him to prepare his defence and inform himself of the character of the jurors who were to decide upon his case. *Non constat*, but the cause was taken up for trial at the instance of the deceased. Cases may be imagined, as where there is danger of losing the testimony of a material witness, in which it would be of the greatest importance to the accused, that he should be able to demand an immediate trial. This being the case, it should be shown where this objection is insisted upon, that the accused did not consent to the trial.

On this subject, Mr. Justice Preston, in the case of the *State v. Price*, 8 An. 693, remarks: that "in the progress of a criminal trial, there are forms of law prescribed purely for benefit of the accused. He has the right to plead not guilty, but may waive it, and plead guilty. Of this class, is the right and privilege to a copy of his indictment and list of his jury, two entire days before the trial.

"These are entirely different from forms which are prescribed for the public good. The prisoner must be prosecuted by indictment in a capital case, and not otherwise. He must be arraigned publicly and cannot waive it by pleading privately. He must appear in person on trial, even if bailed, and not by attorney. For the certainty which should attend criminal prosecutions, for the public example and the happy effects of an open acquittal or conviction, these forms cannot be dispensed with. They are unlike those in which the public have no interest; which are purely personal to the prisoner; which, therefore, in our opinion, can be waived with his consent.

"The accused were, moreover, entitled to a speedy trial by a jury of the vicinage. If circumstances might delay this trial for a term, they might well waive part of the time allowed by law, for the examination of the qualifications of the jury, for the immediate enjoyment of the greater constitutional right to a speedy trial. They did so, after being properly counselled and wisely admonished by the Judge, of the consequences in case of their conviction, and we think, therefore, have no legal cause of complaint."

In the case of the *State v. Benjamin*, the court uses this language, viz:

"It is urged that there is error in the proceedings, because they do not show that a list of the jury which was to pass upon his trial, was served upon the prisoner two days before the trial. An order of court was made directing it. We find no objection made to going to trial; none by way of challenge; no application for a new trial or motion in arrest on this ground, and are bound to presume, therefore, that the list was served upon the prisoner, or that he waived that formality and was content, with the jury that tried him.

"In this respect, the case is entirely different from that of the *State v. Howell*, in which the objection was made when the prisoner was put on his trial. *There must be an essential defect in the prosecution and which could not be waived in the District Court, to induce this court to notice it, where the District Court did not pass upon it, because no objection was made at the proper time and place.*" 7 Ann. 48.

The copy of the indictment and the list of the jury were served upon the prisoner on the thirtieth day of May, and his trial took place the next day. In the absence of any bill of exception or other proceeding, showing a want of consent on the part of the prisoner, we are bound to presume, after verdict found, that the trial took place with his consent.

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It is further objected, "that it does not appear that a true bill was returned against the accused by the Grand Jury, there being no endorsement thereof on the copy of indictment, which was served upon him."

The indictment has an endorsement upon it, "a true bill," which is signed by the foreman. If an imperfect copy was served, the objection appears to have been waived by the consent of the accused, to go to trial without insisting upon the service of a perfect copy, and the delay accorded him by law.

It is further objected, "that the accused was tried by persons called during the progress of his trial, to serve as *talesmen*, when there is no law authorizing the selection and drawing of *talesmen*."

The jury appear to have been empannelled without objection on the part of the prisoner. He is, therefore, in the absence of any bill of exception, presumed to have accepted the jurors who tried the case, as they were tendered him. After having taken the chances of an acquittal with the jury empannelled on his trial, without objection on his part, he must abide the consequences of the verdict of such tribunal, although it has fallen out against him. 10 Ann. 743.

While the objections made do not amount to such error as requires the reversal of the judgment, yet we cannot forbear to remark that the proceedings do not appear from the record to have been conducted with that order and form which ought to characterize a prosecution so grave in its consequences.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed, with costs.

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### J. SÈMÈRE v. W. SÈMÈRE.

With a view to emancipate her slave, *A.* passed an act of sale of him to *B.*, *B.* attempted, but failed, to effect his emancipation, and offered to return him to *A.*, who refused to receive him, and abandoned him to *B.* The heirs of *A.* sued *B.* to recover the slave, but, under the facts of the case, the court maintained the title of *B.*

APPEAL from the District Court of St. Martin, *A. Voorhies, J.*  
*C. H. Mouton* and *M. Voorhies*, for plaintiff. *A. DeBlanc & Fuselier*  
and *Simon & Gayry*, for defendant and appellant.

MERRICK, C. J. This case was before us last year, and remanded to take the answers of the defendant to interrogatories on facts and articles, 10 A. 704.

Those interrogatories are copied into the opinion in the report of the case to which we refer.

Defendant says, in answer to the first interrogatory: "*Marie Marthe Sémère*, passed a sale of the slave *Joseph* or *Charles*, for the purpose of having him emancipated. As I could not succeed to do so, I went to *Miss Sémère* (about a year before her death) to give her back the slave, she abandoned the slave to me."

Ans. 2d. "I did not pay any price for the slave."

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Ans. 3d. "I do not remember to have so stated to any one. In several instances, the slave having misbehaved, I went to *Miss Sémère* (named *Marthe*) to tell her to take back the slave—she said the slave was mine—she would have nothing to do with the slave."

The fourth answer does not appear to have been copied into the record.

Ans. 5th. "That was never agreed to, to wit: In case the emancipation should not be completed, the sale of the 5th of May should be annulled. At least I have no recollection of it."

After the case was remanded, the plaintiff propounded further interrogatories, which are answered as follows:

1st. "You have said, in answer to the previous interrogatories propounded to you, that you went to give back to *Mrs. LaMarthe* the slave *Joseph*: When was it? and was *Joseph* with you at the moment?"

Ans. "When I went to *Miss Marthe Marie Sémère*, to tender the slave *Joseph*, the said slave was not with me, he being runaway at that time. I do not recollect the time I went there."

2d. "Have you, within one year from this date, (the 27th of May, 1854) acknowledged and declared to any one, that the slave, *Joseph*, did not belong to you? Have you made the same declaration within six months from this date? Have you made it three months since? Have you stated the fact in the latter part of March, 1856?"

Ans. "I have, within one year from this date, declared that the slave, *Joseph*, was not my property. I do not know whether I have said so since six months, for there are so many persons that question me about this matter, I may have said so to get rid of them."

3d. Have you not, within nine months from the death of *Marie Marthe Sémère*, declared to some one, that the slave, *Joseph*, was not your property. Have you not delivered said slave to *Julien Sémère*?"

Ans. "I did not deliver the said slave to *Julien Sémère*, but he took the said slave by force, that is, the slave went over to *Julien Sémère*, who, when requested by me to deliver back the slave, refused to do so."

The instrument under which the defendant claims title, purports to be an absolute sale of the slave in question, by *Marie Marthe Sémère*, to him, with the usual covenants of warranty, &c. The consideration expressed, the payment of which was acknowledged, was six hundred dollars. This act of sale was dated 5th of May, 1849, and passed before a Notary Public and two witnesses.

In December, of the same year, the testatrix made her will in nuncupative form by public act, by which she made provision for the emancipation of the other of her slaves, but she took no notice of the slave which she had previously sold to the defendant. *Julien Sémère* was appointed and instituted her universal legatee and heir.

It is alleged in the plaintiff's petition, that the act of sale was simulated and made upon the express condition that, in case said slave should not be emancipated, said sale would be annulled and avoided. These grounds are urged upon our attention in argument, and also, that the obligation to emancipate the slave, was in the nature of a resolutive condition, according to Art. 2040 of our Code, which, when accomplished, operated the revocation of the obligation, placing matters in the same state as though the obligation had not existed.

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If the plaintiff succeeds in this action, it will be because the answers of the defendant, to interrogatories on facts and articles, have added something to his, apparently, perfect title, which subjects it to some one of the objections raised as aforesaid, by plaintiff's counsel. Is the sale simulated? There is nothing in the answer of the defendant from which it can be inferred that the title was a mere sham, not intended to invest *William Sémère* with ownership and property in the slave. On the contrary, the act of sale was absolute on its face, and the party interrogated does not state any fact tending to establish the pretensions of the plaintiff, that the sale was, what is technically considered, a simulation. Was the sale upon the express condition, that in case the slave should not be emancipated, that the sale would be null? The party interrogated, says expressly, that there was no such condition agreed upon. This answer, which stands in the place of title, and which cannot be contradicted by perol, negated the idea that the sale was upon a condition.

If it be admitted that the sale made by the testatrix was subject to the resolatory condition implied in all commutative contracts, it does not follow that the sale, in this instance, can be dissolved on that account; for, it appears that during the lifetime of testatrix, the defendant applied to the proper authority for the emancipation of the slave, but, owing to his bad conduct, in vain, and it is expressly admitted, that proceedings for this purpose are still pending in the Parish of St. Martin, but are opposed by sundry planters of said parish. There is nothing to show that defendant has not faithfully endeavored to fulfill the duties imposed upon him by the act of sale. He has not, therefore, incurred the penalty of the dissolving condition. If we look to the object and intention of the donor, we believe her intention is more likely to be carried out, by leaving the title to the slave, where she placed it; and with a person who has shown a disposition faithfully to perform the trust imposed upon him, than by leaving him with the plaintiff who does not appear to have such object in view.

The instrument, although it purports to be a sale, being in due form for such act, may be treated as an act of donation. 10 L. R. 85. It may be considered that it was made with a condition, or charge upon the donee, that he should apply for the emancipation of the slave; yet if we take this favorable view of the conditions of the parties, there is no reason to declare the donation a nullity for the non-execution of the conditions imposed by the donee. C. C. 1555.

The offer to deliver or reconvey the slave to the testatrix, did not reinvest her against her will, and without any contract between the parties, with a title to the slave. C. C. 2431. *Id quod nostrum est, sine facto nostro ad alium transferi non potest.* The verbal declarations of the defendant to third persons, made without any intention of conveying his ownership to any one, cannot be considered as having the effect of defeating his title. The judgment must be affirmed.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed with costs.

## J. B. J. LOUIS, f. m. c. v. A. RICHARD.

The authorities are not reconcilable on the subject of the right of a party to an act, his heirs and assigns to attack the act for simulation. It is more consonant with general principles that they should not be permitted to do so. But *forced heirs* are to be viewed as third persons, and have the right to attack the act made by their ancestors, on the ground of simulation.

**A** PPEAL from the District Court of Lafayette, *Dupré, J.*  
*A. De Blanc & Fuselier*, for plaintiff and appellant. *Crow & Gerard*,  
 for defendant.

BUCHANAN, J. Plaintiff purchased of *Pierre Landry* in 1849, by public Act before the Recorder of the parish of Lafayette, a negress, slave for life, named *Marie*, for the price of four hundred dollars cash; the seller reserving to himself the usufruct of the slave sold during his life, and with the further condition that should the slave die before her delivery to the purchaser, her loss should be for the purchaser, without any right on his part to indemnity. In 1856, *Pierre Landry* having died, leaving five children, the plaintiff came for possession of the slave *Marie* under his contract with the deceased.

The children of *Landry* defend this action on the ground that the sale of *Marie* by their ancestor to plaintiff was simulated, that no consideration was given for the same; that the slave *Marie* was all the property of their father at the time of his death; and that they are forced heirs.

The District Judge gave a judgment annulling the sale. This judgment is founded in part upon testimony of what the seller had said to a witness after the sale, viz: that he had given back to *Jean Louis* the four hundred dollars which he had received from the latter as the price of the slave.

A bill of exceptions was reserved to the admission of proof of those declarations of the vendor out of the presence of the vendee; upon which we do not consider it necessary to express an opinion.

The authorities are not reconcilable on the subject of the right of a party to an act, his heirs and assigns to attack the act for simulation. The case of *Croizel's Heirs v. Gaudet*, 6 Martin, 524, seems to recognize the right of the party to the act, as well of his heirs, to plead simulation. On the contrary, the case of *Labauve's Heirs v. Boudreau*, 9 Rob. 28, denies that right. We consider the latter doctrine as more consonant with general principles. But the defendants are forced heirs of the deceased *Pierre Landry*, to the extent of two-thirds of his succession; to that extent, they are entitled to be viewed as third persons, in relation to any contract of their father which had the effect of diminishing his succession. The Art. 2456, C. C., makes a presumption of simulation in relation to a sale containing clauses like the present, which may be invoked by these defendants. The burden of proof was upon the plaintiff, in the words of that Art. "to establish the validity of the sale." He has done this to our satisfaction.

It is therefore adjudged and decreed, that the judgment of the District court be amended, that the sale of the slave *Marie* by *Pierre Landry* to plaintiff by act before the Recorder of the parish of Lafayette, of date the 13th September 1849, be rescinded and annulled to the extent of two-thirds; and that plaintiff be recognized as owner of one undivided third of said slave and her increase.

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born since said date; that the defendants, children and forced heirs of *Pierre Landry*, be declared owners of two undivided thirds of said slave and her increase. That the cause be referred back to the District Court, for the purpose of making a legal partition between the parties; that the costs of this appeal be borne by the appellees, and that the costs of the District Court be borne, one-half by plaintiff, and one-half by defendants.

MERRICK, C. J. I think the declarations of the parties to an act attacked as fraudulent may be offered in evidence by any person who has the right to make such attack. But as it is necessary that both parties should be shown to be connected with the fraud or simulation, the declaration of one of the parties alone would not make out the case against both.

Whether the burden of proof in this case was in the first instance upon plaintiff or defendant, I am not prepared to say that there are not sufficient circumstances in the record to throw the burden of proof upon the plaintiff to show the reality of the alleged sale. C. C. 2419.

I therefore concur in the decision of my colleagues.

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D. LYONS, Under-Tutor, &c., &c. v. L. ANDREWS, Tutor.

On the death of his wife, defendant qualified as natural tutor to his children. Having married a second time, he left his two daughters with their uncle and under tutor, and moved with the rest of his family out of the State. Plaintiff, the under-tutor, brought suit to deprive the father of his tutorship. The District Court dismissed the suit for want of jurisdiction. But *Held*: The act of defendant in changing his domicile has not deprived his daughters, who have never left the territorial limits of the jurisdiction, which originally conferred their guardianship upon defendant, of the protection of the court which conferred such guardianship.

Sequestration of the slaves maintained, and the appointment of the father as tutor annulled.

APPEAL from the District Court of St. Landry, *Dupré, J.*  
T. H. Lewis & Porter, for plaintiff and appellant. Moore, curator *ad hoc*, for defendant.

BUCHANAN, J. The defendant's first wife died, leaving four children, two sons and two daughters, issue of her marriage with defendant. He qualified as natural tutor of his children; and plaintiff, their maternal uncle, was appointed their under-tutor. In 1853, about a year before the institution of this suit, defendant (having married a second time) moved with his wife to Texas, taking with him his two sons, but leaving his daughters with their uncle and under-tutor, the plaintiff, who appears to have supported and educated them.

This suit is brought for the purpose of depriving the defendant of the tutorship of his children, on the grounds that he has left the State without causing another to be appointed in his stead; that previous to his departure, he failed to render an account of his administration; that defendant has been unfaithful in his administration; and that he is a man of notoriously bad conduct.

Three slaves of defendant were sequestered at the inception of the suit, and a curator *ad hoc* was appointed to represent him in the suit.

In an answer and amended answer, the curator *ad hoc* pleads the general issue, that the defendant had the right to remove from the State with his children and their property—that before removing from the State, he appointed an

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agent and attorney in fact, and that the matters and things set up in plaintiff's petition have been decided in a judgment which is pleaded in bar of the present action.

This suit was dismissed by the District Court, for want of jurisdiction. This judgment seems to have been based upon the provision of the Code, (Art. 42,) which declares the domicile of the tutor to be the domicile of the minor; and the decisions of the Supreme Court (4 M. R. 715; 5 N. S. 384; 10 Ann. 700,) which recognizes the right of the natural tutor to take minors and their property out of the State. But this case presents peculiar features which take it out of the scope of the cases cited. The under-tutor claims that the father of the minors who are in his (plaintiff's) charge, be deprived of his tutorship for notoriously bad conduct. This is one of the grounds for removal applicable to tutors by nature. C. C. 326. Two of defendant's children and wards have not been removed by the defendant from the State, although he himself has removed from the State. We think that the act of defendant in changing his domicile has not deprived his daughters, who have never left the territorial limits of the jurisdiction which originally conferred their guardianship upon defendant, of the protection of the court which conferred such guardianship. And we conclude, that the District Court should have maintained jurisdiction of the suit, so far as the daughters of the defendant are concerned.

Upon the merits, the witnesses all concur in representing defendant as a confirmed and habitual drunkard. Not to mention the details of the evidence of plaintiff's witnesses on this head, a witness introduced by defendant states, on his cross-examination, that defendant was not *always drunk*, but would drink whenever he could get where there was any liquor. In addition, several witnesses declare that defendant is a gambler; and not only keeps bad company himself, but takes his children to grogshops and gives them liquor. It is proved that his two daughters, who are with plaintiff, and who are young women, refused to go with their father to Texas, and claimed the protection of their uncle.

The evidence in the cause, of which the above is a very meagre synopsis, and which is entirely uncontradicted, shows conclusively that the defendant is not a proper person to have the guardianship of young females.

The sequestration appears, also, to have been a proper conservatory measure.

The three slaves sequestered are but a small portion of the separate property of defendant's deceased wife; the remainder having been taken by him to Texas.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; that the defendant be removed from the tutorship of his daughters, *Amelia Ann Andrews* and *Jane Andrews*; that the sequestration herein issued be maintained, and that the cause be remanded to the District Court, in order that a dative tutor to said minors may be appointed, and all other necessary and legal proceedings be had in the premises.

It is further decreed, that there be judgment of non-suit, as to so much of the demand of plaintiff as relates to the removal of defendant from the tutorship of his two sons, *Albert* and *John*, and that defendant pay costs of this suit in both courts.

## Z. PERRET &amp; WIFE v. P. S. SANCHEZ et al.

An overseer cannot maintain an adverse possession of the the plantation against the owner who has hired him. If the owner discharge the overseer without just cause, before the term of his services has expired, the latter has a remedy, under the provisions of the Code in the title of letting and hiring.

APPEAL from the District Court of St. Martin, *Voorhies, J.*

*De Blanc & Fuselier*, for plaintiff. *J. G. Olivier & C. H. Mouton* and *F. M. Voorhies*, for defendants and appellants.

BUCHANAN, J. The plaintiff, *Zenon Perret*, and the defendant *P. Sidney Sanchez*, made a contract by which *Perret* engaged to manage and oversee the plantation of *Sanchez*, in the parish of St. Martin, for the space of four years, counting from the 16th December, 1853, for the salary of six hundred dollars per annum, payable at the end of each year.

About the expiration of the second year of this engagement, *Sanchez* observed to *Perret*, in the presence of a witness, that he (*Perret*) was unfit to manage the plantation, and notified him to leave. *Perret's* reply was, that he would do so. Some time after this conversation, *Sanchez* engaged another overseer and sent him to the plantation to take possession. *Perret* absolutely refused to give him possession, or even to permit him to come upon the plantation. *Perret* also refused to receive freight which *Sanchez* had sent up from the city to the plantation by a steamboat. *Sanchez*, (who is a resident of New Orleans) being informed of these facts, proceeded to St. Martin, and with the assistance of some of the neighbors, after applying to a justice of the peace, removed forcibly the furniture of *Perret* from the house upon the plantation, and placed himself in possession thereof.

Plaintiff claims twenty thousand dollars damages for this forcible expulsion from *Sanchez's* premises. A jury has allowed him five hundred dollars, and both parties have appealed.

The District Judge charged the jury as follows: "That an overseer has not the possession of the house in which he resides, on a plantation which he manages for another; that the owner of the plantation may turn him out without resorting to any proceedings before a court of justice, when any inconvenience or delay may result from the refusal of the overseer to leave the plantation; that the overseer who persists in remaining on the plantation after he has received notice to quit it, becomes a trespasser, and the owner may then use towards him that sort of violence which may be necessary to overcome his resistance, and turn him out forcibly, inasmuch as his possession of the premises is not the same as that of a tenant or owner, and cannot give rise to the same proceedings in ejectment." This charge is a correct exposition of the law.

The contract for the hiring of labor as overseer of a plantation, can never entitle the overseer to maintain an adverse possession of the plantation against the owner who has hired him. Such a proceeding on the part of the overseer mistakes entirely the object of the contract. If the owner of the plantation discharges the overseer without just cause, before the term of his services has expired, the latter has a remedy, under the provisions of the Code in the title of letting and hiring; but he has no right to resist the owner in obtaining

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possession of his property, in other words, to refuse to be discharged, until a judgment shall have pronounced upon the contract between himself and his employer.

The plaintiff has illegally refused *Sanchez* entrance into his own house, and is therefore to be regarded as a trespasser. His possession of *Sanchez's* house was tortious, and his expulsion therefrom cannot, of itself, give him any claim to damages. The whole evidence negatives the idea of any malice on the part of *Sanchez*. He addressed himself to a magistrate, and obtained what he supposed a judgment, and an execution in the nature of a writ of possession. There is nothing in the evidence which justifies the charges of brutality and violence, in the execution of this process, contained in the petition.

The record contains a list of furniture headed as follows: "Nous soussignés déclarons avoir fait estimation du dommage du ménage de Mr. Zenon Perret, comme suit." Each article in this list has an appraised value. The signers, *Ozère Le Blanc* and *Lucien Broussard*, declare that they appraised the furniture, and it was pointed out to them at the plaintiff's residence, and that they did not see the furniture before the day of their appraisal. They do not say what day that was. The only date which the appraisal bears, is that of its filing in court, the 20th June, 1856, more than four months after plaintiff's expulsion from *Sanchez's* house. There is no proof of its identity with the furniture removed on that occasion, nor that the damage assessed, was caused by the acts of the defendants.

The defendant *Sanchez* offered to prove, in mitigation of damages, the incompetency of *Perret* as overseer, mismanagement of the plantation, and general improper conduct of *Perret* as overseer. This evidence was offered after *Perret* had given in evidence the contract between himself and *Sanchez*, which had been received to show the nature of *Perret's* possession of the house. On objection made by plaintiff's counsel, this evidence offered by *Sanchez*, was rejected by the court, as irrelevant. It is unnecessary for us to pass upon the correctness of this ruling, as the charge to the jury already commented upon and approved by us, rendered the evidence offered immaterial, even supposing it to have been admitted.

It is therefore adjudged and decreed, that the judgment of the District court be reversed, and that there be judgment in favor of defendant, with costs in both courts.

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#### STATE v. J. R. VION

A bond given for the appearance of the accused after he has been convicted of larceny is null, and the surety on such a bond will be discharged.

**A**PPPEAL from the District Court of St. Landry, *Dupré, J.*  
*W. Mouton*, District Attorney, for the State. *Martel & Hardy*, of counsel, for the State. *T. H. Lewis & Porter*, for defendant and appellant.

*LEA, J.* *Jules Ponpeville* having been convicted of larceny, was, after conviction, permitted to give bond, with *Jean Remy Vion* as surety, for his appearance to receive and submit to such sentence as might "be passed upon him by the District Judge."

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The prisoner having failed to appear when called to receive the sentence of the law, the bond was "declared forfeited. It is urged on behalf of the appellant, that the bond having been exacted in violation of a prohibitive Art. of the Constitution, carries with it no obligations. It is evident that the District Judge had no right to exact the bond or to receive it when tendered, the offence of which the prisoner was convicted, being *punishable* by imprisonment at hard labor. If the bond given, was one conferring civil rights under a contract, we might be disposed to apply the maxim, "*volenti non fit injuria*," but the prohibition in Art. 104 of the present Constitution, was not intended for the protection of private rights which might be waived by parties in whose favor it was established, but it was intended to place beyond the reach of legislative control or of judicial action, a principle of public policy which in the case at bar has been violated. The consent of parties cannot give validity to a contract which is in direct violation of a constitutional prohibition established as above stated, not for the protection of private rights, but upon considerations of public policy.

It is ordered, that the judgment appealed from be reversed, and that there be judgment in favor of the defendant and appellant, *Jean Remy Vion*.

MERRICK, C. J. Perhaps it is in the power of the legislature to authorize the courts to admit to bail even after a verdict of guilty, as the Art. 104 of the Constitution may have been intended *in favorem libertatis*. But until such power is expressly granted, the prohibition contained in the Art. with its exceptions must be considered as the rule governing the courts. The Act of 1855, p. 155, sec. 32, does not confer the power, to admit to bail after verdict found. The term *conviction* in the Constitution was probably used in the sense of the finding of the accused guilty by the jury.

I therefore concur in the conclusion of my colleagues.

#### V. MARTIN v. J. BREAUX et al.

A survey which starts from certain points and lines not recognized as boundaries by the parties themselves and not shown by the evidence to be true points of departure; cannot be made the basis of a judgment establishing a boundary.

No effect can be given to a plea of prescription where the boundaries are not established in a manner to show to what property the plea must be applied.

APPEAL from the District Court of Lafayette, *Dupré, J.*

*E. Simon*, for plaintiff and appellant. *E. H. Mouton, T. H. Lewis and Crow & Gerard*, for defendants.

LEA, J. In this case the plaintiff, claiming to be the owner of a tract of land situated on the Bayou Vermillion, alleges that the boundaries which had been once fixed, separating his land from those owned by the adjoining proprietors, both above and below him, were no longer to be seen, and that said adjoining proprietors, though amicably requested, had refused to fix the limits extrajudicially. He therefore prays that they be cited, that after due proceedings, said limits may be fixed according to law, and a surveyor appointed for that purpose. Both of the defendants aver that they have been in the peaceable

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and uninterrupted possession of their respective proprieties with metes and established boundaries as they now exist for more than thirty years. They plead respectively the prescription of ten, twenty and thirty years. One of the defendants, *Alexander Latiolais*, treating the plaintiff's demand as a petitory action, has called in warranty his immediate vendors, the representatives of *Joachim Arceneaux* and *Vidalize Arceneaux*, widow of *Joseph Mouton*. In case of eviction, he, moreover, as a possessor in good faith claims compensation for the improvements put upon the premises. It appears that two surveys were made in accordance with the orders of the court, for the purpose of determining the boundaries of the respective tracts. But it was properly held by the District Court, that neither of these surveys could be made the basis of a judgment, as they were made by starting from certain points and lines not previously recognized as boundaries by the parties themselves, and not shown by the evidence to be true points of departure. Upon the question of prescription we do not find that the evidence establishes a possession of thirty years with fixed and recognized boundaries, serving as division lines, which are now apparent, or which could be ascertained with certainty, and in the absence of such ascertained boundaries, the limits should have been fixed in accordance with the respective titles of the parties. The District Judge considered that it was the duty of the plaintiff to have established the true lines by proper evidence, but we think that he would have made out his case for all the purposes for which the suit was instituted, upon proof that there no longer existed a fixed or recognized boundary, determining the limits of their respective tracts. As the surveys appear to be defective we are not disposed to conclude the parties by a judgment referring them at once to their titles for the ascertainment of a boundary, but we think the report should have been rejected, and a new survey ordered, and in the event that no recognized boundary can be traced, division lines should be marked out by a reference to the respective titles of the parties, a result which it appears might have been attained, as in the united tracts there appears to be a sufficient quantity of land to give to each the respective proportions called for by their titles.

It is ordered, that the judgment appealed from be reversed, and that the case be remanded for further proceedings according to law, and in conformity with the foregoing opinion, the costs of the appeal to be paid by the appellee.

#### W. S. DONNELL v. W. H. PARROTT & WIFE.

Where plaintiff applied for a new trial, on the ground that the introduction of his letters and account sales, to prove facts specially pleaded, of which facts those letters and accounts were the best and most direct evidence, had taken him by surprise, *Held*: that the new trial was properly refused.

**A** PPEAL from the District Court of St. Landry, *Dupré, J.*  
*J. E. King*, for plaintiff and appellant. *Martel & Hardy*, for defendant.

**BUCHANAN, J.** This case is before us upon a reconventional demand of *Mrs. Parrott* for cotton (181 bales) sold by plaintiff, as factor, and the proceeds of

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which he has not paid over. The judgment of the court below is in favor of *Mrs. Parrott* for \$6,836, based upon account sales of 60 bales, of date January 19th, 1854, of 80 bales, of date 25th February, 1854, and an acknowledgment of plaintiff in a letter dated 20th February, 1854, of the receipt of 41 bales per steamboat *Red River*, of which he does not appear to have ever furnished an account.

The objections made by appellant to the judgment of the District Court are two-fold:

1st. That *Mrs. Parrott* only claimed a judgment against him for \$1,000, and cannot recover more than she demanded.

2d. That it is not proved the cotton sold and received by him, as proved by his account sales and letters, was *Mrs. Parrott's* cotton, the correspondence being carried on with *Mrs. Parrott's* husband.

I. It is true that *Mrs. Parrott* alleges an indebtedness of plaintiff to her in the sum of one thousand dollars; but this is stated in her pleadings as the balance due her by plaintiff upon cotton sold by him for her, after crediting him with the amount of two mortgage notes of *Mrs. Parrott*, supposed to have been held by plaintiff; and the plea of *Mrs. Parrott* concludes in these words: "Now this respondent prays that the court will decree the said mortgage, with the notes it was intended to secure, to be cancelled, annulled and void, and that the premises considered, she may have judgment for such balance as may be found due to her, after adjusting the account, and that she may have such other relief as to justice and equity may seem best."

The District Judge considered that the proof in the cause did not establish that plaintiff was the holder of *Mrs. Parrott's* notes at the time he sold her cotton, and consequently did not allow the notes as a credit, or partial payments, in account current; but under the prayer for an adjustment of the account and for general relief copied above, gave judgment for the whole net proceeds of the cotton, taking the sales of that portion of which account sales have been rendered, as a guide in estimating that portion of which no account has been rendered. In so doing, we do not find that the Judge has allowed more than has been demanded.

II. The answer and plea of *Mrs. Parrott* allege that she had a large estate in lands and slaves at the time of her marriage, the control and management of which were secured to her by marriage contract; and that there were shipped to plaintiff more than one hundred and eighty bales of cotton raised on the lands and cultivated by the slaves of *Mrs. Parrott*. In support of these allegations the marriage contract and other documentary proof having been first offered, by which it was established that *Mrs. Parrott* had a separate estate, the letters and accounts of plaintiff, were next offered and received without any objection or reservation, to establish that her crops had been shipped to plaintiff, and received and sold by him.

In an application for a new trial, the plaintiff complains that he was taken by surprise by the effect given to these documents by the District Judge. The Judge properly refused the new trial. It is out of the question to pretend that the plaintiff could have been surprised by the introduction of his letters and account sales to prove the facts specially pleaded, of which facts those letters and accounts were the best and most direct evidence. The *obiter dictum* of Judge Martin in *Skillman v. Leverich*, is too broadly worded, and cannot, at all events, control the present case.

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The judgment of the District Court has done justice between these parties. There is strong reasons for believing, although the fact is not positively proved, that plaintiff was the holder of notes of *Mrs. Parrott* secured by mortgage, to an amount nearly equal to the net proceeds of these cottons at the time he sold them. He has chosen, as the evidence shows, to use these notes in the purchase of a steamboat, instead of applying them to the extinguishment of his indebtedness to *Mrs. Parrott* in account current. The plaintiff has no reason to complain that the account should now be closed in a mode of his own choice.

Judgment affirmed, with costs.

B. C. CROW and R. CADE v. MECHANICS' AND TRADERS' BANK.

It is no part of the duty of a bank to employ counsel, and bring suit upon notes left with it as deposit.

**A** PPEAL from the District Court of Lafayette, *Dupré, J.*  
*M. E. Girard*, for plaintiffs and appellants. *Swayze & Moore*, for defendants.

LEA, J. The plaintiffs, against whom the defendant had obtained a judgment, *in solido*, for the sum of \$1,677, with seven per cent. interest, from the 25th of January, 1843, have obtained an injunction against the execution of said judgment, on the ground, (as they allege,) that *with the view* of cancelling and paying said debt, they deposited for collection in the office of said bank at Opelousas, four notes described in the petition, amounting to more than the sum due upon the judgment. They allege that the bank is responsible to them in the amount called for by said notes, which *should have been* collected and applied to the payment of said judgment, as said notes must be presumed to be prescribed against. Wherefore they pray for an injunction. Assuming all the facts set forth in the petition to be true, they do not establish a cause of action sufficient to justify the granting of an order of injunction. A deposit of notes in a banking institution, (in the absence of any special contract specifying distinct obligations,) only imposes upon the bank the duty of receiving the money if paid, and if not paid, of making such demand of payment and causing to be given such notices of demand and non-payment, as might fix the liability of the different parties to the notes.

It is no part of the duty of the bank to employ counsel and bring suit upon notes thus left upon deposit.

It is the business of the owner of the notes, in such cases, to bring suit upon them himself, if he thinks it to his advantage to do so, but he cannot hold a mere depositary liable for a non-performance of acts which he should have attended to himself.

It is not alleged that the depositors have lost their recourse against any of the parties to the notes, otherwise than by the alleged failure of the bank to institute suit thereon, whereby (as the plaintiffs allege in their petition) "said notes must be *presumed* to be prescribed against."

The liability of a mere depositary with authority to receive, is very different

from that of a collecting agent, to whom an assignment has been made for the purpose of collection. The plaintiffs are entitled to plead in compensation of the judgment against them, such sum or sums of money as may have been received by the bank and have not been paid over to the plaintiffs, or their order, or otherwise accounted for.

An examination of the evidence has brought us to the same conclusion as that of the District Judge: that the execution was credited with all that had been received by the bank, and that the injunction was sued out without proper cause or just foundation.

We have been asked, in any event, to amend the judgment in favor of the plaintiff, by reducing the rate of interest allowed from the date of the injunction, from ten to eight per cent., that being the highest rate of interest allowed by law. This application rests upon the authority of repeated decisions which we do not feel at liberty to disturb. See 9 An. 11; also 8 An. 441, with references.

The defendant has also asked for an amendment of the judgment in their favor, allowing twenty per cent. damages, as provided by the Act of 1831. We think a proper case is presented for the allowance of damages. As the general result of these alterations will be to increase the judgment in favor of the appellee, the appellants should pay costs.

It is ordered, that the judgment appealed from be amended; that the injunction herein obtained be dissolved and set aside, and the Sheriff ordered to proceed with the execution of the judgment according to law. It is further ordered, that the defendant do have and recover of the plaintiffs, *Basil C. Crow and Robert Cade*, with *Benjamin P. Paxton*, the surety on the injunction bond, *in solido*, the sum of \$200, as damages, together with one per cent. additional interest on the amount of the judgment enjoined from the date of the injunction to the dissolution of the same, and that plaintiff pay costs in both courts. It is further ordered, that, except as herein amended, the judgment appealed from be, in other respects, affirmed.

The first of these was the discovery of gold in California in 1848. This discovery led to a great influx of people to California, and the state became one of the most populous in the Union. The second was the discovery of gold in Nevada in 1859. This discovery led to a great influx of people to Nevada, and the state became one of the most populous in the Union. The third was the discovery of gold in Colorado in 1859. This discovery led to a great influx of people to Colorado, and the state became one of the most populous in the Union. The fourth was the discovery of gold in Idaho in 1860. This discovery led to a great influx of people to Idaho, and the state became one of the most populous in the Union. The fifth was the discovery of gold in Montana in 1862. This discovery led to a great influx of people to Montana, and the state became one of the most populous in the Union. The sixth was the discovery of gold in Wyoming in 1869. This discovery led to a great influx of people to Wyoming, and the state became one of the most populous in the Union. The seventh was the discovery of gold in Utah in 1871. This discovery led to a great influx of people to Utah, and the state became one of the most populous in the Union. The eighth was the discovery of gold in Arizona in 1876. This discovery led to a great influx of people to Arizona, and the state became one of the most populous in the Union. The ninth was the discovery of gold in New Mexico in 1878. This discovery led to a great influx of people to New Mexico, and the state became one of the most populous in the Union. The tenth was the discovery of gold in Texas in 1880. This discovery led to a great influx of people to Texas, and the state became one of the most populous in the Union.

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C A S E S  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF LOUISIANA,  
AT  
ALEXANDRIA.

AUGUST, 1857.

PRESENT:

HON. E. T. MERRICK, *Chief Justice.*

|                                                                                       |   |                            |
|---------------------------------------------------------------------------------------|---|----------------------------|
| HON. A. M. BUCHANAN,<br>HON. H. M. SPOFFORD,<br>HON. C. VOORHIES,<br>HON. J. L. COLE. | } | <i>Associate Justices.</i> |
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LATTIER, Administrator, v. PRUDENT RACHAL.

The only persons who have an interest in opposing the *submission* by an Administrator of any of the interests of a succession, to arbitrators, are the heirs and creditors.

**A**PPEAL from the District Court of Nachitoches, *Chaplin, J.*  
*J. G. Campbell*, for plaintiff. *Hamilton & Chaplin*, for defendant and appellant.

COLE, J. This appeal is taken from a judgment of the lower court, homologating the award of the arbitrators in relation to the matters in dispute between the parties, plaintiff and defendant.

On the 25th of April, 1854, the plaintiff, acting in the capacity of administrator of the succession of *Dominique Rachal*, father of the defendant, and *Prudent Rachal*, the defendant, entered into an agreement to submit the case then pending between them to judicial arbitrators.

The arbitrators selected accepted the trust, and were qualified on the 19th July, 1854; and on the 4th of June, 1856, they rendered their award.

On the 27th of August, 1856, the plaintiff applied for a rule on defendant, to show cause why the said award should not be affirmed and made the judgment of the court.

The defendant answered and urged several objections to the homologation of the award, which will be considered in their order:

1st. "That the administrator being without interest, could not submit the matters in dispute to an arbitration."

The only parties who have an interest in opposing the right of an administrator to submit any interests of the estate to arbitration are the heirs and creditors. In this case, it does not appear that the estate is insolvent, and no

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opposition has been made by the creditors to the submission to arbitration of the lawsuit that existed between the parties, and there is an admission in the record that "the widow and heirs of *Dominique Rachal* approve and ratify the submission and award made in this case, and desire that the same be homologated."

Although then, it should be conceded, that administrators have no right to submit to arbitration the interests of the estate they may administer, yet as such prohibition is intended to protect the right of parties interested, submissions thus made are not absolutely null, and their want of authority may be cured by the acquiescence and ratification of the parties represented by them.

In the case of *Delabigarre v. Second Municipality*, 3 A. 238, it was held, that when an executor had compromised a claim of the succession without having been authorized by the court, the heirs alone could take advantage of the omission.

2d. "That after the agreement had been entered into, the plaintiff violated it by filing an amended petition."

This amendment made no change in the issue, and was really advantageous to defendant, for it set forth minutely the items of his account that would be opposed. It does not appear there was any objection made to the filing of the amended petition. The amendment and submission were both filed on the same day, but the former appears from the minutes to have been filed first in order of time.

Besides, defendant was often present at the sessions of the arbitrators, and *J. B. Smith*, one of the arbitrators, was also his counsel in the cause, which was submitted to arbitration, and *A. H. Pierson*, who was the counsel of plaintiff, was the other arbitrator.

It is reasonable to suppose that the filing of this amended petition was done with the consent of defendant, or at least, that he agreed it should be considered by the arbitrators in their examination of the rights and liabilities of the respective parties.

3d. "That the said award was to be filed on or before the 15th November, 1854, whereas it was only filed on the 4th of June, 1856, and that the arbitrators had no right to extend the time."

There were several motions for extension of time made by the arbitrators and counsel of the parties, during the progress of the sessions of the arbitrators, and on the 16th of May, 1856, the following agreement was filed in court:

"In this case it is agreed by the undersigned, arbitrators and counsel, that the time of rendering their award shall be extended to the 16th day of June, 1856, and that all questions that have to be settled by the court and the homologation of the award, be heard and decided by the court in chambers, reserving the right of either party to oppose the award, as if this agreement had not been made, and with the right to appeal from the judgment of the court, as if this judgment had been rendered in open court; they move the court to attend the time according to this agreement.

Signed on this 15th day of May, 1856.

(Signed)

A. H. PIERSON,

Arbitrator and Counsel.

JOHN B. SMITH,

Arbitrator and Counsel.

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The following order was made on the 16th May, 1856:

"In this case on agreement filed, it is ordered that the time allowed the arbitrators to render their award be extended until the 16th day of June, 1856."

The award was filed on the 4th of June, 1856. The evidence also shows that defendant was often present at the sessions of the arbitrators, and never objected to the extension of time; besides his counsel agreed to the same, and it is proved, that defendant considered *J. B. Smith* as acting as counsel, and also as arbitrator, up to the time of rendering the award.

It appears also, that defendant was cognizant of the extension of time, and made no objection.

4th. "That defendant was not notified of the time and place of meeting, nor was he afforded an opportunity of presenting all of his evidence."

The testimony establishes that he was often present at the meetings of the arbitrators. *J. B. Smith* testifies that although not positive, he "believes he (defendant) was present at the session before the award was signed."

*A. H. Pearson* testifies, that "both parties attended their sessions during the present year, previous to the award."

The objections of the defendant to the award are strictly technical, and do not touch the merits.

As we do not consider there is any force in the opposition to the award, the judgment must be affirmed.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

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#### SHOEMAKER v. H. & L. BRYAN.

Under Art. C. C. 2730, which is held to apply to all persons except menial servants, the right of action of a pilot, who has been discharged "without any serious ground of complaint," for his wages for the full term for which he was employed, accrues immediately upon his discharge, and the prescription of one year against his suit will commence when the right of action has accrued.

**A**PPPEAL from the District Court of Natchitoches, *Chaplin, J.*

*Hamilton & Chaplin*, for plaintiff. *J. B. Smith*, for defendants and appellants.

**SPOFFORD, J.** The plaintiff sued the defendants, owners of the steamer *Belle Gates*, for twenty-one hundred dollars, alleged to be the balance due him for his wages as pilot on the said steamer. He had judgment and the defendants have appealed.

The prescription of one year was pleaded and is applicable to the case, the wages of officers, &c., of vessels being governed by that prescription. C. C. 3499 §6.

The plaintiff has alleged and proved a contract for a certain time, to wit: for the season, beginning in January and ending on the 1st September, 1855, during which, the defendants agreed to employ him at a certain salary, as a pilot upon the *Belle Gates*, in the Red River trade. He also answered that "before the end of the season, the defendant, *Leon Bryan*, took the said boat up the Arkansas River, and discharged petitioner without any just cause whatever." The time when the boat was taken out of the Red River trade, and when this

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alleged discharge, therefore, took place, is fixed by one of the plaintiff's witnesses in the month of March, 1855. "If, without any serious ground of complaint, a man should send away a laborer whose services he has hired for a certain time, before that time has expired, he shall be bound to pay to such laborer the whole of the salaries which he would have been entitled to receive, had the full term of his services arrived." C. C. 2720.

This article has been held to apply to all persons, except menial servants, who hire out their services for a fixed period, as for instance, clerks, attorneys-at-law, employed by an insurance company for the year, at a salary, superintendents of cotton presses, agents employed to assist the claimant of an estate in recovering it, &c., &c.: *Orphan Asylum v. Mississippi Marine Insurance Company*, 8 La. 181; *Beekman v. New Orleans Cotton Press*, 12 La. 60; *Angelloz v. Rivollet*, 2 Ann. 652; *Lautigue v. Peet*, 5 Rob. 91; *Decamp v. Hewit*, 11 Rob. 290.

And it is well settled that when there is a discharge of the *employé*, as is alleged in this case, without any serious ground of complaint, the salary stipulated for the whole term becomes due, and the right of action therefor accrues immediately upon the discharge. *Sauborne v. Orleans Cotton Press*, 15 La. 360; *Shea v. Schlatter*, 1 Rob. 319.

The plaintiff's salary for the season, therefore, fell due in March, 1855, when he was discharged. And prescription commences to run when a right of action accrues. The citations in this suit were not served until the 21st August, 1856. The term of prescription was then complete, as there had been no interruption in any of the modes pointed out in Article 3500 of the Code.

It is, therefore, ordered, that the judgment of the District Court be avoided and reversed, and that there be judgment for the defendants, with costs in both courts.

#### SUCCESSION OF BEER, Deceased—Opposition of GOODMAN et al.

A sale made by two of three parties, of their interest in a commercial co-partnership, to the third partner, does not deprive the creditors of the partnership of their privilege upon such effects of the partnership as may be found in the succession of the latter partner, the vendee, at his death.

**A**PPEAL from the District Court of Rapides, *Ogden, J.*  
*M. Ryan*, for the administrator. *Hyman & Cazabat*, for the opposing creditors and appellants.

MERRICK, C. J. This case presents the single question, whether or not the sale made by two out of three of these partners of their interest in a commercial co-partnership, to the third partner, deprives the creditors of the partnership of their privilege upon such effects of the partnership as may be found in the succession of the latter partner, the vendee, at his death?

Article 2794 of the Civil Code, declares that "the partnership property is liable to the creditors of the partnership in preference to those of the individual partner; but the share of the partner may, in due course of law, be seized and sold to satisfy his individual creditors, subject to the debts of the partnership; but such seizure of legal operates as a dissolution of the partnership."

Here the privilege is given the creditors of the partnership by express law. It is now incumbent upon the party who maintains the loss of the right thus expressly granted, to show some provision of law extinguishing the privilege in this case or excepting it from the operation of the general rule. None such has been pointed out.

Article 3244 declares that privileges are extinguished by the extinction of the thing subject to the privilege; by the creditor acquiring it; by the extinction of the debt which gave birth to it; and by prescription. In the case of the vendor of movables, he retains his privilege so long as the goods remain in the possession of his vendee. 3184, 3194, 3230, C. C.

Beyond these express provisions of law we are not aware of any enactment bearing upon the question before us.

On general principles, we think it ought not to be in the power of the partners by arrangements among themselves to defeat the rights of their creditors, but that so long as the partnership effects remain in the possession of any of the partners, they must be held subject to the privilege of the creditors of the partnership. The rights of the creditors of a partnership would be too precarious if they might be defeated by the sale of one or more of the partners of his interest in the partnership to his co-partners. The law has not said that they shall lose their right of preference by such change in the number of the members of the firm, and we cannot decree what the law has not ordained. *Id quod nostrum est, sine facto nostro, ad alium transferri non potest.*

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the lower court be avoided and reversed, and that this case be remanded to the lower court for a new trial, with directions to allow all the claims of *D. Goodman & Co.*, as privilege claims upon such of the partnership effects of *Isaac Beer & Co.*, or their proceeds, as may be found in the hands of the administrator of the said succession of *I. Beer*, the appellees paying the costs of the appeal.

#### E. JOHNSON & HUSBAND v. P. BLOODWORTH—B. TOLEDANO & TAYLOR, Intervenors and Appellants.

The unpaid vendor of a slave sold by private act unrecorded, may enforce the implied dissolving condition against his vendee, to the prejudice of the mortgage creditor of the latter.

APPEAL from the District Court of Natchitoches, *Chaplin, J.*  
*H. Safford*, for plaintiff and appellee. *J. B. Smith*, for defendant. *J. G. Campbell & A. H. Pierson*, for intervenors and appellants.

SPOFFORD, J. It is agreed that the main question to be here solved is this: When the vendee of a slave, holding by private act unrecorded, has mortgaged the slave to a third person by public act duly registered, can the unpaid vendor enforce the implied dissolving condition against his vendee, to the prejudice of the mortgage creditor of the latter?

The principles which, in our opinion, must control the decision of this question are embodied in a few articles of the Civil Code.

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"The dissolving condition is that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed. It does not suspend the execution of the obligation; it only obliges the creditor to restore what he has received, in case the event provided for in the condition takes place." C. C. 2040.

"A resolutive condition is implied in all commutative contracts to take effect in case either of the parties do not comply with his engagements; in this case the contract is not dissolved of right; the party complaining of the breach of the contract may either sue for its dissolution with damages, or, if the circumstances of the case permit, demand a specific performance." C. C. 2041.

"If the buyer does not pay the price, the seller may sue for the dissolution of the sale." C. C. 2539.

"Obligations are *extinguished* \* \* \* \* by the effect of the dissolving condition which has been explained in the preceding chapter." C. C. 2126.

"Such as only have a right that is suspended by a condition, and may be extinguished in certain cases (in the French text, *ou résoluble dans certains cas, ou sujet à rescision*) can only agree to a mortgage subject to the same conditions, and (*ou*) liable to the same extinction." C. C. 3268.

Our jurisprudence upon the topic of the resolutive condition in commutative contracts, so far as it has gone, is believed to be lucid and consistent—Little remains to be said upon that branch of the subject which has been fathomed and expounded, in a few terse paragraphs, by the clear intellect of the late Judge Martin. In *Mortee v. Roach's Syndic*, 8 L. R. 83; this learned Judge, as the organ of the court, remarked: "A sale is a synallagmatic contract which imposes on the vendor the obligation of delivering the thing sold and requires of the vendee the payment of the price. In the case of reciprocal obligations, the party who does not perform his part of the engagement, cannot avail himself of any rights resulting to him from the contract; consequently, the other party may demand the rescission of the contract from the defaulting party.

"The insolvent debtor not having paid the price was not the absolute owner of the slaves; and his right to the property was therefore not indefeasible.

"The cession or surrender of the insolvent debtor's rights could not, and did not, change the character and nature of those rights. They remained the same; for the debtor could only cede the rights he had, and in the condition they were at the time. What was conditional and defeasible in his hands, did not become absolute and indefeasible in the hands of his creditors. The plaintiff did not contravene the order staying all proceedings against the person and property of the insolvent, by exercising his right (to sue for the dissolution) against the syndic.

"The slaves in controversy, not being the absolute property of the ceding debtor, and his defeasible right to them being annihilated by the rescission of the sale, it follows that they make no part of the property surrendered; and their price cannot be diminished, or they in any manner held liable by the syndic of the insolvent's estate, for the costs and charges of the *concurso*." See also, upon the general subject. *Canal Bank v. Copeland*, 15 L. R. 76; *Power v. Ocean Insurance Company*, 19 L. R. 28; *Fulton v. Her Husband*, 7 Rob. 73; *Chretien v. Richardson*, 6 Ann. 2; *Shields v. Lafon*, 7 Ann. 1851.

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But it is contended in the present case that the resolatory condition, to be operative against a mortgagee of the vendee, is required to be notified to the public by a registry of the act of sale, before the mortgage by the vendee is registered. No judicial authority is quoted for such an opinion. No law is cited which, in our judgment, refers in terms or by clear implication to such a necessity.

Registry laws are artificial rules, the creatures only of positive legislation. As they tend to multiply forms in the transmission of property, and to restrict the natural right of man to do what he will with his own, they have seldom, if ever, been extended by judicial construction to cases not within their plain and obvious intentment.

It is true the vendor of an immovable or slave only preserves his *privilege* as against third persons by recording the act of sale. C. C. 3238. But it is impossible to confound the resolatory action with the vendor's privilege. The former is not a mere appendage of the latter. It is a distinct substantive, and independent right or remedy. "Le vendeur en effet, ayant ici deux droits distincts; celui d'agir pour son paiement, en créancier privilégié et non en créancier ordinaire, puis celui de reprendre la chose si on ne le paye pas, la perte du premier le réduit sans doute à n'avoir plus que le second, mais il a toujours ce second: il n'est plus que créancier ordinaire, au lieu d'être créancier privilégié; mais il est toujours créancier, il est toujours vendeur non payé, et il peut dès lors faire résoudre la vente." 6 Marcadé, p. 289, C. N. 1656.

The fact that the lawgiver has said that registry shall be essential to the preservation of the vendor's privilege upon immovables and slaves, and has not said that the same formality shall be necessary to preserve the right of demanding a dissolution of the sale for non-payment of the price, implies that registry is immaterial to the existence of the latter right. *Qui dicit de uno negat de altero.*

The argument is substantially the same under our Code as under the Napoleon Code, for the articles relative to both remedies and to the necessity of inscription to preserve the vendor's privilege, are borrowed from the latter Code. So clear was it under the French Code, that the loss of the vendor's privilege, for want of registry or other cause, did not involve a forfeiture of the vendor's right to resort to the dissolving condition, that there seems to have been no dissent upon this point for more than forty years among the French tribunals and commentators. See Persil (Art. 2103) Duvergier (vente I. 551,) Duranton, (XVI. 362,) Trop- long (Hyp. I. 222,) Toullier (VI. 577,) and the numerous *arrêts* of various tribunals cited by Marcadé, (*loc. cit.*) When jurists of a race so much addicted to theoretical speculation, and so little addicted to reverence for each other's opinions, draw a conclusion from the Code in which they unanimously concur, we may, perhaps, set it down for an obvious truth.

The policy of the law has long been a matter of discussion in France. But it was never supposed there that it was competent for the tribunals of justice to supply what was thought by many to be a defect in the law, giving rise to occasional hardships. The legislative branch of the French government was often appealed to for a reform in this particular, but, for a long time without success. Recently the experiment has been tried, and by Art. 7 of the Transcription law of the 23d March, 1855, it was declared that the resolatory action established by Art. 1654 of the Napoleon Code cannot be brought, *after the vendor's privilege is extinguished*, to the prejudice of third persons who have

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acquired rights upon the immovable under the vendee, and have complied with the laws prescribed for the preservation of such rights.

The Legislature of Louisiana has not yet seen fit to impose such a limitation upon the exercise of the resolutive action with regard to immovables and slaves. The dissolving condition for non-payment of the price stands with us, as it stood in France before the law of the 23d March, 1855, a condition wholly independent of the vendor's privilege, coëval with and parcel of the contract of sale itself. The vendee takes the property subject to the condition in favor of his unpaid vendor; as there is no law requiring a registry to preserve this condition, it follows, according to Art. 3268 of the Louisiana Code, that the vendee can only mortgage the property, subject to the same condition; the general rule of logic and justice, *nemo plus juris in alium transferre potest quam ipse habet* being unqualified in this respect, by any arbitrary rule imposed by the Legislature, the third person who accepts a mortgage from the naked possessor without a recorded title, and afterwards finds it ousted by the effect of the condition on which alone his mortgage had been enabled to acquire possession, has only himself to blame for not having required an exhibition of his mortgagor's title and receipts for the price. If he suffers, he pays the penalty of his own heedlessness in taking a mortgage upon an immovable or slave from one who displayed no other proof of unconditional ownership than possession merely.

We do not perceive that our laws with regard to the registry of sales affect the present question. Those laws were designed to protect creditors of and purchasers from vendors against the unrecorded claims of *sous-vingt* priors vendees and those claiming under such vendees. If the sale of the slaves in question from the present plaintiff to *Portevint Bloodworth* is to be considered null and void, for want of registry, as to persons claiming under *Bloodworth* who are certainly third persons, then his mortgagees, the opponents *B. Toledano & Taylor*, have accepted a mortgage *a non domino*, and are in a worse plight than we take them to be with a mortgage from one who was the owner subject to the dissolving condition.

The laws relative to the registry of mortgages are also, in our view, foreign to the subject before us.

Something has been said about the danger of leaving this tacit right unrestricted by a registry law. Upon this point it is possible that opinions may differ. It suffices for us to say that, when statutes are free from ambiguity and absurdity, we are not called upon to investigate their expediency. Under a government of written laws, the judiciary is but the interpreter of the legislative will. The reform of the law, the redress of public grievances flowing logically from existing statutes, are high prerogatives which belong to the Legislative domain.

We deem it proper, however, to observe that we do not think such injurious consequences as some of those which have been surmised can result from the law as it now stands.

The prescription of five years under Art. 3444 of the Civil Code will protect the third possessor of a slave against an action of this character; slaves bought in other States of the Union are not bought subject to the dissolving condition which is peculiar to the civil law; and movables are unaffected by the doctrine of this case. Such property being governed by distinct regulations which preclude it from being followed into third hands by the dissolving condition.

Upon the other points raised by *B. Toledano & Taylor*, the appellants in

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this case, we also concur in the opinion of the District Judge. The intervenors contended that the vendee *P. Bloodworth* assigned to his vendor, the plaintiff, his share of *James Bloodworth's* succession in payment of the slaves, and that her neglect to notify the administrator of that succession of the transfer, was the cause of her having lost the price.

The evidence shows that this was only a mode of payment left to the option of the vendee, 'who bound himself to pay in cash if the amount was not realized to the plaintiff from the source indicated; but that, before entering into the act of the purchase, the vendee had put it out of his power to pay the plaintiff in that mode, by assigning all his interest in the succession of *James Bloodworth* to *Moses Greenwood & Co.*, who have been made parties to this suit and claim the benefit of the assignment, and that no diligence by the plaintiff could have enabled her to get the priority of *Moses Greenwood & Co.*, because they notified the administrator of the assignment to them before *P. Bloodworth* bought the slaves in question.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed with costs.

It is, further ordered and decreed, that this opinion and decree be forwarded to the clerk of the Supreme Court at Alexandria, in order that the same may be there filed, and notice thereof given in conformity with the agreement of the parties on file.

MERRICK, C. J., dissenting. I am not able to concur in the decree pronounced by my colleagues in this very important case.

The plaintiff *Eveline Johnson* and her brother *Poitevint Bloodworth*, were children and heirs of *James Bloodworth* deceased. On the third day of March 1853, at the succession sale of *James Bloodworth*, deceased, the plaintiff bought the two negroes in controversy, *Henry* and *Ephraim*. Sometime between the 13th day of May, and the 1st day of October, of the same year, the plaintiff through the agency of her husband executed an act under private signature in these words, viz:

"It is agreed between *Poitevint Bloodworth, jr.*, and *Francis Johnson*, representing his wife, *Eveline Johnson*, that *Poitevint Bloodworth, jr.*, shall receive from the estate of *Col. James Bloodworth* late of this parish, deceased, the slave *Henry*, a negro man aged about thirty-eight years, for the price of fourteen hundred dollars, and the slave *Ephraim*, a boy about nine years, for the price of five hundred dollars, and account to the estate for these respective sums, out of the share coming from said estate to him, the said *Poitevint*, and if so much shall not come to him, he is to pay the balance in cash. The said slaves have been delivered to the said *Poitevint*, and he hereby acknowledges possession of the same.

NATCHITOCHES, (Signed.)

P. BLOODWORTH,

Attest—

F. JOHNSON.

ROSS E. BURKE,

This act was never recorded either in the mortgage or notarial records of the Recorder's office. On the 8th day of May, 1853, *P. Bloodworth* being indebted to *Moses Greenwood & Co.*, \$2,229 55 and interest, by note, transferred to them as much of his interest in his father's succession as would be sufficient to pay said note and interest, and authorized and required the administrator to make payment to the holder of the note. This act was recorded in the mortgage records, and notified to the administrator soon after its date, and in consequence

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thereof, *Moses Greenwood & Co.*, were placed by the administrator on the tableau as assignees of the interest of *P. Bloodworth, jr.*, in the succession of *James Bloodworth* deceased. On the 29th day of June, 1853, *P. Bloodworth* being indebted to *B. Toledano & Taylor*, in the sum of \$7,500, among other property, mortgaged these two slaves, then in his possession to them, to secure the said sum of money, describing the slaves in the act of mortgage as inherited by him from *James Bloodworth*, deceased. This mortgage was recorded on the 6th day of July, 1853, in the proper registry of mortgages. *Poitevint Bloodworth, jr.*, died about the middle of October, 1853. The slaves were inventoried as belonging to his estate against the protest of plaintiff's husband, her agent. The succession of *P. Bloodworth, jr.*, is insolvent and administered by a syndic.

It is evident, that were the plaintiff to claim the price of the slaves in the *concursio*, she would be defeated by the recorded mortgage of *B. Toledano & Taylor*. To obviate this difficulty, she has brought suit against the syndic, and alleged the sale to *P. Bloodworth, jr.*, and averred that the price has not been paid, and praying a rescission of the sale under Art. 2539 of the Civil Code. *C. Toledano & Taylor* intervened in the suit, and among other things averred, that they have a better right to be paid out of the funds in the hands of the administrator than *Moses Greenwood & Co.*, and prayed that the plaintiff's demand be rejected.

It does not appear that the plaintiff ever notified the administrator of the transfer of *Poitevint Bloodworth's* interest in the estate to her. Indeed, it does not appear, but the transfer to *Moses Greenwood & Co.*, may have been made before that to the plaintiff. The question is presented, whether the vendor who has not recorded either in the notarial or mortgage records of the Recorder's office, the act of sale executed by him under private signature, can maintain an action to dissolve the sale as against mortgage creditors who have in good faith, had their mortgages recorded in the proper office against the vendee.

The case does seem to have been decided by our courts, and we are left to such conclusions as may seem most in consonance with the spirit of our legislation. A similar question arose under the Napoleon Code in France, and for a time raised doubt and discussion, but has been decided in several cases in the affirmative, and those decisions seem to meet the assent of those French jurists whose writings for the present, at least, seem to possess the weight of authority. These decisions, however, are not authoritative expositions of the law for us, and they are to be followed only when their conclusions are supported by reason, and do not conflict with our own laws and the general policy of our system of jurisprudence.

They rest in substance upon the following propositions:

1st. That the faculty of dissolving the sale upon non-payment of the price is in the nature of a condition.

2d. That the vendee cannot transfer to another a greater right than he himself possesses.

In developing these principles *Toulier* says, "Ces principes sont conformes à l'exacte justice, et les tiers qu'ils blessent n'ont pas raison de s'en plaindre; car avant d'acquérir ou de prendre pour hypothèque des biens qui n'appartenaient pas incommutablement à celui avec lequel ils ont contracté, ils pouvaient et devaient s'assurer du titre en vertu duquel il était propriétaire." *Toul. No. 577.*

Duranton remarks after commenting upon the *pactum commissorium* of the Roman laws, "Mais chez nous en l'absence même du pacte commissoire et quoique le vendeur ait suivi la foi de l'acheteur, en lui faisant terme s'il s'agit d'immeubles, et que l'acheteur ne paie pas au terme convenu, sans avoir juste cause de s'y refuser, le vendeur peut demander la résolution du contract, et par suite, revendiquer les immeubles qu'il a livrés si la résolution est prononcée.

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Et son droit à cet égard n'est pas restreint à la personne de l'acheteur et de son héritier seulement; il est écrit sur la chose et la suit en quelque main qu'elle passe tant qu'il subsiste. L'acheteur lui-même n'a pu la transmettre à d'autres (Art. 2182), ni l'hypothéquer (Art. 2125), que sous l'affectation du droit du vendeur, qui n'a vendu et livré que sous la condition qu'il serait payé du prix; *nemo plus iuris in alium transfere potest quam ipse habet*. Ce point qui a fait d'abord quelque difficulté, n'en fait plus aujourd'hui que maints arrêts ont confirmé cette doctrine. C'est à l'acheteur d'un immeuble qui le reçoit d'un autre acheteur, à se faire représenter les quittances de celui-ci; et l'on voit tout de suite que le défaut de représentation de ces quittances peut donner une juste crainte à l'acheteur d'être troublé dans sa possession, et par conséquent le droit d'invoquer la disposition principale de l'Art. 1653, que nous venons d'expliquer. Le vendeur peut donc agir contre le tiers, et il le peut même directement sans avoir besoin de faire prononcer préalablement la résolution du contrat avec l'acheteur; mais il faut mettre ce dernier en cause, pour établir que le prix n'a pas été payé et que le vendeur n'a pas été satisfait de quelque autre manière."

Are the reasons adduced by the writers of the French law, such as ought to control the decisions of our courts? If it were not for the provisions of our law, in regard to the registry of mortgages and conveyances, and the classification of the dissolving condition with privileges, there would be no great difficulty in following the French decisions, and in answering the question in the affirmative. We may assume, that the policy of our law, is, as far as possible, to assure the vendee, mortgagee, or privilege creditor, who holds by recorded title, in possession of the right, thus made known to all the world. There is the more necessity for this, because a very large portion of the property of the citizens of the State consists in slaves, which are regarded as immovables, although they are subject to frequent changes of place, and ownership; and much of this kind of property has been brought here from other States of this Union, and much held under acts under private signature, and there is not that facility of ascertaining the former proprietors, nor whether some former proprietor may, as in the case of landed estate, not remain unpaid. In France, where land alone is held by many writers to be subject to a dissolution of the contract of sale for the non-payment of the price, in the hands of the third possessor, and where the population is much more permanent, and changes of proprietors much less frequent than our own, there is, correspondingly, much less inconvenience resulting from the rule, than there would be with us, and yet even the legislative department of that country has been compelled to interpose and correct what their courts have virtually held to be a *casus omissus*, and to supply by new enactments the evils resulting from the interpretations of their courts.

The Art. of the Code, upon which this action is based, applying equally to immovables, movables and slaves, is in these words: "If the buyer does not

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pay the price, the seller may sue for the dissolution of the sale." C. C. 2339. See, also, 2040, 2041, and 2042. If it is not controlled by other legislation the action must be held to be well founded. The following Articles of the Civil Code, may be considered as having some bearing upon the construction to be given to the foregoing Art. (viz), Art. 2242. "Sales, or exchanges of real property and slaves, by instruments under private signature, are valid against *bonæ fide* purchasers and creditors, only from the day on which they are registered in the office of a notary, or from the time of the actual delivery of the things sold." Art. 2417. "The sale of any immovable or slaves made under private signature, shall have effect against the creditors of the parties, and against third persons in general, only from the day such sale was registered in the office of a notary, and the actual delivery of the things sold took place. But this defect of registering shall not be pleaded between the parties who shall have contracted in such act, their heirs or assigns who are as effectually bound by a sale under private signature, as if it were by public act."

Art. 3216 declares, that the vendor of a slave, has the privilege upon the slave, for the payment of the price. Art. 3238, is in these words: "The vendor of an immovable or slave, only preserves his privilege on the object, when he has caused to be duly recorded in the office for recording mortgages his act of sale, in the manner directed hereafter, whatever may be the amount due him on the sale." Art. 3314, "Conventional mortgage is acquired only by consent of the parties; and judicial and legal mortgages, only by the effect of a judgment, or by operation of law. But *these mortgages are only allowed to prejudice third persons* when they have been publicly inscribed on records kept for that purpose, in the manner hereafter directed." Art. 3315. "By the words, *third persons*, used in the foregoing Art., are to be understood, all persons who are not parties to the act, or to the judgment, on which the mortgage is founded, and *who have dealt with the debtor either in ignorance or before the existence of this right.*"

The Act of 26th March, 1813, provides that all sales &c., which shall not be recorded, agreeably to the provisions of that Act, shall be utterly null and void to all intents and purposes, except between the parties to the same. The Act of 25th of March, 1810, provides that no notarial act, concerning immovable property, shall have any effect against third parties, until the same shall have been recorded in the office of the Judge of the parish, in which such immovable property is situated. 2 Moreau's Dig, p. 286. 7 N. S. 661. These statutes were reenacted in 1855. See Acts 1855, p. 335, and Revised Statutes, 433.

I think the object of the Civil Code, and the statutes of 1810 and 1813, was to secure the vendee, as well as all other innocent persons, against the latent claims of all prior vendors and mortgagees, upon property in the possession of any one holding as owner. It is objected, that no one can convey a greater right to a purchaser than he himself has. The maxim cited, is very far from being of universal application. We know in the matter of sale, that the *bonæ fide* purchaser, by an apparent title, *a non domino*, becomes so far owner, as to make the fruits of the immovable his own, and under a short prescription, to become the absolute owner, which are certainly greater than his vendor possessed, and the same is conceded as to the recorded mortgage over the vendor's unrecorded privilege and mortgage. It is not true, under our Code, that the vendee, who has not paid the price, is not the owner of thing, and that, therefore, he cannot convey the property in the thing to another; for, it is expressly

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declared, that the sale is considered to be perfect between the parties, and *the property is of right* acquired to the seller as soon as there exists an agreement for the object, and for the price thereof, although the object has not yet been delivered, nor the payment made, (C. C. 2431,) and after such contract the thing sold is at the risk of the buyer. C. C. 2442. *Res perit domino*. The vendor then conveys to the second vendee that which he has acquired, *the property* of the thing which is not diverted merely because the price is not paid. If this be so, the vendor then has only a right to look to the thing as a security for the payment of the price. He is under *our Code* in no sense the owner of the thing which he has sold. Now, although in strict law, we may distinguish between the dissolving condition implied for the non-payment of the price, by our law, and the vendor's right of preference upon the proceeds of the thing sold, yet we think that it was not the intention of the lawgiver, in the provisions of the Code, in reference to privileges, to draw this distinction, and that he included both terms under the general head of privilege in prescribing the manner in which the vendor could secure his rights.

For the Articles of the Code prescribing the manner in which the seller may obtain a dissolution of the sale, give a right to demand the rescission of the sale of movables, as well as immovables. C. C. 2542. And under the title of privileges, under the head "of the privilege of the vendor of movable effects" after providing in what manner the vendor may claim a preference on the price it declares, in Art. 3196, that if the sale was not made on a credit, the seller may even claim back the things in kind, which are thus sold, as long as they are in the possession of the purchaser, and prevent the re-sale of them, provided the claim for restitution be made within eight days of the delivery, at farthest, and that the identity of the objects be established.

In the next two Arts. the Code treats of the same right in reference to goods in bales and packages, and household furniture, &c. Now it can hardly be supposed, that the compilers of the Code would have devoted three out of five Arts., under the head of vendor's privilege on movables, to the right of vendor to reclaim the goods sold for the non-payment of the price, unless they had considered that right a privilege also, and the maxim *qui dicit de uno negat de alterio* is without application to the question before us. If it were a privilege in the matter of movables, it could not be the less so in the matters of immovables and slaves. Hence, when the lawgiver declared that the vendor of an immovable, and slave, preserved his privilege only by recording *his act of sale*, (C. C. 3238,) and that no notarial act, concerning immovable property, shall have any effect *against third parties*, until the same shall have been recorded, (Act 1810,) and when he further declared, that mortgages are allowed to prejudice third persons, *only*, when they are recorded, (C. C. 3315,) in other words, that mortgages shall have effect against third parties, when they are recorded, it is no forced interpretation to hold that the subsequent *bona fide* vendee or mortgagee, who has recorded his title, will be protected against a former vendor or mortgagee, as to the unrecorded title, as well as to incumbrances, which have not been made public upon the mortgage records. For the party who has dealt with the debtor, *in ignorance* of the rights of another, is to be protected. C. C. 3315. This view is strengthened by the following considerations:

We may assume that this was the contemporaneous construction of the legislation upon the subject, for we cannot but suppose, that innumerable actions of

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this kind would have been instituted, if it had been supposed they could be sustained, for the books are full of cases where the parties have failed (for want of inscription,) in their actions, to recover a privilege for the price upon the thing sold, and this is the first case brought before this tribunal, in which an attempt has been made to defeat a recorded mortgage, or the title of a *bona fide* purchaser, without notice, by an act of sale not recorded, although it has been for a long time settled, that a suit to recover the price, did not prevent a party from turning to the action of rescission. 15 L. R. 79.

We cannot suppose, that the Legislature would have guarded with so much care the inscription of mortgages and privileges, unless they were to be of some avail when so recorded. For example, the recorder of mortgages must give security, 3357, 3358 and by Art. 3328, it is made the duty of "every notary, who shall pass an act of sale, mortgage, or donation of an immovable, or slave, to obtain from the office of mortgages, of the place where the immovable is situated, or, where the seller, debtor or donor has his domicile, if it be a slave, a certificate declaring the privileges or mortgages, which may be inscribed on the object of the contract, and to mention them in this act, under the penalty of damages towards the party who may suffer by his neglect in that respect." If any former vendor who holds with unrecorded act of sale, has a right to rescind the sale, the production of the certificate of mortgages so carefully enforced, is of no avail to the purchaser, and the Art. itself, and all the abstruse learning and provisions of law, on the subject of the inscriptions and erasures of mortgages, are absurd and useless.

It may be argued, *a contrario*, from Arts. 3360, 3362, 3366, that the third possessor is only bound to surrender the property when the mortgage has been recorded. And the Act of 1839, p. 194, section 2, in providing that certain notarial acts, if recorded within twenty days, should not be affected by subsequent acts, although recorded first, clearly shows that the Legislature at that time thought that a purchaser or mortgagee, acquired rights against all third persons by recording their acts.

If Arts. 3238, 3314 and the Acts of 1810 and 1813, do not protect the *bona fide* vendee or mortgagee, against the unrecorded claims of any former vendor, then the Art. 3194 and 3196 in regard to movables, cannot protect the vendee of a movable against the claim of any former vendor who may have sold on credit, for these Arts. do not so much expressly limit Art. 2539, as do the Arts. and Acts cited in regard to the immovables. A doctrine which would fill our business community with alarm.

The prescription in the action of revendication of slaves, as against a possessor by just title, and in good faith, is five years. The introduction of the principle contended for would leave the property subject to a rescission and revendication for five, and perhaps ten years after the maturity of or an unsuccessful attempt to recover the price, a result wholly incompatible with that assurance of title intended by the provisions of the Code in regard to prescription. C. C. 2218, 3507, 3508.

The policy of our law has always been to place property directly in commerce, and protect the possessor in good faith in his title and property. Hence the provisions relative to substitution, *fidei commissum*, prescription, partition, &c. The construction contended for is in direct conflict with this policy, as well as the design of the law-giver to protect creditors and others dealing with one apparently owner.

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The sanctioning of the principles contended for would render insecure the most important interests, and would, as already observed, fill with alarm the holders of mortgage securities and the owners of real estate, slaves and movables. Without the immediate interposition of the Legislature, no one would feel secure. The recorded title, the probate sale, the certificate of mortgages, would be as so much waste paper, and another element of suspicion would be added to our already clouded titles. The holder of personal property would not be in any manner more secure, for any person who had possessed the property within five years previously, could, under the formidable maxim, *nemo plus juris in alium transfere potest quam ipse habet*, demand the thing itself and leave him unprotected by his prescriptions, delivery and payment of price to his immediate vendor.

It would be inconvenient, and often impossible, to obtain in our country the quittances for the price of movables and slaves for five or ten years previous to any sale which might be made and even in regard to immovables with our improvident and migratory population, it could not be expected.

If it is the folly of the subsequent vendee or mortgagee, to take a title or mortgage without causing the quittances of all former owners for five, ten or fifteen years to be produced, and if no one may convey a greater right than he has, then the whole registry law is founded on a mistake and fallacy, for it would be equally the folly of any subsequent purchaser or mortgage creditor, that he did not assure himself that the property had not been previously sold, or mortgaged before he purchased, for no one can convey to another a greater right than he has, and the possessor had no power to sell or mortgage a second time.

In reply to the argument that the French jurists are unanimous now in the construction which they placed upon the Code, I may be permitted to observe that we have the two statutes of 1810 and 1813, besides many provisions of our Code different from the Napoleon Code. Moreover, the present construction arrived at under that Code, was not adopted, as Duranton informs us, without a struggle there. The great danger is that if we undertake to follow the interpretations of the French commentators, as sure guides, because the Napoleon Code originated with them, we shall overlook the distinctive features of our own legislation so different in its tendencies, and find ourselves involved in inconsistencies and often standing directly in the way of the interests and advancement of our own people, whose habits are in so many respects the opposite of those of the French nation.

As already observed, it is not pretended that there were in force in France, Acts corresponding with our Acts of 1810 and 1813, and the Arts. of our Code are in my opinion essentially different from those of the Napoleon Code. In the Napoleon Code, I find no Arts. corresponding with 3314 and 3315, conferring upon the mortgagee with a recorded title the right of affecting the property as against third persons who have not had their securities recorded. Neither are Arts. 3196, 3197, 3198, classing the dissolving condition as to movables with privileges, in the Napoleon Code.

Although the Code has no where said in express terms "that registry is essential to the preservation of the dissolving condition" the law has classed this with privileges, and declared that they cannot exist without registry, and moreover declared, that it is essential to the validity of a notarial act to affect slaves as against third persons that it should be recorded, (Act 1810,) that

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sales under private signature affect third persons only from the day of their registry, (2242, 2417,) and it has impliedly declared that mortgages may affect third persons when they are recorded. C. C. 3319.

Again, it is said that if the Act of 1813 makes the sale absolutely void, then the vendee and mortgagee take nothing. This is fully answered both by Art. 2417 of the Code, and the same Act, by which it appears that the defect of registry shall only be pleaded between the parties to the Act. Hence, when this argument is resorted to, the reply is, "you put the vendee in possession as owner; we trusted him on the faith of your act, and we have recorded our mortgage, which if it prejudices you is your own fault. You put it in the power of the vendee to deceive us and the rest of the community. If you say now you did not sell, your assertion is repelled by the act which you have executed but which you have either dishonestly or negligently withheld from record and publicity."

In conclusion, I may observe that I consider the construction which I have placed upon the Articles of the Civil Code and Acts of 1810 and 1814, within the letter of their provisions. But were it not within the exact and precise letter of any given phrase, but within the general scope of the whole, it would not be the less our duty to obey the known will of the lawgiver. For if the mind from an examination of the whole legislation on a given subject has comprehended its spirit and thus ascertained the legislative will, it has learned the *law* on that subject, and any wandering after words and phrases in order to find some other interpretation, or a refusal to obey because the letter of the law cannot be marshalled to embrace a particular word which is still within its general scope, is itself a violation of law. In the case of *Holmes v. Wiltz*, it was held that an interpretation of a statute which must lead to consequences both mischievous and absurd is inadmissible if the statute be susceptible of another interpretation whereby such consequences may be avoided; that the legislative intention must be honestly sought after and faithfully executed, if not in conflict with a paramount law, and that in cases like that, the court was authorized to search for the meaning not merely in the words of the statute itself, but in the subject-matter, in the history of the legislation thereupon, the purpose of the new law, the reason of its enactment and the evil it sought to remedy.

As *B. Toledano & Taylor* dealt with *P. Bloodworth* in ignorance of the plaintiffs rights (3315, C. C.) and as they have recorded their act and mortgage I think they are protected by Art. 3314 of the Civil Code.

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In *all* criminal cases the separation of the jury, though by leave of the court and with the consent of the accused and his counsel, will vitiate the verdict if such separation take place after the evidence has been closed and the charge given.

**A**PPEAL from the District Court of Rapides, *O. N. Ogden, J.*  
*C. N. Hines*, District Attorney, for the State. *J. C. Manning*, for defendant and appellant.

**COLE, J.** The defendant was indicted for wounding, with a dangerous weapon, with intent to kill.

He was convicted and sentenced to the penitentiary for twelve months.

He relies for a reversal of the judgment on the ground, "That the jury separated after they had received the charge of the court, and before they had agreed upon and rendered their verdict." It appears from the record, that they were permitted to separate from the adjournment of the court, on May 11, until the next morning, when they rendered their verdict.

We consider this objection fatal.

In the case of the *State v. Hornsby*, 8 Rob. 554, and in that of the *State v. Desmond and E. & O. Connor*, 5 A. p. 399, it has been decided that in capital cases, a separation of the jury, with or without the consent of the prisoner, after the jurors have been sworn, is fatal to the regularity of the proceedings of the lower court, and entitles the accused to relief. We think that in cases not capital, the lower court has the right in its discretion to permit a separation of the jury, after they are empanelled, and *before* they receive the charge of the court.

We are of the opinion, that in all criminal cases, capital and otherwise, no separation of the jury, *after they have received the charge of the court*, can be allowed, and that such separation will vitiate the verdict.

In the case of the *State v. Hornsby*, the court say:

"In cases *not* capital, courts may, in their discretion, permit the jury to disperse until after they have received the charge of the court; but they should not be permitted to separate after the charge has been given. In *these* cases, misconduct on the part of the jury, will set aside their verdict; in capital cases, upon a separation, misconduct and abuse will always be presumed."

In "*The State v. Crosby et al.*," 4 A. 435, the court say: "It is only in capital cases that jurors are not permitted to separate after being sworn. In cases not capital, it is discretionary with the Judge to permit them to disperse, *until* he has delivered to them his charge."

The uniform practice in the United States, appears to be not to permit the jury to separate in a criminal suit, *after the case is given them in charge by the court*, without consent of counsel.

This practice would not have been so generally adopted unless it had been deemed necessary for a just protection of the rights of the State and of the accused.

Before the testimony is concluded and the charge given to the jury, it may not be so necessary, in a case not capital, to prevent the jury from separating; for it is not yet known whether the verdict will probably be for or against the prisoner, and it is not so likely that improper influence will be exercised upon the minds of the jurors.

It is entirely different when the testimony is closed, and the charge of the court is given, for then the probable guilt or innocence of the prisoner appears, and the nature of the verdict can be predicted almost with certainty.

We do not think that the consent of the prisoner, or of his counsel, ought to suffice to permit the separation.

In capital cases it has been decided by this court, that the consent of the prisoner or his counsel cannot authorize it, so as to render the verdict valid; the reason given is that the prisoner may be really unwilling to permit the jury to separate, but may consent; fearing that his refusal may prejudice the jury against him.

The same reason exists with as much force in cases not capital, and therefore the same rule ought to obtain.

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This court has also expressed its opinion, that even in cases not capital, the jury ought not to be permitted to separate after the charge is given to them.

We are of opinion that a separation of the jury in all criminal cases after the evidence is closed, and the charge has been given to the jury, and before a verdict has been rendered, vitiates the verdict.

It is, therefore, ordered, adjudged and decreed, that the verdict of the jury and the judgment of the lower court, in this case, be avoided and reversed.

It is further ordered, adjudged and decreed, that a new trial be granted appellant, and that this cause be remanded to the lower court to be proceeded with according to law.

### STATE v. MORGAN.

The Clerk of the District Court tendered his resignation to the Judge of the District, who, thereupon, appointed a clerk for the remainder of the unexpired term of the clerk who had resigned: And that the resignation was properly tendered to the Judge, who is empowered, by Art. 79 of the Constitution, to fill any vacancy that may occur subsequent to an election, and the person so appointed holds his office until the next general election.

It is not requisite that the person so appointed by the Judge should be commissioned by the Governor.

**A** PPEAL from the District Court of Rapides, *O. N. Ogden, J. Hyman & Cazabat*, for appellant.

COLE, J. The defendant was indicted at the November term, 1856, of the District Court, for buying and receiving from a slave, one bag of corn, on 11th November, 1856, without the owner's consent.

He was found guilty and sentenced, and has appealed.

There is a bill of exceptions, in reference to the organisation of the court, and qualification of the person then acting as clerk. It is as follows: "Be it remembered, that before the trial of the case, the defendant objected to proceed to trial on the ground that the court was not legally organised. That the Clerk of the Court is *C. E. Joüett, Esq.*, who has not been in attendance, nor his deputy, as such, during the time of the presumed session of the court."

"And defendant objected to *M. R. Ariail, Esq.*, swearing the jurors who tried this case, and the witnesses, on the ground that *M. R. Ariail*, who was then acting as clerk, was not the Clerk of the Court; *Joüett*, the clerk, never having legally resigned his office; and the court having no power to appoint a clerk until a vacancy occurred in the office of clerk. That *M. R. Ariail* could not have acted as clerk, (even if he had been legally appointed by the court) because he was not commissioned by the Governor."

"But the court overruled the defendant's objections, and permitted the said *M. R. Ariail* to act as clerk, and to swear the jury and witnesses in this case for the following reasons, to wit:

"That on the 3d of May, 1857, the aforesaid *C. E. Joüett*, at that time the Clerk of the Court, addressed to the presiding Judge a letter tendering his resignation as clerk, to take effect from that day, which letter was handed to said Judge on the 4th of May, the day fixed by law for the session of the court, and on the same day the Judge, acting under the power and authority vested in him by the 79th Art. of the Constitution of the State, proceeded to fill the of-

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free by appointing *M. R. Ariail, Esq.* Clerk of said Court, for the remainder of the unexpired term of the said *C. E. Joüett*, resigned, as aforesaid, and the said *M. R. Ariail* having accepted the appointment, the oath of office was administered to him by said Judge, after which he entered upon the discharge of the duties of said office. And the said Judge hereto annexes copies of: 1st. The letter of *C. E. Joüett*, resigning his office. 2d. Appointment of *M. R. Ariail*, as clerk. 3d. Letter of same, accepting the appointment. 4th. Oath of office of *M. R. Ariail*, and bond, with approval of the Judge, the said copies to be taken as a part hereof. The said Judge further states and certifies to the Supreme Court, that the said *M. R. Ariail* was, at the time of said *C. E. Joüett's* aforesaid resignation, the Deputy Clerk of the Court, regularly appointed and qualified as such."

"To which opinion, ruling and action of the court, the defendant excepts and files this his bill of exceptions, to be signed according to law, which is done in open court, this 15th of May, A. D., 1857.

(Signed)

O. N. OGDEN, Judge."

We are of opinion, that a Clerk of the District Court can tender his resignation to the Judge of the District in one of the parishes of which such clerk exercises the duties of his office.

We are aware of no law which obliges him to send his resignation to the Governor.

It appears proper, that the resignation should be sent to the District Judge, inasmuch as Art. 79 of the Constitution of the State empowers the Judge of the court to fill any vacancy in the office of clerk of his court, that may occur subsequent to an election, and the person so appointed holds his office until the next general election.

There was then a vacancy the moment *Joüett* tendered his resignation to the District Judge.

We are acquainted with no law, which requires one appointed by the Judge, to fill the vacancy of a clerk who has resigned, to be commissioned by the Governor.

Perhaps, as a measure of precaution, evidence of the appointment should be transmitted to the Department of State.

The defendant also excepted to the refusal of the Judge to charge the jury, that the Act of 18th March, 1852, was repealed by the Act of 19th March, 1857.

The Act of 18th March, 1852, No. 326, and the Act of March 19, 1857, No. 187, are on the same subject matter; and sec. 5 of the Act of March 19, 1857, declares "That all laws contrary to the provisions of the Act, or on the same subject-matter, be and the same are hereby repealed."

The alleged offence of defendant was committed against a law which has been repealed, and this court is obliged to reverse the judgment.

We have recently, at Monroe, examined the question at large in the case of "*The State v. the slave, King*," in which we have given our reasons for a similar decision.

Vide also, the case of "*The State of Louisiana v. Cecilia Clay, f. w. c.*," decided in June last at New Orleans.

It is, therefore, ordered, adjudged and decreed, that the verdict of the jury and the judgment of the court thereon in this case, be avoided and reversed. It is further ordered, adjudged and decreed, that the prisoner and appellant, *Francis D. R. Morgan*, be discharged from custody.

## JOHN OSBORN v. A. S. MOORE.

Where it appears that the plaintiff, in obtaining a writ of arrest, acted in good faith and upon an apparent cause of action, in some degree, arising from defendant's own conduct and declaration, he ought not to be condemned to pay damages. Nor are the jury at liberty in assessing damages to estimate the traveling expenses and loss of time of defendant in preparing his defense and attending court. In the eye of the law the expenses of a suit which a party incurs, are, as a general rule, considered as covered by the taxed costs.

**A** PPEAL from the District Court of the Parish of Winn. Trial by a jury. *Chaplin, J. W. B. Lewis and W. B. Hyman*, for plaintiff and appellant. *Mercer Canfield*, for defendant.

**MERRICK, C. J.** The plaintiff's original demand against the defendant for seventy dollars is not within our jurisdiction.

On the defendant's reconventional demand for damages for the alleged illegal arrest in this case under the writ of arrest, we are of the opinion that the plaintiff was acting in good faith and upon an apparent cause of action, and that the defendant's conduct and declarations were, in some measure, the cause of his arrest. We come the more readily to this conclusion, against the verdict of the jury, because the testimony consists in part of depositions which we feel ourselves equally competent with them to consider, and because the verdict for the amount rendered (\$150) cannot be maintained on any principle. The defendant, upon being arrested, appears to have been immediately discharged by the Sheriff on giving up to him property as security, for his appearance, valued at \$100. The jury were not at liberty to estimate the traveling expenses and loss of time of the defendant in preparing his defence and in attending on the court. The very nature of judicial proceedings presupposes that suitors will be put to some trouble in defending and prosecuting suits, but as a general rule, these damages are, in the eye of the law, supposed to be covered by the taxed costs. It is desirable that courts of justice should be open to all men, and that suitors should not be deterred from pursuing their rights through fear that they should be compelled to pay for the loss of time of their adversary, nor from using, in good faith, the process of the court and the means of redress prescribed by law, through apprehensions that they should be mulct in vindictive damages, if from any unforeseen cause, they should fail in their action.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and that there be judgment upon the defendant's reconventional demand in favor of the plaintiff and against the defendant, and that the defendant pay the costs of the appeal and his reconventional demand in the lower court.

## DR. FOREST MANICE v. GEORGE DUNCAN, f. m. c.

*Nos constat* that the endorser of a promissory note against whom a solidary judgment has been attained with the maker, was a mere surety for the latter.

Suffering a sale to be postponed, after a seizure under execution, is not *per se* a prolongation of the term of payment to the judgment debtor, when the sale takes place sooner than it could have been forced in the usual course of legal proceedings. Nor will a mere waiver of forms and delays in the sale under execution discharge the co-debtor, where no resulting injury is shown. Where an execution has been returned, it will be presumed, in the absence of proof to the contrary, that it was ordered to be returned for sufficient reasons. A mere failure to execute the judgment will no more release the co-debtor than a forbearance to sue would have discharged the endorser.

APPEAL from the District Court of Natchitoches, *Ogden, J.*

A. H. Pierson, for plaintiff and appellant. *Hamilton, Chaplin and Morse*, for appellee.

SPOFFORD, J. This is an hypothecary action, having for its object to subject a town lot and house in Natchitoches, and a slave named *Harriet*, to the payment of a certain judgment obtained in 1839, by the plaintiff, against *William Long*, the former owner of the property, and duly inscribed and re-inscribed in the mortgage office of the Parish of Natchitoches.

There is no dispute as to the former existence of the judicial mortgage; but it is contended on behalf of the third possessor, *Mary Ellen Long*, and the judgment debtor, *William Long*, (who intervenes to defend the title of the former,) that the judgment as to him is extinguished, and that the judicial mortgage has therefore ceased to affect the property. There was a verdict and judgment below sustaining this defence, and the plaintiff has appealed.

The original judgment referred to, was rendered in favor of this plaintiff, against *David O'Neill*, *Lewis G. De Russy*, *William Long* and *John Tucker*, *in solido*. But the petition of *Manice*, alleged that the claim was based upon a promissory note made by *David O'Neill*, and endorsed by the the other defendant.

The defence now interposed by *Long*, as a party to the hypothecary action, is that he was a mere surety in the judgment for *O'Neill*, the principal debtor, and that all liability on his part, under the judgment rendered against himself and *O'Neill*, *in solido*, has been extinguished by the indulgence of the plaintiff, the judgment creditor, towards *O'Neill*, by prolongation of the time of payment, by the release of a seizure by amicable arrangement, and by *laches* generally, whereby a subrogation in his own favor to the rights of the plaintiff against *O'Neill*, has been rendered impossible.

Upon this issue, the intervenor, *Long*, assumed the burden of proof; and it was incumbent upon him to make out a clear case of release.

In the first place, he should have shown that he occupied and still occupies the position of a surety, in order to invoke the rules of the Civil Code under that title. He has not done so. It is not alleged or proved that he was originally an accommodation endorser of *O'Neill*. For aught that appears, he might have been as much interested in contracting the debt toward *Manice*, as *O'Neill* himself. The judgment is a solidary one, and if it did not change his

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attitude relatively to *O'Neill*, it fixed his liability as an absolute debtor to *Manice* jointly and severally with *O'Neill*. The utmost that can be said is, that prior to the judgment he appeared as an endorser of a note of which *Manice* was the maker. *Non constat*, that he was a mere surety. See *Dubuch v. Godchauz*, 6 Ann. 780.

Again, if it be conceded that his position as endorser towards the holder was unaffected by the solidary judgment rendered against himself and the maker, and that he can exact the same diligence from the judgment creditor in the pursuit of the maker after as before the judgment, still the burden is upon him to show, by satisfactory evidence, the giving of time, for a consideration, to his co-debtor, *O'Neill*, or other acts of the creditor, whereby his own condition was rendered more onerous. *Woodbury v. Friend*, 19 L. R. 496. This he has not done. The evidence is obscure and quite too indefinite to fix upon the plaintiff the commission of acts which would discharge the intervenor, considering him still as an intervenor. It is not made reasonably certain that the horses alluded to in argument were seized under an execution against *O'Neill* in favor of *Manice*, or released by the latter's orders. It is not clear that *Manice* or his attorney, ever took the *Lockett* claim under an agreement to credit its proceeds on the judgment and then gave it up, or lost it by neglect. It is not shown that any injury was done, or any loss sustained by the consent of *O'Neill* to the sale of the *Lockett* claim seized under execution against him before the legal time for the advertisements would have expired, or by the subsequent postponement of the sale, by consent of parties, for five days longer than the term first agreed upon, the new term being still within the delay which the law would have required. Suffering a sale to be postponed after a seizure under an execution, is not *per se* a prolongation of the term of payment to the judgment debtor, when the sale takes place sooner than it could have been forced in the usual course of legal proceedings. And it is inadmissible to say that a mere waiver of forms and delays in the sale under execution when no resulting injury is shown, will discharge the co-debtor. The same thing may be said of the return of an execution issued upon a twelve months' bond given by *O'Neill*; in the absence of proof to the contrary, we must believe that it was ordered to be returned for sufficient reasons.

And a mere failure to execute the judgment, cannot of itself, absolve the co-debtor, any more than a forbearance to sue before judgment would have discharged the endorser.

The return of the Sheriff that a writ of *feri facias* was satisfied *pro tanto* by the taking of a twelve months' bond, cannot override the law, which declares that a twelve-months' bond does not operate a novation or extinguishment of the judgment under which the execution issued.

It was the business of the intervenor, under his allegations, to show an agreement on the part of plaintiff to give time to *O'Neill* for a consideration, or some act which operated to his injury by impairing rights to which he should have been subrogated. He has failed to show either. If he was the surety of *O'Neill*, as his argument assumes, he could, so far as the record informs us, by paying the judgment which he was legally bound to pay, have been subrogated to all the rights of the judgment creditor, unimpaired by any act of the latter.

There was no transaction or compromise between the plaintiff and his judgment debtor, *O'Neill*.

It is proper to remark, without expressing our concurrence or dissent, since

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the views we have already presented make it unnecessary for us to decide upon that point, that the latest adjudged case to which we have been referred in our State reports, affirm the doctrine of Judge Story, in contradiction to one or two previous decisions: "Even a valid agreement to give time to the maker, or to a prior endorser, will not discharge a subsequent endorser, or affect the rights of the holder, when the indulgence is granted, or agreed to be granted, after such subsequent endorser has been fixed with a final judgment against him at the suit of the holder." Story's Prom. Notes, §417, cited in the *Louisiana State Bank v. Haralson*, 2 Ann. 457. Contra *Gustine v. Union Bank*, 10 Rob. 412.

Prescription cannot avail the third possessor in this case. *Bibb v. Union Bank*, 3 Ann. 334. Moreover, *Mrs. Long* acquired her title to the town property within ten years previous to this action. The judgment was not prescribed.

It is idle for her to complain that one of plaintiff's counsel released the judicial mortgage so far as it bore upon one portion of *Long's* property, before she acquired the property now attached and which she bought under mortgage certificates which notified her of the present incumbrance.

It is, therefore, ordered and decreed, that the judgment appealed from be reversed; and it is further adjudged and decreed, that the plaintiff's judicial mortgage be recognised as affecting the town lot and improvements and the slave *Harriet* described in his petition, and that the said property be seized and sold to satisfy the judgment in favor of *Dr. Forest Manice* against *William Long*, for the sum of five hundred dollars with five per cent interest thereon from the 23d August, 1838, until paid, and four dollars and fifty cents costs of protest and costs of suit, unless within ten days after notice of this judgment the defendant herein shall pay and satisfy said judgment; and it is further ordered and decreed, that the defendant pay costs in both courts. •

#### SUCCESSION OF L. A. RACHAL.

An Administrator dies without having rendered his account. An Administrator is appointed for his estate. The only regular account the latter can render is of the succession of which he is the administrator. By pursuing the forms of law, his account of this administration may bind such persons as are bound to take notice thereof; but he can bind no one by a pretended account of the administration, by his intestate and himself, of a succession of which he himself never was the legal representative.

APPEAL from the District Court of Natchitoches, *Chaplin, J.*

*Hamilton & Chaplin*, for appellants. *A. H. Pearson*, for administrator, appellee.

MERRICK, C. J. *L. A. Rachal* and *Louis Gallier*, were commercial partners. *Rachal* died in 1853. *J. B. Anty* was appointed administrator of the succession of *Rachal* in January, 1854. *Anty* died, and *William P. Morrow* was appointed administrator of *L. A. Rachal's* succession in December, 1854. *P. Oscar Chaler*, was appointed administrator of *Anty's* succession. This last named person having obtained from *Gallier* the partnership accounts, employed one *Murphy* to collect them and procure their acknowledgement and thereby

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incurred a debt to *Murphy* for \$203, on this account. Afterwards *Chaler* filed an "account of the administration of *J. B. Anty* as administrator of *Louis Alexander Rachal's* succession."

In this account he proposed to return to the administrator of *Rachal* the acknowledged accounts with a list of those insolvent, or otherwise not collected, and also placed *Murphy* thereon as a creditor for the amount due him, and made publication and cited the heirs precisely in the manner he would have done, had he been administrator of *Rachal's* estate instead of that of *Anty*. The surviving partner, *Gallier*, opposed the account because, as he alleged, the partnership was charged with a sum of over \$200 to *Denis V. Murphy*, when it should be paid by the administrator himself, and because *Anty's* succession was responsible for the accounts not collected.

The account was homologated and the administrator was allowed to pay over to the administrator of *Rachal* the assets, and the decree recognized the debt of *Murphy* as a just debt against the succession of *L. A. Rachal*, to be paid in the due course of administration. *Gallier* appealed. No injustice has been done *Gallier* by the decree of the lower court. He himself handed the partnership accounts to *Chaler* after *Morrow* was appointed administrator. He cannot complain, therefore, that they were placed in *Murphy's* hands to procure their acknowledgments and thus interrupt prescription. Neither does the decree against *Rachal's* estate so far as we can now perceive prejudice him in those respects of which he complains.

But we must not be understood as sanctioning a proceeding so extremely irregular as this. *Chaler* could bind no one (except, at least, they were regularly cited,) by his pretended account of his and *Anty's* administration of *Rachal's* succession. The only regular account which he can render will be of *Anty's* succession, of which he is administrator. 1 Rob. 404. By pursuing the forms of law his account of his administration of that estate may bind such persons as are bound to take notice of the same, but he cannot, by a mere publication, bind the administrator of *Rachal's* succession to pay out of that estate a sum of money to a third person. As the judgment rendered cannot bind the administrator of *Rachal's* succession, it cannot as a judgment, even incidentally, bind *Gallier*, to the payment of the \$203 allowed *Murphy* in this form of proceeding against *Rachal's* succession.

The administrator of *Rachal* is no party to the proceeding and the heirs of *Rachal* who have been cited have not appealed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed with costs.

## THE STATE, on the relation of F. VIENNE, v. S. M. HYAMS.\*

The Act of 1846, prescribes the mode of proceeding in contesting the election of a Sheriff. The Supreme Court is not the proper tribunal to entertain such a contest, and cannot go behind the commission to examine the proof upon which the governor acted in issuing it.

**A** PPEAL from the District Court of Natchitoches, *Chaplin, J.*  
*W. J. Hamilton*, for plaintiff and appellant.

BUCHANAN, J. *Mandamus* from the Sixteenth Judicial District Court, holding sessions in the parish of Natchitoches, sued out by a party who alleges that he was elected Sheriff of the parish of Natchitoches, in November, 1853, and commissioned by the Governor as such, against a person who detains the keys of the prison of said parish, of which by law the Sheriff is keeper.

The respondent denies that relator was legally elected and commissioned as Sheriff of the parish of Natchitoches. He alleges that he himself was a candidate for said office, but does *not* allege that *he* was elected. He claims simply to hold over, in virtue of a former commission, until a Sheriff be legally appointed.

The appeal turns altogether upon a bill of exceptions to the refusal of the District Court, to receive evidence of the returns of election, upon which the Governor issued the commission to the relator.

The ruling of the court below was correct. The Act of 1846, p. 116, prescribed the mode of contesting this election of Sheriff, which the parties agree was held in November, 1853.

The record shows that in January, 1854, the Governor issued a commission to the relator, as having been elected Sheriff; and the respondent does not pretend that he or any other person has contested the election. Had he done so, the matter would, under the law, have been submitted to a jury in the District Court. The Supreme Court is not the tribunal to entertain such a contest, nor is this the proper form of proceeding.

We are unanimous in the opinion, that we cannot go behind the commission to examine the proof upon which the Governor acted in issuing the relator's commission and to reverse his decision.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed; and that the appellant, *Samuel M. Hyams*, pay costs in both courts.

\* This case was taken to New Orleans, with the supposed consent of the parties. An opinion was prepared by Mr. Justice Buchanan, and concurred in by all the Judges, but no written consent of parties being found in the record, it was not read. That opinion is now adopted and read as the opinion of the court.

## STATE v. T. SULLIVAN et als.

The State has a right to recover legal interest on a forfeited bail bond from the principal and surety therein, from the date of the judgment.

**A** PPEAL from the District Court of Rapides, *Ogden, J.*  
*M. Ryan*, for defendants and appellant.

COLE, J. This is an appeal from a judgment *in solido*, against the principal and securities on a bail bond.

The only point on which appellants rely in this court, is as to the legality of that part of the judgment which allows interest from the day of judgment.

They contend, that the amount of the bond is a penalty which the law imposes on them; that its exact amount is prescribed by law, and the lower court had no right to make it more onerous by obliging them to pay interest.

They further aver, that there is no analogy between this and civil cases, in which the law expressly provides, that interest shall be paid on a debt from the time it is due.

We are of opinion that the judgment is correct.

It is true, that the exact amount of the bond is fixed by the Judge, who bails a prisoner, and the security signs for a particular sum, but when the bail bond is forfeited, it then becomes a debt due the State.

There is no reason why the State should not be entitled to the same privileges as its citizens, with relation to the right of receiving interest on debts due it.

There is nothing in the law which excepts the State from the benefit of the Statute, which declares that all debts shall bear interest at the rate of five per cent. from the time they become due, unless otherwise stipulated.

As then the bail bond when forfeited, is a debt due the State, it bears legal interest from the day of its forfeiture, for then it became due.

This does not render the surety responsible beyond the amount of his obligation; for when he signed the bond, he is supposed to have known the law, and to have been aware that he was contracting not only to pay the amount of the bond, in the event of its forfeiture, but also legal interest thereon from the time the judgment of forfeiture rendered it a debt due the State.

When a party binds himself, he is always supposed to do it in accordance with and submission to all the laws that may in any way affect his contract.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed with costs.

## JOSEPH CARMOUCHE, Administrator, et al. v. CYDALISE CARMOUCHE et al.

A donation of a slave with the reservation of the usufruct to the donor, during his life, is radically null.

APPEAL from the District Court of Avoyelles, Ogden, J.  
Barlow & Waddill, F. Cannon and W. E. Cooke, for plaintiff. H. & S Taylor, for defendants and appellants.

SPOFFORD, J. In 1831, *Clément Carmouche*, ancestor of the plaintiffs, made a donation *inter vivos*, to his daughter *Cydalise*, (one of the defendants,) of his slave *Hélène*, then aged about thirty years. This donation was made with the reservation of the enjoyment or usufruct of the slave to the donor, for the term of his life.

Four or five years after the date of this donation, *Hélène* gave birth to a child named *Claire*, also a defendant in this suit.

*Clement Carmouche*, died in 1854; *Hélène* always remained in his possession as his slave. *Clair* grew up in the same cabin with her mother, and remained in the possession of *Clément Carmouche*, until about the period of his death. She did light work about the house. The evidence concerning her treatment is somewhat contradictory. Some of the witnesses speak of her as *Carmouche's* slave, although indulged as a house servant; whilst others say, she was treated as a free person, and spoken of in the family as free.

But we think it clear, upon the whole, that she never enjoyed absolute freedom at any rate, until shortly before the death of *Carmouche*. She was born a slave; she lived with a master, who had and exercised, occasionally at least, the right of controlling her. The donation of her mother to the defendant, *Cydalise Carmouche*, was radically null. C. C. 1524; *Dawson v. Holbert*, 4 An. 36; *Haggerty v. Corri*, 5 An. 433. As it conveyed no title to *Cydalise*, the latter had no power to emancipate *Claire*, which she attempted to do by selling her to herself on the 17th October, 1853.

The attempt of *Clair* to buy herself, shows that she did not then consider herself free. This transaction was a palpable effort to evade the law which restricts the right of manumission. In the January preceding, *Clément Carmouche* had applied to the Police Jury of his parish for permission to emancipate *Clair*, which was refused. He undoubtedly desired and intended to give her her freedom, but it has never been lawfully accomplished. The District Judge thought that she could not invoke the prescription established by the Article 3510 of the Code, until she attained the age of thirty years, as the Article 185 prohibits the emancipation of slaves under that age. However this may be, we find that she has not been in the enjoyment of her liberty adversely to her master, for the space of ten years prior to the institution of the suit, and that the master had not lost possession of her from her birth, for any period up to a short time before his death.

The action is not, therefore, barred. C. C. 3510.

Judgment affirmed.

JOHN W. MARTIN *v.* H. & L. BRYAN.

An action to recover wages of the officers, sailors and crews of ships and other vessels, is prescribed in one year, whether they are employed by the season or by the month.

**A**PPEAL from the District Court of Natchitoches, *Chaplin, J.*  
*Hamilton & Chaplin*, for plaintiff. *J. B. Smith*, for defendants and appellants.

MERRICK, C. J. The plea of prescription must be sustained.

The action is brought to recover \$2,100, the balance of wages (after allowing a credit of \$300) alleged to be due the plaintiff for services as a pilot on Red River, on the steamboat *Belle Gates*, for the season of 1855; that is, from January until about the first of September of that year. Petitioner further alleges, that he was discharged before the expiration of the season, without cause. The plaintiff's cause of action accrued when he was discharged. 1 Rob. 321. As he went into the employment of the owner of the steamboat *Magnolia Branner*, in May, 1855, from whom he received \$759, he must have been discharged before that time. Service of citation was made 21st of August, 1856. Without, therefore, relying upon the testimony of *Adam Leonard*, (which appears to us free from suspicion or bias,) we find that the prescription of one year, under Art. 3499 C. C., had elapsed, and that the plaintiff's action was barred. 10 Rob. 53; 11 Rob. 403.

But it is said the contract was by the season, and, therefore, not covered by the Article of the Civil Code in question. This Article applies "to the wages of the officers, sailors and crew" of ships and other vessels. It does not distinguish whether those wages are for services by the month or the season, and we cannot distinguish where the law does not distinguish. C. C. 8, 20; 6 Toul. 75.

Again, it is said that one of the defendants was absent from the State, and, therefore, the maxim *contra non valentem agere, non currit prescriptio* applies. The plaintiff, in his petition, alleges that the defendants are residents in the parish of Natchitoches. Service was made upon a free white person residing with them at their domicile, and there is nothing to show that the service of citation might not have been made at any time after the cause of action accrued, as well as when it was made.

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the lower court be avoided and reversed; and that there be judgment in favor of the defendants and against the demand of the plaintiff, he paying the costs of both courts.

## H. GILLY v. GEORGE BERLIN.

A commission merchant cannot charge a planter for insurance unless he was instructed to insure, or a subsequent ratification by the latter is shown. Eight per cent. interest, and two and one-half per cent. commission, avowedly charged for advancing, taken together constitute an usurious charge.

**A** PPEAL from the District Court of Avoyelles, *Ogden, J.*  
*H. & S. L. Taylor*, for plaintiff. *E. N. Cullom* and *W. E. Cooke*, for defendant and appellant.

**SPOFFORD, J.** This suit is based upon a commission merchant's account against the defendant, his constituent. There was judgment for the plaintiff, and the defendant has appealed.

The appellant complains of but three items, to wit, an item of \$31 50 paid for insurance upon a gin-house belonging to the defendant; an item of \$50 21 commissions for advancing money; and a sum of \$82 09 alleged to have been charged as interest in excess of the legal rate, making a total of \$163 80, which the appellant asks to have deducted from the judgment rendered against him by the District Court.

It is conceded, that no instructions were given to the plaintiff to insure the gin-house, as was done, for the year beginning August 18th, 1854, and ending 18th of August, 1855. But the plaintiff contends that, as he had instructions to insure on a previous occasion, it was his duty to continue to insure until instructed otherwise. That might have been a correct conclusion under other circumstances. But here the plaintiff had been acting as the factor of the defendant, since 1850. He was never instructed to insure the gin-house until January, 1854, and then the instruction would appear to have been special, not to insure by the year, but to take out a policy only until the 18th of August, 1854. There were no business transactions between the plaintiff and defendant, after the 17th June, 1854. If the plaintiff had failed to insure for the year, between the 18th of August, 1854, and the 18th of August, 1855, under these facts, and the gin-house had been burned, we do not think the plaintiff could have been held liable for the loss. If it was not his duty to insure, and he had no instruction to do so, he cannot recover, unless there has been a subsequent ratification express or implied. Finding none in the record, we conclude that this charge must be disallowed.

As to the commissions and interest, it is clear that eight per cent. interest and two and a half per cent. avowedly charged as commissions for advancing, taken together, constitute an usurious charge. The commissions for advancing money must be disallowed; and, there being no written agreement to pay a conventional interest of eight per cent., the interest charged must be reduced to the legal rate. *Patterson v. Leach*, 5 An. 547; *Barrett v. Chaler*, 2 An. 874; *Brander, Williams & Co. v. Lum*, 11 An.

It is, therefore, ordered, that the judgment of the District Court be avoided and reversed. And it is now ordered, adjudged and decreed, that the plaintiff recover of the defendant the sum of one thousand and fifty-six dollars and

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eighty-three cents, with interest thereon, at the rate of five per cent. per annum, from the 28th of March, 1856, until paid, and the costs of suit in the District Court; the costs of this appeal to be borne by the plaintiff and appellee.

T. LACOUR et al. v. Heirs of G. LACOUR, père.

The partition spoken of by Art. 1449 C. C., applies only to partitions regular in form, as donations *inter vivos* or *mortis causa*, and not to a mere division of property without writing. Such divisions can only give rise to collations among the heirs, whenever a definitive partition is made. This case remanded for such partition under the plaintiffs prayer for general relief.

**A**PPEAL from the District Court of Natchitoches, *Chaplin, J.*  
*H. Safford*, for plaintiffs and appellants. *J. B. Smith*, for defendants.

MERRICK, C. J. In the month of March, 1840, *Gasparite Lacour, père*, made a division among his children and grand-children, his presumptive heirs, of \$48,000, in notes and obligations on various persons, it being the principal part of his estate.

No notarial act of this partition was made, and the only written evidence of it is an unsigned memorandum of the amounts which he distributed to each heir.

The plaintiffs in this action, representing persons who were minors at the time of the informal partition, complain that the promissory notes which were received by their tutor and tutrix at the division, were, for the most part, on persons insolvent, and prays that the other heirs be decreed to contribute such sums as will equalize the shares of the heirs, and for general relief in the premises.

The testimony is somewhat voluminous, but the view we take of the case, renders it unimportant at this time to analyze it, or express an opinion as to its effect on the question of the solvency or insolvency of the debtors.

The District Court being of the opinion that relief could not be granted without an estimation of the property partitioned, and moreover that the plaintiffs could not recover unless it was alleged and proved that their co-heirs had received more than the disposable portion, which he thought had not been done, gave judgment in favor of the defendants, dismissing plaintiffs' demand.

The plaintiffs have appealed.

The partition spoken of by Article No. 1449 of the Civil Code, and on which the District Judge principally based his decree, applies only to partitions regular in form, as donations *inter vivos* or *mortis causa*. It cannot be understood of a mere division of property without writing, like the one in question, in the present case. C. C. 1718, 1309, 1310.

We consider, therefore, the division made by *Gasparite Lacour, père*, in 1840, as only giving rise to collations on the part of those who received the respective claims allotted them, and not as a partition itself. It must follow that the heirs are bound to collate the value of the effects received by them respectively, according to the rules governing collations, whenever a definitive partition is made. Although the proceeding was not formally commenced

as a suit for a partition, the evidence satisfies us that one should be ordered, and we think the proceeding may be continued under the prayer for general relief, in plaintiffs' petition. C. C. 1218, 1219, 1438; Kenner's Digest, p. 781, No. 6.

We do not wish, in the present state of the case, to express an opinion further upon the facts, but prefer to leave them open for the action of the District Court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed; and that this case be remanded to the lower court, with directions to refer the case to a notary public for an inventory and partition, and to be further proceeded in before said District Court, according to law. And it is further ordered, that the defendants pay the costs of appeal.

SPOFFORD, J., concurring. I am under the impression that the plaintiffs sue, in affirmance of the informal partition, and are only seeking to enforce the mutual warranty implied between the parties to a definitive partition. Considering the action in this aspect, the informalities alluded to might be considered as waived, and the partition ratified by the heirs, who are *sui juris*. If so, the case might now be decided upon this record. But my colleagues being of a different opinion, rather than delay the cause another year, I assent to the decree remanding it, as the just rights of the parties may perhaps be more speedily adjusted by this course.

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J. H. HEALD v. W. P. OWINGS et al.

The wife, whether separated in property by contract or judgment, or not separated, cannot bind herself for her husband, nor conjointly with him for debts contracted by him before or during the marriage. C. C. 2412.

APPEAL from the District Court of Natchitoches, *Chaplin, J.*

*H. Safford*, for plaintiff and appellant. *J. B. Smith*, for defendants.

SPOFFORD, J. The only controversy here presented, is as to the liability of *Mrs. A. S. Owings*, for an account made out by the plaintiff against her husband and herself jointly.

It is alleged, that she bound herself for the account by a letter to the plaintiff, promising to pay such debts as her husband might contract "for acceptances, advances and supplies for plantation purposes." This letter was written just before instituting a suit against her husband for a separation of property. We concur with the District Judge, that such a promise was within the prohibition of the Article 2412 of the Civil Code.

It does not clearly appear that the debts contracted by her husband enured to her separate advantage, or to the amelioration of her paraphernal estate. The plantation itself was not paraphernal property at the date of the account. Nor does it appear that the items of the account either before or after her petition for a separation of property was filed were for such expenses as she was bound to bear. The cases of *Dickerman v. Keagon*, 2 An. 440, and *Daily v. Pearson*, 5 An. 125, were dissimilar to this in their facts.

Judgment affirmed.

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v.  
LACOUR.

## M. A. B. STONE AND HUSBAND v. J. M. B. TUCKER, Under Tutor.

A party who has appealed from a judgment homologating the proceedings of a family meeting, cannot, at the same time, carry on an action to annul these proceedings. The action of nullity will be dismissed on the exception *lis pendens*.

**A**PPEAL from the District Court of Natchitoches, *Chaplin, J.*  
*Hamilton & Chaplin* and *P. A. Morse*, for plaintiffs and appellants. *J. G. Campbell*, for defendant.

COLE, J. This is a suit to annul certain portions of the proceedings of a family meeting.

The defendant filed the exception of "*lis pendens*."

The lower court sustained the exception, and plaintiff has appealed.

There is no error in the judgment.

An appeal, allowed by the District Judge from an order of the Clerk, homologating the proceedings of said family meeting, is now pending.

The present suit grows out of the same cause of action.

Plaintiff had the right to appeal from the order of the Clerk, considered as a decree of the District Court, or to institute an action of nullity.

Having elected by appealing, she cannot commence a separate suit for the same cause of action, during the pendency of the appeal.

If this were allowed, it would induce endless litigation.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

## STONE AND HUSBAND v. PAYNE &amp; HARRISON.—J. M. B. TUCKER, Intervenor.

A family meeting in consenting to the natural tutrix, who is about to marry a second time, retaining the tutrixship of her minor children after such marriage, have no right to restrict her in the legal exercise of her rights and discharge of her duties as tutrix, and a requirement which they may undertake to make, that all her drafts for moneys belonging to the minors shall be drawn to the order of, and endorsed by, the under-tutor, is mere surplusage, and will be considered as not written.

**A**PPEAL from the District Court of Natchitoches, *Chaplin, J.*  
*Hamilton & Chaplin* and *P. A. Morse*, for plaintiffs and appellants. *A. H. Pearson*, for intervenor.

COLE, J. This suit originated from the illegal dispositions contained in a family meeting convened to decide whether *Mrs. Mary A. B. Stone*, widow of *John Tucker*, who was about to contract a second marriage, should be retained in the tutorship of her minor children.

She appealed from the order of the Clerk, (considered as a decree of the District Court) which homologated the proceedings of the family meeting; her appeal is now pending.

The facts of the case are as follows :

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v.  
HARRISON.

*Payne & Harrison*, of New Orleans, are indebted to the estate of *John Tucker*, the late husband of *Mrs. Stone*, in the sum of \$1,635 60, which is admitted to be the proceeds of community property. *Mrs. Stone*, in her capacity of tutrix, and as such, entitled to administer her husband's succession, instituted this suit to recover of them said sum.

This proceeding was instituted in the District Court at Natchitoches; defendants having waived the right of being sued at their domicile.

In their answer, defendants admit their indebtedness to the said estate in said sum; but aver, that they have been notified by the under-tutor, *J. M. B. Tucker*, not to pay said money without his consent, to be evidenced by his endorsement of the draft or other order against said fund. They pray that said under-tutor may be cited to defend this suit, and they make a tender, in open court, of said sum.

Defendants, on the 30th Sept., 1856, having proffered, in open court, the sum claimed by plaintiffs, it was ordered (the parties thereto consenting) that they retain the said fund in their hands, subject to the decision of this case.

The under-tutor intervened, and alleged, that by the advice of a family meeting, which retained the petitioner, *Mrs. A. B. Stone*, (in her approaching marriage with *McLauren*,) and under which advice duly homologated, she was retained as tutrix, all drafts for money belonging to the minors shall be drawn to the order of, and endorsed by, the intervenor, the under-tutor; that she accepted the tutorship under these terms, and has acted in other cases according to them.

That in this case no demand was made on petitioner for his approval or endorsement, and this action is a violation of the terms of the retention of the tutrix. That intervenor does not assent to the payment of this money as sued for, as it belongs wholly or in part to the minors, and the said tutrix has shown no good cause for the disbursement or reception of said funds.

He prays that her demand be rejected, and that the funds do remain in the hands of *Payne & Harrison*, where they are drawing interest.

A bill of exceptions was taken by plaintiffs to the refusal of the court to strike from the record that part of the defendant's answer calling *J. M. B. Tucker*, the under-tutor, in warranty, and the said *Tucker's* answer on the ground that the under-tutor cannot appear in behalf of the minors, except in cases where the interest of the tutrix conflicts with that of the minors, which from the face of the record is not shown.

In the answer to the pleas set up in the answer in warranty or intervention of the under-tutor, plaintiff avers, that said restriction of her rights by the family meeting is null and void, and prays for the rejection of the demands of the under-tutor, and a decree of nullity so far as the restrictions aforesaid go, and for judgment pursuant to the prayer of petition.

We are of opinion, that plaintiff had the right to collect from *Payne & Harrison* the amount due her husband's estate.

She had been retained as tutrix by the family meeting, and as such, is entitled to administer said estate; the restrictions on her right as tutrix in the proceedings of the family meeting are mere surplusage, and must be considered as not written; they did not annex these restrictions as conditions without which they were not willing to retain her, but merely added them in their proceedings, after they had declared she should be retained as tutrix.

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v.  
HARRISON.

The restrictions contended for by the under-tutor are adverse to the policy of our law.

He asks that the sum owed by *Payne & Harrison* shall remain in their possession.

In like manner claims due the estate might remain in the hands of the debtors, liable to be lost from insolvency or other causes.

If such a course of action were pursued, the tutrix would have no funds with which to pay the debts of the succession.

The lower court rendered judgment for plaintiff as partner in the community for one-half the sum claimed; the other half to remain with *Payne & Harrison*, subject to the draft of *Mrs. Stone* as tutrix, payable to the order of, and to be endorsed by, the under-tutor of the minors. Plaintiff asks to have one-half of the said sum to be decreed to her in her own right and the other half as tutrix.

We consider, she should have judgment for the whole amount in her capacity of tutrix, and, as such, entitled to administer. The respective portions due her and the minors can be determined in her final settlement with them.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed.

It is further ordered, adjudged and decreed, that plaintiff, *Mary A. B. Stone*, wife of *L. L. McLaurens*, in her capacity of tutrix of her minor children, and, as such, entitled to administer the estate of her deceased husband, *John Tucker*, recover of defendants, *Payne & Harrison*, one thousand and six hundred and thirty-five dollars and sixty cents, (\$1,635 60,) with costs of suit up to the time of the answer filed and deposit tendered by them of said amount.

It is further ordered, adjudged and decreed, that the intervention of the under-tutor, *J. M. B. Tucker*, be rejected, and that the costs of intervention, of the original suit, except those due as aforesaid by *Payne & Harrison*, and the costs of appeal, be paid by the estate of said *John Tucker*.

#### DANIEL DEAL & Co. v. THOMAS A. PATTERSON.

An action of debt upon a judgment rendered in another State of the Union, is a personal action, the prescription of which is governed by Art. 3508 of the Civil Code.

Since the Act of March, 1848, (promulgated 4th April, 1848,) placing absentees and non-residents on the same footing with residents of the State, in relation to the laws of prescription, ten years will suffice to enable a judgment debtor to prescribe against his creditor, though the latter be a resident of another State.

When a statutory change is made in regard to a particular term of prescription, the time anterior to the promulgation of the change is reckoned according to the old law, and the subsequent time according to the new enactment.

**A** PPEAL from the District Court of Natchitoches, *Ogden, J.*  
*H. Safford*, for plaintiffs and appellants. *Hamilton & Chaplin*, for defendant.

**SPOFFORD, J.** The present action was instituted against the defendant in the Parish of Natchitoches upon a personal judgment rendered against him in the State of Pennsylvania, where he formerly resided and where the plaintiff

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PATTERSON.

still reside. The prescription of ten years was pleaded to the action in the court below, and the plea prevailed; the plaintiffs have appealed.

It is now settled that an action of debt upon a judgment rendered in another State of the Union is a personal action, the prescription of which is governed by the Article 3508 of the Civil Code. *Succession of Tilghman*, 7 Rob. 291; *Surget v. Stanton*, 10 Ann. 319; *Shackleford v. Robinson*, 10 Ann. 583. See also the opinion of Simon, J. in note to *Planters' Bank of Mississippi v. Watson*, 9 Rob. pp. 267-274; and *Succession of Ducker*, 10 Ann. 758. It appears that in the cases of *Louisiana State Bank v. Barrow*, 2 Ann. 405; *Louisiana State Bank v. Haralson*, Ib. 456; *Judson v. Connolly*, 4 Ann. 169; and *Davenport v. Labauve*, 5 Ann. 140, the judgments which were held to be prescribed only by thirty years, if at all, were domestic judgments.

By Article 3508, the personal actions therein embraced were prescribed by ten years, if the creditor were present, and by twenty years if he were absent. The law stood thus until the passage of "an act placing absentees and non-residents on the same footing with residents of the State in relation to the laws of prescription," approved March, 14th, 1848, (see Acts p. 60) and promulgated April 4th, 1848. When a statutory change is made in regard to a particular term of prescription, the time anterior to the promulgation of the change is calculated according to the old law, and the subsequent time according to the new law. *Xanpi v. Orso*, 11 La. 59.

In the present case, it appears that the judgment was rendered in the Pennsylvania court on the 6th June, 1842, after personal service, both parties being then residents of that State. But it also appears that the defendant made a full acknowledgment of the debt and of the binding force of the judgment against him on the 11th July, 1843. For, at that date, he endorsed upon a writ of *fi. fa.* issued under the judgment, immediately after the Sheriff's return of a seizure, the following waiver and confession:

"I do hereby waive the holding of inquisition and appraisement of the property levied upon by virtue of this writ, and confess condemnation of the same."

This being the last apparent interruption prior to the institution of the present suit, the prescription must date from the 11th July, 1843. Assuming that the defendant left the State of Pennsylvania immediately after signing the above acknowledgment, (the hypothesis most favorable to the plaintiffs and unfavorable to the success of defendant's plea,) a term of four years eight months and twenty-four days elapsed under the old law, by which it took twenty years to bar the action of the absent creditor. That left fifteen years three months and seven days to run in order to complete the term of prescription under the old law. But on the 4th April, 1848, the new law went into operation, which reduced this remaining term one-half, by putting the non-resident creditor on the same footing as a creditor present, that is, shortening the term as to time from twenty to ten years. Therefore, a lapse of seven years seven months and nineteen days from the 4th April, 1848, without an interruption, would complete the prescription which barred an action in Louisiana on the Pennsylvania judgment. The defendant acknowledged service of the petition in this case and waived citation on the 20th February, 1856. Between the 4th April, 1848, and the date of this acknowledgment, there was a period of seven years, ten months and sixteen days, or about three months more than was necessary to perfect the prescription pleaded by the defendant.

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This view of the case renders it unnecessary to decide what effect the Act of April 30th, 1853, (p. 250) and March 15th, 1855, (p. 224) might have in a case of this kind; they in no wise conflict with the article 3508 of the Civil Code, which is fatal to the plaintiff's claim.

Judgment affirmed.

#### A. M. GRAY v. CELESTE COUVILLON.

Thirty years uninterrupted possession is required to enable a party to prescribe beyond his title. To sustain the plea of prescription under Art. 849, C. C., it is necessary not only to show a possession of ten years, but also that this possession has been held by boundaries fixed according to a common title or different titles. Art. 829, and the following articles, prescribe the mode of fixing boundaries, and the Art. 849 must be considered in connection with these.

Parties are not bound by a consent to boundaries which have been fixed under an evident error, unless perhaps by the prescription of thirty years.

**A**PPEAL from the District Court of Avoyelles, *Ogden, J.*  
*Barlow & Waddill and H. & S. L. Taylor*, for plaintiff. *W. E. Cooke*, for defendant and appellant.

**COLE, J.** This is an action of bornage or boundary, instituted by the plaintiff to establish his eastern boundary between his lands and those of defendant.

He asks to be placed in possession of his land up to the line called for by his titles, and that defendant be decreed to pay him the sum of five hundred dollars damages for the illegal detention and cultivation of a portion of his land, and the further sum of five dollars per acre per annum for all the land of plaintiff in defendant's possession.

The defendant answered by a general denial, and pleaded the prescription of ten and twenty years.

Afterwards, the defendant sued out an injunction to prevent plaintiff from digging a ditch on the land she claims to have acquired by prescription, until the decision of the boundary suit.

To this plaintiff, who is defendant in the injunction, filed a general denial, and claimed damages for the sum of one hundred and fifty dollars.

In 1808, *McCrummen*, a United States Deputy Surveyor, by order of the general government, surveyed the tracts of land mentioned in this suit, besides other townships in the Southwestern Land District, and it was by this survey that the government sold, and by it the different owners bought and sold. They were re-surveyed by *W. C. Robert* in 1849; these surveys conform to each other, and were approved at the land office.

The division line now in contest, has been for many years since, a matter of dispute between the different proprietors. This originated from the fact, that the survey made by *McCrummen*, was nearly obliterated, and was not visible by ordinary examination.

In 1834, the owners of a portion of the two tracts now owned by the parties to this suit, wishing to have the true line run by *McCrummen* retraced, called upon one *Baggerly* to do so, but his survey was unsatisfactory.

This suit was instituted to have the line permanently fixed between lands of

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P.  
COUVILLON.

plaintiff in Sections 10 and 15 of T. No. 1, R. 5 E.; and those of defendant in the contiguous sections, 11 and 14.

Plaintiff claims that the true boundary between his lands and those of defendant is the McCrummen line, or the North and South section line common to and separating the parallel sections in which they are respectively situated, because these lands were originally acquired according to lines of United States surveys.

The defendant claims by the Baggerly survey, although she purchased by the government survey.

An order of survey was granted by the court, and *W. C. Robert* and *James McCauley*, United States Deputy Surveyors, were appointed.

The line of division claimed by plaintiff, which is the one produced from *W.* to *W.* on the court map, is proved by the testimony of *Robert* to be the government or McCrummen line. The return of *McCauley* also agrees with the line run by *Robert*.

The line for which defendant contends is *T. P.* produced towards *M.*, as exhibited by the court survey, which *Robert* in his testimony states "is an isolated line and has no possible connection whatever with any other lines or corners, and was evidently located by some surveyors, as a temporary approximate line, without regard to any actual connections."

The line produced from *W.* to *W.*, which is the one decided by the lower court to be the true dividing line, gives to plaintiff that portion of land shaded yellow on the court map, containing 978-100 acres, which is now in the enclosures of defendant, and claimed by her by prescription and by the line *T. P.*

The 978-100 acres of land claimed by defendant are not covered by her titles; she can then only succeed by her plea of prescription, but this defence cannot be maintained.

Defendant relies on Art. 848 and 849, C. C.,—but no uninterrupted possession for thirty years, as required by Art. 848, has been established.

Art. 849 does not sustain her plea of prescription for ten years.

This Article declares: "If the boundaries have been fixed according to a common title, or according to different titles, and the surveyor had committed an error in his measure, it can always be rectified, unless the part of the land, on which the error was committed, be acquired by an adverse possession of ten years, if the parties are present, and twenty years if absent."

Defendant pretends that she has been in possession more than ten years and is therefore entitled to the land in controversy.

We are of the opinion, that to support the plea of prescription, under Art. 849, it is necessary not only to show a possession of ten years, but also that this possession has been held by boundaries fixed according to a common title or according to different titles, and that this Article must be taken in connection with Art. 829, and the following articles, which explain how boundaries are to be fixed.

Now in the case at bar, it is not established that *Baggerly*, who located the line of division, which she claims, was a sworn surveyor; that he ever made any *procès verbal* of his work; that he ever examined the title papers of the parties, nor that he ever complied with other formalities required by the Articles of the Code relative to fixing the limits and surveying of lands.

The evidence does not establish conclusively that the different proprietors agreed positively to consider the Baggerly line as the settled division line. It was pointed out by some of them as the division line, but there is no evidence

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to show that they promised to take it for ever as the true boundary between the lands now owned by the parties to this suit.

It also appears that they thought it the McCrummen line, and the one called for by their titles from the government.

If then they gave any consent to the Baggerly line, it was one given in error.

Parties are not bound by a consent to boundaries which have been fixed under an evident error as to the correct location of their titles, unless, perhaps by the prescription of thirty years. 6 A, *Frederick v. Brulard*, p. 383.

The case of *Lemoine v. Monela*, 9 A. p. 515, has been referred to by defendant to show that in actions of bornage, a dividing line long established between the parties will be taken as the true one in preference to running a new line more in accordance with the calls and distances and which gives to plaintiff a larger boundary. But the decision in this case is based on the fact that the dividing line had been recognised and established between the lands of plaintiff and defendant and those persons under whom they claim, more than twenty years previous to the commencement of the suit.

The court in their decision, referring to the case of *Williamson v. Hymel*, 11 L. p. 183, says:

"We have heretofore said, that 'in an action of bornage, a dividing line long established between the parties, and referred to in the *procès verbal* of sale of the plantation to the plaintiff, will be taken as the true one, in preference to running a new line more in accordance with the calls and distances, and which gives to the plaintiff a larger boundary.'"

In this case of *Williamson v. Hymel*, the court say, "We think, therefore, the jury was warranted in concluding that the plaintiff, having purchased an indefinite quantity, could not claim beyond a line which existed long before his purchase, and that the description of the plantation in the inventory and in the *procès verbal* of sales, referred to the existing lane and division line, as they had remained for fifteen years."

The case of *Zeringue v. Harang's Administrator*, 17 L. p. 350, is also relied on by defendant.

But in this case the court, after ordering that new posts should be placed by the surveyors where the former limit or fence stood, say: "When their survey shall be returned into court, it will be competent for the plaintiff to contest defendant's right to this surplus of land not called for by his title; and he will recover it, unless defendant shows such a possession of it, under the former inclosures, as will establish in him a right to the same by prescription; if, therefore, plaintiff has suffered any grievance, he can be relieved on the final judgment to be hereafter rendered in the cause, and should not have called upon us to interfere at this stage of the proceedings."

The cases just referred to, vary much from the one at bar. In this no reference was ever made in the sales between the different parties to the division line claimed by defendant.

No such consent as contemplated by law is shown to have been given by the various proprietors to the line of defendant, and it is not proved that they considered it as the recognized and established boundary by which the limits of their lands were determined.

On the contrary their consent seems to have been merely a tacit recognition for the time being of this line, until the boundaries of their lands should be accurately defined.

We are of opinion, that as the titles of the parties call for the boundary line which has been determined by the court survey, and as no such consent as is contemplated by law has been shown to have existed between the parties for a series of years to a well established and recognized line different from that called for by the titles, and as the plea of prescription for the 978-100 acres is not established, plaintiff is therefore entitled to a judgment in his favor.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed with costs.

GRAY  
v.  
COUVILLON.

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ELIZA TOLER, Administratrix, v. RALPH CUSHMAN et al.

An accommodation endorser against whom, and his principal, a judgment *in solido* has been rendered, on paying the judgment becomes legally subrogated to all the rights of the creditor in a twelve months' bond given in the case by the principal obligor, and may enforce the payment of such bond by the surety therein.

**A** PPEAL from the District Court of Avoyelles, *Ogden, J.*  
*H. & S. L. Taylor*, for plaintiff and appellant. *J. H. Overton*, for defendant.

MERRICK, C. J. *Samuel W. Henarie* sold to *Daniel Clark, jr.*, a negro man named *Dave* for \$750. *Clark*, to secure the price, gave his three promissory notes, endorsed by *Joel Toler*, of whose estate, the present plaintiff is administratrix. Two of the notes having matured, they were consolidated and a new note for the amount was given. On this note, judgment was rendered in March, 1841, against *Clark* and his accommodation endorser, *Joel Toler*, for \$525, with ten per cent. interest from March 1st, 1841. On an execution issued upon this judgment, at a sheriff's sale of said negro man *Dave*, which was made on the 19th day of March, 1842, *Daniel Clark, jr.*, having become the purchaser, executed his twelve months' bond in favor of *Samuel W. Henarie* for \$643 80, bearing ten per cent. interest from date, with *Ralph Cushman* as security.

At the maturity of the bond, an execution issued and the negro man was sold for \$277, and the writ returned June 3d, 1843, unsatisfied as to the residue. In September of the same year, an execution was issued on the judgment against *Toler* with a credit of \$187, (being the amount made on the bond less costs,) and was returned in December with a credit of \$200 paid by *Toler*. On the 22d of July, 1844, an *alias fi. fa.* issued on the *twelve months' bond* against both *Clark* and *Cushman*, and was returned after a sale of the property of *Clark* under seizure, with a credit of \$25 50.

The plaintiff, as administratrix of the succession of *Joel Toler*, deceased, on the 8th day of January, 1852, settled the balance of the twelve months' bond in favor of *Henarie*, amounting to \$517 69, by discounting paper belonging to the succession and she took a written subrogation to the twelve months' bond against *Clark* and *Cushman*.

This suit is brought to recover the amount paid by *Toler* and his succession, from *Ralph Cushman*, and since his demise, from his succession. The judgment of the lower court was in favor of the defendant, and the plaintiff appealed.

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v.  
CUSHMAN.

The Defendant's counsel urges in this court the following defences to the action, viz :

*First.* That there was no payment in *money* ; therefore no payment in the legal acceptance.

*Second.* That under the authority of the case of *Crow v. Walsh*, 3 Ann. 549, subrogation could not extend beyond the contract to which *Toler* was a party.

*Third.* If payment was made at all, it was not made at the time of the subrogation.

To arrive at a correct solution of the questions presented in this case, it will be necessary to consider the position of the parties. It is clear, from authority, that the twelve months' bond executed by *Clark* and *Cushman* did not novate and extinguish the judgment. Hence, *Toler's* estate was still bound for the debt, the original judgment, and by being bound, it had the right to pay at any time and become subrogated to the *rights, mortgages and privileges* of the creditor generally, either with or without a written act of subrogation. C. C. 3022, 3030.

The question therefore arises, is the twelve months' bond one of those *rights* to which the surety is entitled to be subrogated? The reason to doubt, is, that the sale to the judgment debtor on a twelve months' credit under execution does not change the title to the property sold, and, since 1855, under the express statute on the subject, the surety of the judgment debtor on the bond, becomes himself subrogated to the judgment.

The Act of 1855, p. 365 sec. 4, is subsequent to the execution of the twelve months' bond and cannot be held to apply to it, and moreover, were it intended to change the rights of the parties, it would be unconstitutional as impairing the obligation of a contract. This statute must therefore be laid out of view, and the cause decided upon the principles of the laws in force at the time the obligation was entered into.

It has been settled by several decisions of this court, that the surety on the twelve months' bond executed prior to the Act of 1855, does not on payment become subrogated to the original judgment even as against the principal judgment debtor, but that on payment, he becomes legally subrogated only to the rights of the creditor upon the twelve months' bond. Had *Cushman*, the surety on the twelve months' bond, paid it, it would have at once extinguished the judgment and liberated both *Toler* and *Clark* from the same, and yet *Cushman's* only remedy would have been upon his twelve months' bond and such mortgage as might have been retained by recording the sheriff's deeds. He could have had no recourse against *Toler*. *Cushman's* estate on payment would not therefore have been in a position to claim a proportion of the amount paid on the bond from the succession of *Toler*.

On the other hand, a twelve months' bond although it does not novate the judgment must have the effect to defer the creditor's right of payment of the original judgment until the maturity of the bond.

If the debtor's surety, although bound by the judgment *in solido* with him, has paid the debt, he at once becomes subrogated to the creditor's right to a twelve months' bond given by a third person and can enforce such twelve months' bond. Therefore a twelve months' bond made by a *third person* is a right to which the surety becomes subrogated on payment of the judgment against himself and his principal, as a security covered by the general expression in the Art. No. 3030, C. C., as a right of the creditor. Is it different

where the debtor himself makes the bond? The property of the debtor is the common pledge of all of his creditors. When the property of the judgment debtor is sold but bought in by the debtor himself under a twelve months' bond, the creditor has been to some extent deprived of this pledge; for his recourse upon it has been deferred for twelve months, and he is obliged to incur the risk of the loss of the revenues arising from his debtor's property as well as that arising from the deterioration and loss of the property itself. For this, among other things, the surety on the twelve months' bond is bound to the creditor. The twelve months' bond then becomes a further security to the creditor representing to some extent the property of the debtor. *Offut v. Hendley*, 9 L. R. 1; *Fenn v. Rila*, 9 L. R. 99; *Coons v. Graham*, 12 R. 206; 9 Rob. 185; 12 Rob. 206; C. P. 716.

Again, if the surety on ordinary commercial paper is entitled to the benefit of collateral paper obtained by the creditor, against the endorsers and maker, much more must the surety of the judgment debtor be entitled to treat the twelve months' bond which is executed for the sole purpose of procuring a payment of the judgment as collateral and to claim the benefit of it in the hands of the creditor. *Griffings, Administrator, v. Caldwell*, 16 L. R. 294.

From the best examination we have been enabled to give this question without the aid of books, we conclude, therefore, that it was in the power of *Toler's* administratrix to become subrogated to the rights of *Henaris*.

But it is said that in order that subrogation should take place there should have been a payment in money. The debt has been paid by the transfer of commercial paper and we do not think the estate of *Cushman* interested in inquiring into the mode of payment further than to ascertain that it was real and in good faith. C. C. 2625, 2146, 2134, 2135.

On the last point made by the defendant's counsel we observe that the \$517 69 appears to have been arranged at the time the subrogation was given, and the settlement made on the 8th of January, 1852. But however this may be, the conclusion to which we have arrived, that the twelve months' bond was a right of the creditor, to which the surety became subrogated, on payment, will enable the plaintiff to recover.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that the plaintiff, in her said capacity, do have and recover judgment against *J. L. Degeneris*, administrator of the said succession of *Ralph Cushman*, deceased, for the sum of seven hundred and seventeen dollars and sixty-nine cents, with ten per cent. interest on the sum of four hundred and forty-three 98-100 dollars from the fourteenth day of December, 1843, until paid, and costs of both courts to be paid in the due course of administration.

## WEST FELICIANA RAILROAD COMPANY v. C. A. THORNTON.

Where the Clerk of a county court in another State, certifies the exemplification of a record, as being a true and correct copy of the record, &c., as far as the same remains on file and of record in his office, he certifies all that the law requires him to certify. It is not a valid objection to the completeness of the record, that the reasons on which the judgment was founded are not set forth; the reasons for the judgment do not form a part of the decree. The opinion of the court may be and often is given *ore tenus*. The judgment is of necessity a matter of record.

The Clerk of the county court properly copied into the exemplification of the record, and certified as a part of it, the decree made in the case by the High Court of Errors and Appeals, and the objection that it is a copy of a copy, is not tenable. Any paper properly made a part of the record in the cause, although in reality a copy, becomes an original for the purpose of making out a transcript of the cause as it appears of record in the court whence it comes.

Where a judgment is rendered upon a note, the latter is merged in the former, and can be severed only by a reversal or rescission of the judgment.

A final judgment of a competent court of a sister State after citation, is conclusive of the matters therein determined between the same parties here, in the absence of evidence positively impeaching it.

**A**PPEAL from the District Court of Rapides, *Ogden, J.*

*Mercer Canfield*, for plaintiff. *W. B. Lewis*, and *W. B. Hyman*, for defendant and appellant.

**SPOFFORD, J.** This suit was brought in the parish of Rapides, upon a judgment rendered against the defendant, after contestation, in a court of the State of Mississippi. The original suit was founded upon a promissory note executed by the defendant. His defence in Mississippi was the statute of limitations of that State, where the note was executed and where it was payable.

The cause was originally tried in the Circuit Court for Wilkinson County, Mississippi. There were three trials, and three successive verdicts for the plaintiff. The first two were set aside, but upon the third verdict, a final judgment was rendered for the plaintiff. The defendant prosecuted a writ of error in the High Court of Errors and Appeals, where the judgment of the Circuit Court of Wilkinson County was affirmed, with five per cent. damages, pursuant to a Mississippi statute.

The defendant in the present suit excepted to the introduction in evidence of the exemplification of the record by the Clerk of the Circuit Court of Wilkinson County, Mississippi. The Clerk's certificate is in the following form:

"THE STATE OF MISSISSIPPI,  
Wilkinson County. }

"I, *Henry J. Butterworth*, Clerk of the Circuit Court in and for said county and State aforesaid, do hereby certify the foregoing sixteen pages to be a true and correct copy of the record, first and last executions, also of the final decree of the High Court of Errors and Appeals, with the endorsements and Sheriff's return thereon, in the case of the *West Feliciana Railroad Company* against *Charles A. Thornton*, as fully as the same remains on file and of record in my office. Given under my hand and the seal of," &c., &c.

The objections to the certificate as presented by the bill of exceptions are: *first*, that it shows the record to be incomplete; and, *second*, that the Clerk of Wilkinson County Court could not certify to the correctness of the copy of the final decree of the High Court of Errors and Appeals.

Undoubtedly a mutilated record should not be received in evidence. But a

should appear to be mutilated before the court is called upon to reject it. W. FELICIANA RE.  
S.  
THORNTON.  
Here there is no mutilation. The Clerk certifies all that the law authorizes him to certify; that he has made a true copy of the record in the cause, as fully as the same remains on file and of record in his office. His certificate does not disclose that any thing is missing, which was ever of record in the cause. Nor does any thing seem to be wanting to the completeness of the record. It was urged in the oral argument, that the reasons on which the High Court of Errors and Appeals founded their judgment upon the writ of error, are wanting, and that the record is, therefore, fatally defective. But in no court with whose jurisprudence we are conversant, do the reasons for judgment form an integral part of the judgment itself. The opinion of the court is but an exposition of the motives upon which its decree is based. The opinion of the court may be, and in practice often is given *ore tenus*; the judgment is of necessity a matter of record. For the sake of greater accuracy and to avoid as far as possible the mistakes of reporters, a practice has grown up in the courts of England, France and the United States, of reducing to writing the reasons which influence the decision of the court in each case, and of reading the opinion thus prepared before pronouncing the decree which alone, in strict language, forms the "judgment" of the courts. Even if the judgment is not a logical sequence of the opinion, the judgment can never be impeached as between the parties on that account. The decree of the High Court of Errors and Appeals in this case, is perfectly free from ambiguity; the reasons which that court may have given for rendering it are of no consequence to us, and can in no degree affect a judgment which, upon its face, is complete, lucid and conclusive of the matter at issue between the parties. Not only are the reasons for that judgment unnecessary to the determination of the present controversy, but there is nothing to indicate that they ever formed a part of the record which the Wilkinson County Clerk attempted to certify.

But it was urged as a second objection to the admissibility of the transcript, that the Clerk of the Circuit Court could not certify a decree of the High Court of Errors and Appeals, and that his copy of that decree is but the copy of a copy, and therefore inadmissible. The judgment of the High Court of Errors and Appeals, authenticated by the certificate of the Clerk of that court, and sent down to the Clerk of the Wilkinson County Court to be preserved among its archives, formed an essential part of the record in this cause. It was the duty of the Wilkinson County Clerk to copy it into the exemplification of the record which he sent hither; and the objection that it is a copy of a copy, is no more tenable than would be a similar objection to his transcription of any authentic copy of a public act or record, which either of the parties might have adduced in evidence upon trial. Any paper thus made a part of the record in the cause, although in reality a copy, becomes an original for the purpose of making out a transcript, which shall embody a truthful history of the cause, as it appears of record in the court whence it comes.

The objections to the admissibility of the exemplification were, therefore, properly overruled.

In this court, it has not only been strenuously urged that the Mississippi judgment was against evidence and contrary to Mississippi law, but that we can go behind that judgment and entertain the plea of prescription under the Louisiana Code to the note upon which the Mississippi suit was based. It is conceded that the judgment in Mississippi was rendered after contestation be-

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THORNTON.

tween the parties, by a court of competent jurisdiction, and no fraud is alleged. Under these circumstances, it is far beyond the appellate power of this court to alter or revise the decrees of the High Court of Errors and Appeals, or of any other court of Mississippi. And it would be subversive of fundamental principles and productive of litigation without end, to open a judgment thus rendered and permit the defendant to plead either the old or any new defence to the original cause of action. The promissory note which the plaintiff sued upon in Mississippi, has no longer a legal existence; it is merged in the judgment, and it can only be severed from it by the reversal or rescission of that judgment. *Abat v. Buisson*, 9 La. 418; *Oakey v. Murphy*, 1 An. 372; *Smalley v. Creditors*, 8 An. 386; *Dennistoun v. Payne*, 7 An. 333.

The prescription *liberandi causa* appertains to the remedy, and is governed by the law of the former. The defendant can plead any prescription established by the law of Louisiana to the particular action brought against him here; but this is a personal action of debt upon a judgment—it is not an action upon a promissory note. The prescription applicable to judgments is ten years. But the judgment sued upon was rendered in April, 1855, and this suit was brought in June, 1856.

It is well settled, that a judgment rendered in another State of the Union, properly authenticated, has the same force and effect here as in the State where it was rendered. *Tipton v. Mansfield*, 10 La. 193; *Briggs v. Spencer*, 3 Rob. 265; 7 Cranch 481; 3 Wheat. 234. And a final judgment of a competent court of a sister State, after citation, is conclusive of the matters therein determined between the same parties here, in the absence of evidence positively impeaching it. *Rosand v. Jarvis*, 5 An. 43; *Lewis v. Wilder*, 4 An. 574; *Hazard v. Agricultural Bank of Mississippi*, 11 Rob. 335; *Machee v. Coirao*, 2 N. S. 599.

There is nothing in the pleadings or the evidence to impeach the judgment sued upon; and the action upon that judgment is not prescribed by our law.

We have not noticed the bill of exceptions to the refusal of the prayer in the defendant's answer for a trial by jury, because, although the point has been brought to our attention, the appellant's counsel has not asked that the cause be remanded for a jury trial, but has chosen to put it before us on its merits, and to ask a final judgment at our hands. This course was the more proper, as the defence involves only questions of law, and as our opinion upon these questions is decisive of the case, it would be worse than useless to subject the parties to the expense and delay of a new trial.

Judgment affirmed.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF LOUISIANA,  
AT  
NEW ORLEANS.

NOVEMBER AND DECEMBER, 1857.

PRESENT:

HON. E. T. MERRICK, *Chief Justice.*

|                                                                                       |   |                            |
|---------------------------------------------------------------------------------------|---|----------------------------|
| HON. A. M. BUCHANAN,<br>HON. H. M. SPOFFORD,<br>HON. C. VOORHIES,<br>HON. J. L. COLE. | } | <i>Associate Justices.</i> |
|---------------------------------------------------------------------------------------|---|----------------------------|

EMMA LESSEPS, widow RICHARDSON v. J. J. WICKS.

The signature of the vendee to an act of sale *sous seing privé*, is not necessary under the provisions of our Civil Code, which does not contain the Art. 1840 of the C. N. Under our law a sale of movables may be made by parol; but if the vendor chooses to make the sale in writing, his signature to the act is good proof against him, although without the signature of the vendee. The expression of Art. 2339 of the Civil Code, "between those who have subscribed it" is synonymous with against those who have subscribed it. A party against whom an act under private signature is offered must either acknowledge or deny his signature. The burthen of proof of a simulation is thrown on the defendant who alleges it. A special plea always controls, so far as it goes, the general issue. A party is not allowed to vary or destroy his own voluntary written agreement, by any thing short of written evidence, which includes answers to interrogatories on facts and articles.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*C. Roselius and L. Castera*, for plaintiff and appellant. *Durant & Hornor*, for defendant.

BUCHANAN, J. The defendant was sued by citation and sequestration, for certain movables (household furniture,) sold by him to *Robert Richardson*, deceased, for a price in cash. A bill of sale of said movables, under private signature, containing an acknowledgment of the receipt of the price, and signed by defendant, was offered in evidence by plaintiff, and rejected by the District Court, on the ground that the document was not signed by the vendee, *Robert Richardson*.

There was judgment of nonsuit; and the case is before us, upon a bill of exceptions to the ruling of the court below, rejecting the evidence above mentioned.

We think the court erred, both on general principles and on the issue, as made by defendant's answer.

As to the necessity for the signature of the vendee to a bill of sale under

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private signature, the appellee has relied in this court upon the authority of Duranton. But the reasoning of that commentator, *loco citato*, has reference to the Article 1325 of the Code Napoleon—an Article not copied into the Louisiana Code. That Article requires acts under private signature which contain synallagmatic conventions, to be made in as many originals as there are parties having a distinct interest.

In our law, a sale of movables may be made by parol, as well as in writing; but if the vendor have thought fit to reduce his acknowledgment of such a sale and of the receipt of the price to writing, under his signature, such written acknowledgment is surely good proof against him. The expression of Article 2239 of the Louisiana Code "*between* those who have subscribed it" is synonymous with "*against* those who have subscribed it;" and by article 2240, he against whom an act under private signature is offered, is bound to acknowledge or deny his signature. In fact, that is what the defendant has done in this case; for in his answer, after pleading the general denial, he goes on to plead specially "that the transfer mentioned in the plaintiff's petition was not serious, and never intended to be carried into effect between the parties, viz: deceased and plaintiff; that no consideration for the furniture described in the petition of plaintiff, was ever given by deceased, and that the said furniture always remained in the possession of defendant, who has never ceased to be owner thereof."

The second of these pleas waives the first—the general issue; and the contract being admitted, (that is to say, the execution of the written conveyance of the property to defendant,) the burden of proof is thrown upon the defendant to prove the simulation, which he alleges. A special plea always controls, as far as it goes, the general issue.

The case of *Hill v. Maddox*, 11 Ann. 511, cited by defendant, has no analogy to the present. In that case, an instrument having the form of a sale for cash, of articles of household furniture, and signed by the vendor, was not rejected by the court, but was held to be an informal pledge, and not a sale, by virtue of two other contemporaneous writings, which were given in evidence, and which explained the true nature of the transaction.

The only question that remains, is, whether the cause shall be remanded for the purpose of giving the defendant an opportunity to make out by proof, the special defence pleaded by him.

It appears that defendant offered no evidence, and it is possible that he may have written proof in the nature of a counter letter, which he did not deem it necessary to offer, on account of the ruling of the District Court, rejecting the plaintiff's evidence. If so, his neglect to offer such proof, can scarcely be imputed to him as a fault for which he must suffer. We will therefore give defendant the benefit of the silence of the record on this subject. But it is proper that we should add that the unvarying jurisprudence of this court does not allow a party to vary or destroy his own voluntary written argument, by any thing short of written evidence, which includes, under the decisions, answers to interrogatories on facts and articles. *Williams v. Hood*, 11 An. 115; *McCall v. Henderson*, 11 An. 210; *Stratton v. Rogers*, 11 An. 381; *Seméré v. Seméré*, 10 An. 705; *Barry v. Louisiana Insurance Company*, 11 Martin 632; *Delahoussaye v. Delahoussaye*, 7 N. S. 203; *Prudence v. Bermodi*, 1 La. 240; *Rogers v. Hensley*, 2 La. 600; *Maignan v. Gleises*, 4 L. R. 4; *Macarty v. Bond*, 9 L. R. 356; *Frost v. Bebout*, 14 L. R. 108; *Hackett, minors*, 4 Rob. 299;

*Groves v. Steel*, 2 An. 482; *Harkin's succession*, 2 Ann. 926; *Rachal v. Rachal*, 4 An. 501.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that the cause be remanded, with instructions to the said court to receive in evidence the document mentioned in the bill of exceptions in the record; and that defendant and appellee pay the costs of appeal.

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### STATE v. RICHARD McDONNELL.—MICHAEL DUFFY, Appellant.

The surety may be sued without making the principal a party to the suit.

The Auditor's account, charging a delinquent tax collector with the amount of his defalcation, is sufficient evidence to establish the liability of the surety on the collector's bond.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*E. W. Moise*, Attorney General, for the State. *C. Roselius*, for the appellant.

MERRICK, C. J. This suit was instituted upon the bond of the defendant, *Richard McDonnell*, as State Tax Collector for the Fourth District of New Orleans.

The account from the books of the Auditor of Public Accounts, which was offered in evidence without objection, shows that *McDonnell* was a defaulter for \$27,954 57.

The proceeding was commenced by a rule against the tax collector and his sureties under the 71st Section of the Act approved March 15, 1855. Acts 1855, p. 517, 518. *McDonnell* having absconded, as it appeared by the return of the Sheriff, a Curator *ad hoc* was appointed to represent him.

*Michael Duffy*, one of the defendants in the rule, who was condemned as surety for *McDonnell* for the sum of one thousand dollars, has appealed from the decree which was adverse to the defendants. He assigns the following errors, viz:

1st. "The proceedings are irregular, null and void, because the principal obligor, *McDonnell*, has not been cited and is not before the court, and no judgment can be rendered against his sureties unless the amount of the alleged defalcation is established contradictorily with him. The appointment of a Curator *ad hoc* is unauthorized by law."

2d. "There is no legal evidence whatever to establish any defalcation on the part of *McDonnell*, the tax collector. The return of the Auditor of Public Accounts is no evidence of the facts stated therein. No law has made it so."

I. On the first ground assigned as error, we remark, that if there be any case, in which the surety should respond for his principal, it is where the principal has absconded with the funds the safety of which the surety has undertaken to guarantee.

If a personal service upon the principal were necessary in order to charge the surety, a bond taken to secure the State against the acts of the principal debtor would be entirely nugatory, for if the principal should flee from the State, there would be no recourse against his sureties. But the surety may be sued without making the principal a party to the suit. If so, the appointment of a Curator *ad hoc*, to represent the principal debtor, cannot prejudice the surety.

If the surety is properly cited, the only question between him and the State

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is, has the bond been forfeited, and how much is due upon the same? It might be convenient for him if his principal should answer these questions. But if his principal has absconded, the surety must respond to them alone.

II. The certified extract from the Auditor's account was received without objection. It was, therefore, properly considered by the court. The defendant who did not even take a bill of exceptions to the introduction of the evidence, cannot make its reception a valid basis for the assignment of error. He must be presumed to have assented to its introduction. 11 An. 37. But if it be intended by the assignment of errors to assert, that the account of the Auditor proves nothing when introduced in evidence, the objection is answered by the section of the statute cited, which makes it the duty of the Auditor of Public Accounts to charge the delinquent with the amount of his defalcations, and to require the District Attorney of the proper district to proceed, by rule, against the tax collector and his sureties.

Judgment affirmed.

### THOMAS HYNES v. C. A. MORIN.

Where the holder of two notes secured by mortgage on the same property, at the maturity of the first note obtained a judgment on it, with preference on the proceeds of the sale of the mortgaged property, which being sold under his execution, did not bring a sufficient amount to satisfy both notes. *Held*: That the *fi. fa.* issued under the judgment, should have been first satisfied in full, and the balance held by the purchaser and judgment creditor, who bought in the property, to meet the other note *pro tanto*, when it became due.

The plaintiff in the seizure, who was the holder of both of the notes, not having asked for a sale of the property on such terms of credit for the balance of the price, as would correspond with the falling due of the second note, the Sheriff had no right to apply the price first to the outstanding note in the hands of the seizing creditor, and thus leave a balance unpaid on the execution under which the property was sold.

**A**PPPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*L. F. Andry*, for plaintiff. *G. Legardeur* and *J. L. Tissot*, for defendant and appellant.

**SPOFFORD, J.** The appellant states his case thus:

"*C. A. Morin*, was the holder and owner of two promissory notes subscribed by *Thomas Hynes*, one for the sum of \$1,680, the other for the sum of \$1,770, and secured both by the *same mortgage* upon the *same property*.

"At the maturity of the first note, to wit: that of \$1,680, *Morin* brought suit upon it, obtained judgment against *Hynes* and issued a *fi. fa.* under which the Sheriff seized the mortgaged property and sold it for \$2,400 cash.

"The Sheriff then deducted his costs, amounting to \$45 50, and applied the balance, to wit: \$2,354 50, to the payment: 1st. of the outstanding note of \$1,770, and 2d, of the writ in his hands which amounted, with interest and costs, to \$1,789 05; thus leaving a balance of \$1,204 55, still due under the writ.

"For the recovery of this balance, *Morin* issued an alias *fi. fa.*, which was enjoined by *Hynes*, upon the ground that the sheriff ought to have applied the proceeds of the sale to the payment in full of the writ, and that the latter was, therefore, satisfied."

"The District Judge was of a like opinion and made the injunction perpetual."

"From this judgment *Morin* has appealed."

Considering that *C. A. Morin*, the holder of both the mortgage notes, one due and the other not due, chose to take a judgment by preference on the one that was due, without, at the same time, asking for an order that the property (mortgaged at once to secure both) be sold on such terms of credit for the balance as would correspond with the falling due of the other note, we think there was no error in perpetuating the injunction. By the terms of the judgment, which were of his own seeking, he had secured a preference on the proceeds of the sale for the payment of the whole of the note then due. However, justly and successfully, a third person might have complained of and interfered with this judgment, the party who procured it had no right to change it. The *fi. fa.* issued under it should have been first satisfied in full, and the balance held by the purchaser and judgment creditor, *Morin*, to meet the other note *pro tanto*, when it should fall due.

Judgment affirmed.

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#### STATE v. JOHN MCGINNIS.

The information charged that the prisoner on, &c., at, &c., "with a certain dangerous weapon, to wit: a pistol, in and upon one *Thomas Martin*, did make an assault, by wilfully shooting at him with the intent, him, the said *Thomas Martin*, then and there to kill and murder." There was endorsed on the information the phrase "Information with intent to kill," which formula was repeated by the clerk in the entry on the minutes of the court. *Held*: That the mistake of the clerk neither enlarged nor reduced, nor violated the authentic accusation contained in the body of the information on which the prisoner had been arraigned and pleaded not guilty.

The verdict of guilty, found by the jury, was properly followed by a sentence against the prisoner for the offence charged in the body of the information. The minor offence of "an assault with intent to kill," endorsed on the information, was not the offence for which he should have been punished.

**A**PPPEAL from the First District Court of New Orleans, *Hunt, J.*  
*E. W. Moise*, Attorney General for the State. *B. S. Tappan* and *Race & Foster*, for the appellant.

**SPOFFORD, J.** *John McGinnis* has appealed from a judgment of the First District Court of New Orleans, whereby he was sentenced to eighteen months imprisonment, at hard labor, in the State Penitentiary, and to pay the costs of prosecution.

There is no bill of exceptions in the record, and our attention is confined to two errors assigned in this court as apparent on the record:

"1st. That the accused has been sentenced for an offence for which he was never tried.

"2d. That he has been sentenced under an illegal, invalid and insufficient information."

Under an Act of 1855, (Revised Statutes, p. 160, Section 2,) "prosecutions for offences not capital, may be by information, with the consent of the court first obtained."

It appears by the record, that the District Attorney, with leave of the court, filed an information against *John McGinnis*, which was duly docketed and numbered 12,574. This information, which thus became an integral part of the record, charged, that *John McGinnis*, on, &c., at, &c., "with a certain dangerous weapon, to wit: a pistol, in and upon one *Thomas Martin*, did make an assault, by wilfully shooting at him, with the intent, him, the said *Thomas Martin*, then and there to kill and murder."

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Upon his arraignment, he pleaded "not guilty," and, after a trial, the jury brought in a verdict of "guilty," with a strong recommendation to the mercy of the court. There was no demurrer, no motion to quash, and no motion for a new trial or in arrest of judgment.

Inasmuch as under the number and title of the cause, there was endorsed upon the information, the phrases "information for assault with intent to kill," a descriptive formula, which, it appears, the clerk repeated when making his entries relative to the arraignment, trial, &c., &c., the appellant contends that we must infer that he was tried for nothing but an assault with intent to kill, which is punishable by simple fine and imprisonment, (Revised Statutes, p. 136, Section 10,) and could not be punished for an assault by shooting at another, or an assault with intent to commit murder, which are punishable by imprisonment, at hard labor, not exceeding two years. Revised Statutes, p. 136, Section 9.

The concise endorsement of the character of the offence upon an information or indictment is for convenience only, and forms no part of the substance of the charge. The *State v. Smith*, 5 Ann. 341; *State v. Rohfricht*, 12 Ann. 388. It is advisable that the District Attorney or the clerk, if he makes such endorsement at all, should describe the offence as accurately as is consistent with brevity; but a mistake in this particular can neither enlarge nor reduce, nor vitiate the authentic accusation which is contained only in the body of the indictment found, or information filed by leave of the court.

The prisoner is never called to answer to the condensed title of a bill or information; he is arraigned and tried upon the bill or information itself.

So an error of the clerk in entering upon his minutes a brief description of the nature of the offence, whenever the case is called by its number and in its order, cannot change in any degree the formal accusation preferred against the prisoner according to law, nor vitiate the proceedings under such accusation.

Although, in this case, it would have been more accurate to have endorsed upon the information the words, "assault by shooting another with intent to murder," the prisoner to whom that information was read, when he pleaded to it, knew that such was the nature of the accusation against him; and the mistake of the District Attorney or the clerk in styling the offence "an assault with intent to kill," by an endorsement which was surplusage and entries which were needlessly full, mislead no one; for the prisoner was tried, not upon the endorsement, nor upon the concise description of the charge unnecessarily added by the clerk to his entries of the proceedings in the case, but upon the information itself. And when the jury found a general verdict of guilty, they found the prisoner guilty in manner and form as charged in the information, not as charged in the endorsement or the clerk's entries.

The second error assigned is so vaguely set forth that, perhaps, it should receive no notice at our hands. We will remark, however, that the information strictly pursues the tenor of the 9th Section of the crimes Act of March 14th, 1855, p. 131, and that the offence is purely statutory. If there are any defects in setting forth details, they are defects of form merely, and as such, should have been objected to by demurrer or motion to quash before the jury was sworn, and could not be listened to afterwards. Act relative to criminal proceedings, approved March 14th, 1855, Section 18, Revised Statutes, p. 177, Section 91.

Judgment affirmed.

## W. CREEVY et al. v. J. W. BREEDLOVE.

A motion to dismiss the appeal is too late after the lapse of three judicial days, from the filing of the transcript, and after the cause has been set down for trial at the instance of the party who moves the dismissal.

Property sunk in a steambot and unclaimed for twenty-three years held to be clearly derelict. Excessive damages awarded below will be reduced by the Supreme Court.

**A** PPEAL from the Fifth District Court of New Orleans, *Augustin, J.* Tried by a jury. *H. Gaither and W. S. Stansbury*, for plaintiffs. *Semmes & Labat and J. C. Larue*, for defendant and appellant.

**SPOFFORD, J.** The motion to dismiss came too late. More than three judicial days had passed since the filing of the transcript, and the cause had already been set down for trial at the instance of counsel for the party who afterwards made the motion to dismiss. See *Temple v. Marshall & James*, 11 Ann. 613. *O'Reilly v. McLeod*, 2 Ann. 138.

The property sunk in the steamer *Tennessee* having been unclaimed for twenty-three years was clearly derelict. The plaintiffs had a right to attempt its recovery by means of their diving bells and wrecking apparatus.

The defendant, under the evidence, was without a legal interest to justify his interference with the operations of the plaintiffs. There is evidence enough in the record unobjected to, to establish the fact of his wrongful interference to the damage of the plaintiffs, without considering the validity of the certificate from the Supreme Court of Chancery of the State of Mississippi.

But the damages awarded (\$7,000) appear to us excessive. The temporary pendency of the injunction could only have caused the plaintiffs to lose the time and money they had already expended over the wreck, and were obliged to spend in resisting the injunction. All other considerations are too remote, conjectural and fanciful to serve as a basis for the estimate of damages in a case of this character.

For, the alleged treasure is still in the river bed. So soon as the injunction was dissolved, the plaintiffs might have returned thither and renewed their search for gold. They lost the time spent in gaining access to the wreck in the fall of 1846, because, pending the injunction the current of the river again covered it with mud and sand. They were put to an expense of five hundred dollars in defending the suit. It seems to us that under the evidence three thousand dollars would be an ample remuneration to the plaintiffs for their labor lost in consequence of the defendants course in suing out the injunction.

It is, therefore, ordered, that the judgment of the District Court be avoided and reversed, and it is now ordered, adjudged and decreed that the plaintiffs recover of the defendant the sum of three thousand five hundred dollars and the costs of suit in the District Court, they paying the costs of this appeal.

## DELPHINE SOUDIEU v. J. E. FAURÈS.

Brokers may extend their responsibility beyond its limitations as fixed by Art. 2987 C. C., by assuming to themselves other functions than those imposed upon them by law and usage. Where such an agent has disobeyed instructions, he cannot rely upon a ratification of his acts by his principal, without showing that they were ratified after a disclosure of all the material facts.

**A**PPEAL from the Second District Court of New Orleans, *Morgan, J. G. Legardeur*, for plaintiff. *St. Paul & Bouny*, for defendant and appellant.

SPOFFORD, J. Brokers acting strictly in that capacity, "are not responsible for events which arise in the affairs in which they are employed; they are only, as other agents, answerable for fraud, or faults." C. C. 2987.

But they may incur other liabilities, by assuming to themselves other functions than those which law and usage impose upon brokers. By convention, or by their course of conduct with particular parties, they may modify and enlarge their responsibility.

In this case it appears that the defendant was not a simple intermediary; he took upon himself other and greater obligations than those of a note broker merely.

He undertook to make safe investments of the plaintiff's money. He received the money and placed it upon his own judgment, not upon hers. This is obvious, not only from the direct testimony in the cause, but from an admission in the defendant's answer.

He disobeyed instructions and did not invest upon mortgage or in first class discount paper. He invested imprudently and is responsible for the loss consequent upon that imprudence and violation of instructions, unless the plaintiff is shown to have ratified his action, after a disclosure to her of all the material facts. The ratification relied upon as inferrible from her having once had in her possession the worthless note which the defendant bought with her funds is not well established; for aught that appears she was left in ignorance of what the defendant was bound to disclose in order to shift from himself the responsibility of a violation of instructions and of a lack of that prudence which his special undertaking guaranteed.

Judgment affirmed.

## T. J. DURANT v. J. L. RIDDELL.

The erection of a verandah of the same width with the street, in front of one's house, is not an infringement of the rights of the owner of the adjoining tenement and cannot be complained of as in violation of the Articles of the Civil Code regulating the servitudes of light and view.

**A**PPEAL from the Sixth District Court of New Orleans, *Cotton, J. C. Roselius*, for plaintiff and appellant. *Benjamin, Bradford & Finney*, for defendant.

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BUCHANAN. J. Plaintiff and defendant are owners of adjoining tenements having a front on Baronne street in this city. Defendant has erected a verandah in front of his house, of the same width with the side-walk of Baronne street, and supported by iron columns. Plaintiff complains of this as a nuisance which has caused him pecuniary damage, and prays for its abatement.

In argument, plaintiff relies upon Articles 707, 711, 712 and 713 of the Civil Code. An examination of the evidence does not show an infringement by defendant of any of those Articles. The servitudes of light and view, which plaintiff may claim, are those which are common to all the front proprietors of Baronne street, and no more. The distinction which is made in the petition between a right to erect a balcony of three or four feet in width in front of one's property (which is admitted,) and the right to erect a balcony or verandah of the width of the side-walk of Baronne street (which is denied) is purely fanciful, and has no foundation in law or in reason. Every front proprietor is clearly under an obligation not to obstruct the free use of the street; and the enforcement of this obligation concerns the municipal authority, which has enforced it, as shown by the ordinance of 1852, by the prohibition to erect awnings or balconies, which shall be less elevated than eight feet, above the side-walk. As to the verandahs, of the kind erected by the defendant, extending over the whole breadth of the side-walk and elevated far above it by columns on a line with the curb stone, which the evidence shows to have become so common of late years, they are very obviously, so far as the public is concerned, a great improvement as compared with the hanging galleries and wooden sheds which extend only to the half or the third of the width of the side-walk, and from which the drip, in rainy weather, is so great an annoyance to foot passengers. These modern verandahs, on the contrary, afford a perfect shelter from the sun and weather, to passers by the front of the houses to which they are attached. In sultry climates, the necessity of shade from the sun, to health, and comfort, has universally introduced the custom of balconies or verandahs; which in this respect, are equally beneficial to the inmates of the houses, and to wayfarers. So much for the public considerations attaching to this subject; and which are the only ones really presented by the evidence, inasmuch as the plaintiff has not pretended to have any servitude upon the property of his neighbor the defendant, created by convention or written title.

As to the acts of defendant and his tenants, alleged to have caused damage to plaintiff, we perceive an inconsistency in the complaint first made, that the erection of the verandah was an intrusion upon the privacy of the plaintiff's dwelling, by enabling defendant's tenants to look into plaintiff's bedchambers; and the second complaint, (after defendant had erected a screen or lattice upon the south end of his verandah) that the screen or lattice so erected, obstructed the prospect towards Canal street. The defendant, in erecting such screen, appears to have been actuated by a sincere desire to obviate the objections previously made by his neighbor, to the verandah; and to have used every exertion to protect the plaintiff from the indiscretion or impertinence of defendant's tenants.

Being of opinion that the defendant has not invaded the legal rights of the plaintiff, in the erection of the verandah in question, the judgment of the District Court is affirmed, with costs.

## L. &amp; R. COUCY v. PATRICK CUMMINGS—J. M. BACH, Warrantor.

The mere trespasser who is defendant in a petitory action, cannot defeat a *prima facie* title made out by the plaintiff on the ground of the non-registry of such title.

The registry may be made at any time and it does not concern a trespasser that it should be made at all.

As against a naked trespasser, the plaintiff in the petitory action is not bound to show a title perfect against the whole world.

In forced sales for taxes the forms of law must be rigidly pursued and a title thus derived cannot be aided by intentment.

When the proceedings are against one described as an absentee, the purchaser at the tax sale would acquire only the interest of such absentee.

APPEAL from the District Court of Jefferson, *Burthé, J.*

*Michel & Gilmore*, for plaintiffs. *T. McCay*, for defendant. *Hiestand & Levy*, for warrantor and appellant.

SPOFFORD, J. The plaintiffs having succeeded in a petitory action for certain lots of ground in Jefferson, the defendant's warrantor has appealed.

The plaintiffs claim the lots as instituted heirs of *Victoire Marcos Tio*, deceased, who acquired title from *Nelson Fouché* and *Jean Jacques Montford* on the 17th May, 1836, by notarial act.

The warrantor, *Bach*, claims to have acquired a valid title to the same lots on the 10th May, 1852, by the Sheriff's adjudication at a tax sale in the suit of "the Mayor and Aldermen of the City of Jefferson for use of *T. May v. Judith Proux*, absentee or unknown owner of lots 17 to 20 in square 34."

The appellant contends that the plaintiff's title is absolutely null and void because the act of sale from *Fouché* and *Montford* to *Tio* was not proved to have been recorded, and that he, though he were a mere trespasser, as the defendant in a petitory action, could defeat the plaintiffs by pleading this lack of registry. (Rev. Stat. p. 453).

This position is indefeasible. An unrecorded sale is valid between the parties and their privies. The act is receivable in evidence though not registered. The registry may be made at any time. It does not concern a trespasser that the registry should be made at all. The law was intended only to protect those who claim to have acquired the thing by valid title themselves through or under a vendor of the person who holds an unrecorded deed and thereby causes innocent parties to be deceived. The policy of the law is that such parties shall not be affected by latent conveyances. See *Buel v. N. Y. Steamer*, 17 L. 541.

The plaintiffs made out a *prima facie* title in themselves. It was then for the defendant to show a better one. For as against a naked trespasser the plaintiff in a petitory action is not bound to show a title perfect against the world. *Patin v. Blaise*, 19 L. 396; *Bedford v. Urquhart*, 8 L. 239; *Baillie v. Burney*, 3 Rob. 319; *Broughton v. King*, 9 R. 218.

The title set up by the warrantor only dates back to the year 1852. It is a title purporting to be derived from one *Judith Proux*, by forced sale for the cost of building a banquettes assessed against her alone, as appears by the surveyor's certificate, which forms the only evidence in the record of the imposition of a tax upon this property.

It is contended that because the proceedings were conducted against *Judith*

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*Prouz* as an "absentee or unknown owner" of the lots, it matters not who was the owner, but that the rights of every other claimant were transferred to *Back* at the Sheriff's sale by virtue of the 21st section of the Act of 9th March, 1850, p. 60. In these forced alienations of property, the forms of law must be rigidly pursued and a title thus derived cannot be aided by intendment. Upon their face the proceedings were only directed against *Judith Prouz*, described as an "absentee or unknown owner," and they could therefore only convey to the purchaser such interest as she had. It does not appear that she had any.

The judgment appealed from is, therefore, affirmed with costs.

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CITY OF NEW ORLEANS v. MARTIN GORDON, Agent, &c.

In an action on a penal statute which must be strictly construed, it is necessary that the facts constituting the *gravamen* should be clearly and distinctly stated.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*F. C. Laville and Morel*, for plaintiff. *Durant & Horner*, for defendant and appellant.

VOORHIES, J. This is an action to recover of the defendant \$350, with interest, Assistant City Attorney's commission and costs, penalties alleged to have been incurred by him under the third section of an ordinance of the city, approved 23d June, 1854, as follows, viz :

"Sec. 3. Be it further ordained, that any person or persons refusing or neglecting to repair the side-walks, foot-passages, or common alleys, in front of his or their property, or bordering thereon, or cause the same to be made when required, after the expiration of the ten days, shall be liable, in addition to the cost of making said repairs, to a fine of ten dollars for each day he or they are in contravention, said fine to be recoverable before any court of competent jurisdiction."

The agent, in his answer to the plaintiff's petition, after pleading the general issue, avers, that the side walks in front of the property of his principal is and has always been in good order; that neither he nor his principal has ever been put in default; and that if what is alleged be true, which is denied, the city itself has violated the ordinance by not repairing the side walks, &c.

The defendant is appellant from a judgment of the court below, condemning him to pay the plaintiff said sum of \$350, with five per cent. interest thereon from judicial demand, ten per cent. thereon for Assistant City Attorney's commission and costs of suit.

The first section of that ordinance provides, "that whenever any of the side-walks, common alleys, or foot-passages, within the corporate limits of the city, shall need repairs, it shall be the duty of the street commissioner, or his deputies, to notify, in writing, the owners or their agents of the property fronting or bordering thereon, to cause said repairs to be made within ten days after service of said notice."

The second section declares, "that after the expiration of said ten days, in case said side-walks, common alleys or foot-passages are not repaired by the

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owners, or agents aforesaid, it shall be the duty of the street commissioner to cause the necessary repairs to be made at the expense of said owners of property fronting or bordering on said side-walks, common alleys or foot-passages."

*F. Young*, deputy street commissioner, for the plaintiff, and *E. F. Briggs*, for the defendant, were the only witnesses examined on the trial below, the substance of whose testimony may be thus briefly stated. That of the former shows, that the side-walk in front of the defendant's property was bad and wanted repairs; that some one, whose name was not signed, had complained of it on the books in the Street Commissioner's office; that the defendant's agent was notified of it in writing, on the 25th of September, 1856; that the bricks of the pavement have sunk down in two or three places, collecting pools of water whenever it rains, and wetting the passers by, and has never been repaired; that the side-walk complained of, and in consequence of which he notified the defendant, is on Apollo street, and extends from *Thalia* to *Melpomene* street; and that he examined the side walk on the day of the trial and found it in the same condition it was, when he notified the defendant's agent, no attempt ever having been made by the city to have the same repaired.

The testimony of the other witness, who resides on *Thalia* street, between *Nayades* and *Apollo*, shows that he is acquainted with the side-walks, along the whole front of which there is a row of trees; that he was called on by *Gordon*, the defendant's agent, to examine it soon after the equinoctial storm in September last. One of the trees had been blown down, and put up or taken away afterwards, leaving no obstruction. He thought that *Gordon's* notification to repair the side-walk, proceeded from the tree having been blown down, considering the side-walk in pretty good order. He was not in the habit of going by there daily, but at the time *Gordon* called on him to examine the side-walk, he found it in as good order as the generality of banquettes in that neighborhood; he has passed over it some twelve or fifteen times since the month of October, and found it in the same condition as it was when he examined it the first time.

The present suit was instituted on the 19th of November, 1856, and tried on the 1st of April, 1857.

The following statement forms a part of the petition, viz:

"[Suit No. 159.]

COMPTROLLER'S OFFICE,

*Martin Gordon*, agent of *D. F. Kenner*, No. 35 Camp street. }

To City of New Orleans:

For fine incurred by him for having, on or about the 25th day of September, 1856, violated City Ordinance, to wit: Ord. 1586, sect. 3d, in refusing to repair his side-walk, within corporate limits of the city, although duly notified by *J. A. Guyol*, Street Commissioner, on the 25th September, 1856.

*Martin Gordon*, No. 35 Camp street, agent of *D. F. Kenner*, Appollo street, between *Thalia* and *Melpomene* streets. Fine of \$10, after ten days notification of ord., during 35 days, at \$10, \$350.

Witness.

*F. YOUNG*, Deputy Street Commissioner.

Registered, November 11th 1856.

*T. THEARD*, Comptroller.

To *F. C. Laville*, Assistant City Attorney."

In an action on a penal statute, which must be strictly construed, it is essential, in our opinion, that the facts constituting the *gravamen* should be clearly and distinctly stated. In this case, the petition merely sets forth the defendants indebtedness, arising from his violation of the third section of the

ordinance, which is therein copied, and that "he has, during thirty-five days, violated said section of said ordinance, at ten dollars a day, making in all the sum of \$350, as per bill annexed, and part of this petition." There is no description given of the property of the defendant, or the nature of the repairs required to be made to the side-walk in front of the same. The evidence, which we have carefully examined, appears to us insufficient to supply this defect; indeed, giving equal weight to the testimony of each of the witnesses, whose credibility does not appear to have been taken into consideration by the court below, it is certainly very inconclusive, especially when we take into view the facts, if such repairs had been necessary, of the remissness of the city to make them at the expense of the defendant, as enjoined by the ordinance, which is imperative, leaving it no discretion to postpone indefinitely such repairs, in order to inflict a heavy penalty on the owner. As the manifest object of the ordinance is to keep in order, free from any nuisance, the side-walks, common alleys and foot-passages of the city for the common use and benefit of the public, the infliction of the penalty in cases in which such object is not sought to be attained, as in the present case, would be inequitable, and not in accordance with the letter and spirit of the ordinance.

We think the court below, therefore, erred in overruling the defendant's exception to the plaintiff's petition, on the ground that the same did not contain such specifications of a violation of the ordinance as to enable him to answer.

It is, therefore, decreed, that the judgment of the court below be reversed, and the action dismissed at the plaintiff's costs in both courts.

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#### CITY OF NEW ORLEANS v. B. SALOY.

The defendant, sued for a tax bill, objected to the citation, that the advertisement by which he was cited, under the Act of the Legislature, April 15, 1853, was only once inserted in the official newspaper. The objection held not to be valid.

**A**PPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*Laville and Morel*, for plaintiff. *G. & C. E. Schmidt*, for defendant and appellant.

**SPOFFORD, J.** The objection to the citation does not seem to be sustained by the tenor of the law of April 15th, 1853, p. 86.

The other point made in the brief of appellant is too indefinitely stated; no conditions are shown to have been violated, and no specific informalities are suggested to invalidate the plaintiff's claim.

Judgment affirmed.

**BUCHANAN, J.**, takes no part in this decision.

## FEARN, PUTNAM &amp; Co v. W. A. RICHARDSON.

A merchant in Louisville filled an order on him for merchandize to be shipped to the purchaser at Vicksburg, and took a bill of lading for the same, deliverable to the purchaser at Vicksburg, from the agent of a steamboat on which the goods were to be transported. The goods were taken by drays from Louisville to Portland, to be there received on the boat according to the custom of the trade in low water on the Ohio river. At Portland the goods were delivered to a different boat from the one from which a bill of lading had been taken, and were never delivered to the purchaser at Vicksburg. *Held*: That the bill of lading in such a case is conditional, and only binding in case of actual delivery of the goods to the steamboat.

The vendor of the goods did not use ordinary care and diligence in shipping the goods and the purchaser is entitled to recover back the price paid for them.

**A**PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*Price & Day*, for plaintiffs and appellants. *H. Gaither*, for defendant.

MERRICK, C. J. The plaintiffs, doing business at Jackson, Mississippi, ordered thirty coils of rope from the defendant, a dealer at Louisville in wool, hemp, bagging, rope, twine, &c.

The latter made out an invoice of the goods and took a bill of lading for them from the steamboat Republic on the 2d August, 1854, signed by "P. Lus. Barham, agent, per S. Bomer" by which the merchandize was to be delivered to plaintiffs agent at Vicksburg, Mississippi. The plaintiffs in payment remitted their bill of exchange upon the house of *Fearn, Donnegan & Co.*, of New Orleans, which was accepted by them. The merchandize never having come to hand the bill of exchange was protested for non-payment, but was finally paid by the acceptors on the 20th December, 1855.

This action is brought by the plaintiffs to recover back this sum of money as paid in error.

The proof shows that the Ohio river is usually low in August, and that in low water the custom of the trade is to take bills of lading from the agents of the boats in Louisville, and forward the goods by drays to the boats at Portland, accompanied by dray tickets addressed to the boats on which parties intend to ship, giving the marks and numbers of packages. Sometimes the bill of lading has the condition inserted, "subject to dray tickets."

It appears from the correspondence of the parties, which has been produced and on which the case must be determined, that the Republic did not receive the goods, but that they were taken by a boat called the Odd Fellow, and reshipped on the steamer Dresden and finally delivered to *Messrs. J. C. Griffin & Bro.* Memphis, Tennessee. They were claimed by a *Mr. Ford*, as belonging to his brother who had failed, and whose business he was winding up. He took six coils of the rope to his plantation, and the rest of it he sold to *Griffin & Bro.* The parties doubting their respective rights to recover of *Griffin & Bro.* and *Ford*, have canvassed in their correspondence the question on whom the loss must fall. The defendant contends that he was only an agent, that he took a bill of lading from the boat and sent the goods to Portland for the boat, and that he did his duty and was discharged. The plaintiffs contend that the goods were never properly shipped and delivered. It is not important to consider whether the defendant must be considered as a dealer on his own account or as a factor. In either case it was his duty to see the goods shipped. It has been held that in ordinary cases the captain of a vessel is without authority to bind the

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owners by signing a bill of lading unless the goods are actually delivered or put on board the vessel. Abbott on shipping, p. 323, note 3. But the custom of trade at Louisville it seems, is to sign the bills of lading before the goods are sent by the drays to Portland. In such cases the bills of lading must be considered as conditional and only binding in the event the goods are really delivered to the boat at Portland.

It would then seem that the production of a bill of lading alone, signed by the agent in Louisville, does not show a delivery to the steamboat, but that the production also of the dray receipts are required in order to fix the liability of the owners of the boat. The defendant has not therefore shown that ordinary care and diligence which was required of him, whether he be considered a vendor of the goods or a mere agent. He should have shown that the dray receipts were signed by the clerk or other officers of the Republic, and he did not exercise proper care, inasmuch as he does not appear to have examined the dray receipts, on the return of the drays from Portland, in order to ascertain whether the goods had been delivered, and if so, whether they had been delivered to the right boat.

But the defendant further contends that at the time the draft was paid the plaintiffs did not pay in error, for they had full knowledge of the whole transaction and are therefore precluded from recovering. C. C. 2280. It is admitted that the draft was paid by *Fearn, Donnegan & Co.*, the acceptors. We think, therefore, the payment must be considered as relating to the date of the draft, and that epoch must be considered its date between the parties on the question before us.

The garnishees have sufficient funds in their hands to pay the debt.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and that the plaintiffs do recover and have judgment against the defendant, for the sum of three hundred and sixteen 47-100 dollars, with legal interest thereon from the 28th day of December, 1855, until paid, and costs of both courts, and it is further ordered, that said garnishees, *Parmele & Brother*, pay said sum of money, interest and costs, out of the funds attached in this suit, and admitted by their answers to be in their hands.

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### S. J. BAIR v. I. P. ABRAMS AND WIFE.

The written admission of a party of the fact that he had made a verbal sale of a slave to another, is primary evidence, and makes legal proof of title to the property.

Where a sale is made with the right of redemption, the right must be exercised within the time agreed on, otherwise the purchaser becomes irrevocably possessed of the thing sold. C. C. 2549.

APPEAL from the Sixth District Court of New Orleans, *Cotton, J.*

*A. T. Steele and J. B. Lyman*, for plaintiff and appellant. *Clarke & Bayne and Drouet & Charvet*, for defendants.

VOORHIES, J. This is the second appeal which has been taken in this case.

In the former, the ruling of the Judge *a quo* was held to be erroneous in refusing the defendants a continuance to enable them to prove the fact, as set forth in their affidavit, "that the plaintiff's title to the slave in dispute had

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been conveyed, by act under private signature, to *George W. Gooche*, prior to June, 1852."

On remanding the case, no attempt appears to have been made by the widow *Bushey* to call her vendor, *Joseph T. Calhoun*, in warranty; neither does it appear that *Gooche* has ever been notified of this suit.

The defendants derive their title from *Gooche*. On the hypothesis that the evidence warrants the conclusion, that the slave in question was in the plaintiff's possession as owner in January and February, 1852, and was brought hither by him from Texas, as alleged in his petition, it remains then to be ascertained whether or not his title has ever been legally conveyed to *Gooche*. In proof of the divestiture, the defendants introduced a power of attorney under private signature from the plaintiff, to a certain *B. T. Houghton*, dated the 9th of June, 1852, and a letter from the plaintiff to *Pickett, Perkins & Co.*, dated 17th July, 1852. The mandate or procuration contains the following clause: "And to prevent the sale of a negro woman named *Mary*, sold by me to one *George W. Gooche* for the space of twelve months, for six hundred dollars; as there is a special contract and agreement between the said *G. W. Gooche* and myself, that the said slave is not to be sold to any one within twelve months, and only to myself, and for the amount of six hundred dollars, being the purchase money," &c. In his letter, the plaintiff declares:

"Moreover I will state to you, that I sold a light colored girl named *Mary Sneed* to a *Mr. Gooche*; the girl I was to have back at the same price which she was sold for, which was six hundred dollars, when I returned from California, or at the expiration of twelve months."

On the trial below, the plaintiff objected to this evidence on the ground that, if offered to prove a verbal sale from him to *Gooche* of the property in question, it was inadmissible, as such a sale was null and not susceptible of proof; and if offered to prove a written sale of said property, it was equally inadmissible as secondary evidence, the sale itself as the best should be offered, unless shown to have been lost or destroyed, or its production shown to be out of the power of the party.

The objection, it appears to us, could only go to the effect and not the admissibility of the evidence. As a general rule, it is true the law requires literal proof of title to immovables or slaves, but a verbal sale of such property, accompanied by actual delivery, and proved as required under Article 2255 of the Civil Code, is no less binding on the parties. The written admissions of a party of the existence of a verbal sale of such property, ought certainly to be as binding upon him as that which is elicited from him when interrogated on oath under that Article. But in the present case it seems to us, that the evidence objected to is primary and not secondary, making legal proof of title to the property in controversy. *Millaudon v. Police Jury*, 8 N. S. 133; *Millman v. Leverich*, 11 La. 520.

The contract then between *Bair* and *Gooche* is shown to be a sale with the right of redemption (*la faculté de réméré ou de rachat*), which rested solely on the will of the former to dissolve it, by offering to repay the price and redeem the property. *Patterson v. Roman*, 14 La. 214. "If that right has not been exercised, within the time agreed on, by the vendor, he cannot exercise it afterwards, and the purchaser becomes irrevocably possessed of the thing sold." C. C. 2548. In the present case, as the stipulated term has long since expired, it is clear that the right of redemption can no longer be exercised.

Judgment affirmed.

SAMUEL SIMMONS v. HIS CREDITORS—On the Opposition of FLINT & JONES.

Where an appeal is taken by one of the opposing creditors from a judgment homologating the tableau of distribution, it is not sufficient to give an appeal bond in favor of the syndic. The creditors on the tableau interested in maintaining the judgment, must be made parties to the appeal, or it will be dismissed, on the motion of any of them.

The motion to dismiss on such a ground, is not too late after the expiration of three days from the filing of the record, as the court will, *ex officio*, notice the want of parties for a final decree.

APPEAL from the Third District Court of New Orleans, *Duvigneaud, J. Race & Foster*, for appellants. *Heistand & Levy*, for appellees.

VOORHIES, J. *William Florence*, classed on the tableau of distribution as a privileged creditor of the insolvent, claims the dismissal of the appeal, on the ground that no bond has been given either in his favor or that of the creditors and appellees. The appellants' bond is in favor of the syndic alone.

We think this case falls within the rule announced in the case of *Armstrong v. His Creditors*, 8 An. 368. See the authorities there quoted.

But it has been urged by the appellant's counsel, that the motion for the dismissal was too late, on the authority of the case of *Creevy v. Breedlove*, 12 An. The decision in that case was based on the rule announced in the case of *John Temple v. Marshall & James*, 11 An. 613, (see authorities there quoted,) to the effect that the appeal would not be dismissed for irregularities in the transcript, such as the want of an order of appeal, &c., unless such motion were made within three days after the record was filed. But in the present case, the motion rests on entirely different grounds, namely, that *William Florence*, who has an interest in maintaining the judgment, has not been made a party to the appeal. In the case of *Widow Robert, Executrix, v. Ride & Mairot*, 11 An. 409, we said: "It is needless to inquire whether the motion to dismiss in this case should have been filed within three days after the transcript was brought up from the inferior court, inasmuch as the practice of this court has been to notice, *ex officio*, and without any motion to dismiss having been made, the want of proper parties for a final decree." See cases there quoted.

Appeal dismissed.

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J. RICE v. E. GARRETT et al.

Where the defendant, in an injunction suit prays, in his answer, for damages against the principal and sureties, and the judgment dissolving the injunction is silent on the subject of damages, it is equivalent to a rejection of the claim for damages and the judgment is *res judicata* between the parties.

APPEAL from the Fourth District Court of New Orleans, *Reynolds, J. H. T. Hays*, for plaintiff and appellant. *J. Dunlap and W. S. Stanbury* for defendants.

BUCHANAN, J. The plea of *res judicata* was properly sustained by the District Court.

RICE  
v.  
GARRETT.

The present suit is for damages against the principal and two sureties upon two several injunction bonds given for the same injunction in the case of *Garrett v. Rice*, decided upon appeal in this court, at the May term, 1856, not reported.

The injunction issued in the suit of *Garrett v. Rice*, had for its object to stay the execution of a judgment in which *Rice* was plaintiff, and *Garrett* defendant. Under the Act of 1831, the principal and sureties in the injunction bond were made parties to said suit, and *Rice*, the defendant therein, prayed, in his answer to the suit, for damages against the said principal and sureties.

The injunction was dissolved by judgment of this court on appeal; and we declared, in the reasons for judgment, that we did not think it a case for the infliction of damages.

Our decree was silent on the subject of damages. This was equivalent to a rejection of the demand for damages, under the pleadings in that cause. *Spencer v. Baniater*, decided this term, and cases there cited.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

### C. DERBIGNY v. J. B. TREPAGNIER.

The appellee, at any time before the cause is at issue on the merits, may have the appeal dismissed as being premature; the judgment of the lower court not having been signed.

**A**PPEAL from the District Court of St. Charles, *Burthe, J.*  
*Handlin and St. Paul*, for plaintiff and appellant. *E. Bermudez*, for defendant.

VOORHIES, J. The defendant and appellee claims the dismissal of the appeal in this case, on the ground that the same is premature, the judgment of the court below not being signed.

"The Judge must sign all definitive or final judgments rendered by him, but he shall not do so until three judicial days have elapsed, to be computed from the day when such judgments were given. C. P. 546. An amendment to this Article provides: "That hereafter, all motions for new trials in causes, shall be made and determined, and all final judgments signed before the adjournment of the court for the time at which such causes were tried, and whether three judicial days shall have elapsed or not: provided, that this amendment does not apply to the parish of Orleans."

"The party, who believes himself aggrieved by the judgment given against him, may, within three judicial days after such judgment has been rendered, pray for a new trial, which must be granted, if there be good ground for the same." C. P. 558.

These Articles, construed with reference to each other, and to Article 555 of the same Code, which declares that all judgments thus rendered, shall be considered as having effect only from the last day of the term, whatever may be the day on which they shall have been signed, clearly imply, in our opinion, that no appeal lies from a final judgment which has not been signed by the

Judge. Such a judgment cannot be considered as having the effect of *res judicata*. 3 An. 482; 5 An. 401.

We think the appellee was in time to file the motion to dismiss before the cause was at issue upon its merits.

Appeal dismissed.

DERRIGY  
v.  
TREPANIER.

### J. M. SAUX v. F. LEFEVRE & Co.

An appeal from a judgment against the two members of a commercial firm *in solido*, taken by one of the partners only, dismissed on the ground, that the other partner against whom the judgment was rendered should have been made a party to the appeal, he having an interest in maintaining the judgment to secure his recourse against the appellant for his portion of the debt.

APPEAL from the Fourth District Court of New Orleans, Price, J.

*Budd & Lambert*, for plaintiff. *J. L. Tissot*, for defendants and appellants.

VOORHIES, J. The plaintiff in this case obtained a judgment against the defendants, *in solido*, for the sum of \$400, with interest and costs. *François Lefevre* alone appealed from that judgment. In his petition for the appeal, he alleges that the judgment was rendered against the members of the firm, now dissolved, individually and *in solido*, condemning him to pay the plaintiff the amount claimed in his petition.

The appellee has moved to dismiss the appeal on the ground, that the defendants, *François Lefevre* and *Joseph Figuierè*, have not been made parties to the same, or cited in the premises in accordance with law.

The only question presented is, whether *Figuierè* has an interest in maintaining the judgment. In taking the appeal, it is clear that *Lefevre* only acted for himself and in his own interest in the matter, and not for his partner; consequently, he must be deemed a principal, and not an agent of the partnership. Hence, it follows clearly, that the judgment against his partner, bound *in solido* with him, cannot be disturbed on this appeal.

Such being the case, then it is obvious that *Figuierè* has an interest in maintaining the judgment; otherwise, if reversed, he would inevitably lose his recourse against the appellant, his partner, for a contribution, in the event of his discharging the debt. Supposing that a judgment in this case would not effect *Figuierè's* interest, as he is not a party to the appeal, then it may be asked what avail would such a judgment be to the appellant, as he would still be liable to his partner for contribution?

Appeal dismissed.

SUCCESSION OF C. PASQUIER—Opposition of AUGUSTE VOINCHE to  
Tableau of Distribution.

Where the relevancy or competency of the evidence offered by a party on the trial of a cause cannot be judged of without knowing the purpose for which it was offered, and it does not appear by the bill of exceptions to the rejection of the evidence, that the party offering it was prejudiced by its rejection, the action of the lower court will not be reversed.

Where the evidence offered is apparently foreign to the case, the party offering it must show that it would be rendered material by other evidence which he undertook to produce.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*R. & H. Marr and Clark & Bayne*, for the curator, appellant. *Budd & Lambert*, for opponent and appellee.

**SPOFFORD, J.** This appeal presents only questions concerning the admissibility of certain evidence which the District Judge excluded, on the ground of irrelevancy to the matter in dispute.

To induce us to reverse the action of a District Judge in such a case, the appellant should show, by his bill of exceptions or by the record in the cause, that he was prejudiced by the ruling. Here there is no such showing. The appellant did not suggest that the rejected evidence would tend to exonerate the succession from liability to *Voinché* upon the notes, which formed the basis of his opposition. Although it be true that no replication to, or joinder of issue with the opponent is required in our practice, still the curator who refuses to acknowledge a claim against the succession, which is put in suit by way of opposition to his tableau, should at least disclose the purpose for which he offers evidence on the trial of the opposition; that purpose being stated, the court then can judge of the relevancy or competency of the evidence; without such a statement, the time of our courts of the first instance might be wasted in vain inquiries into collateral or even foreign matters, to the detriment of suitors and the delay of justice. Because counsel fancy that they may perhaps elicit something that will touch the case, they are not to be permitted to offer evidence which has no *prima facie* bearing upon it, and which they do not link with it by a statement of what they are prepared to prove. The true rule, we conceive, has been laid down by Greenleaf in his treatise on the law of evidence, vol. 1, sec. 51. It is not necessary that the relevancy of evidence should appear at the time when it is offered; it being the usual course to receive, at any proper and convenient stage of the trial, in the discretion of the Judge, "*any evidence which the counsel shows will be rendered material by other evidence, which he undertakes to produce.*"

The appellant here did not pretend to have it in his power to show that the notes held by the opponent *Voinché* against *Pasquier's* succession, or either of them, embraced any part of the opponent's claims, already allowed on the former tableau. Therefore, the evidence adduced on the trial of other issues with other parties, and the explanation of *Pasquier's* books touching an account heretofore adjusted, were, so far as appeared, irrelevant to this case. And the appellant's counsel, when he proffered evidence thus apparently foreign to the case, did not show that it would be rendered material by other evidence which he undertook to produce.

Judgment affirmed.

## JOHN A. P. MAPLES et al. v. MITTY and SARAH, f. w. c.

Children to the extent of the *legitime* are not considered as heirs, but as creditors of their father's estate. They are entitled to the revocatory action *only* for the enforcement of their *legitime*, beyond that they are mere ordinary heirs and cannot be heard to allege the turpitude or defeat the judicial confession of their father. Vide *Succession of Trimmell*, decided in 1854, opinion book 24, page 323.

APPEAL from the District Court of St. Tammany, *Watterson, J.*  
*G. S. Lacy, R. A. Upton, and Martin & Childress*, for plaintiffs. *A. Hennen, and J. R. Jones*, for defendants and appellants.

BUCHANAN, J. This is a suit instituted by the children and forced heirs of *Nathan Maples*, deceased, to set aside sales, made by the said *Nathan*, of the defendants in the cause, to one *Jenny Broxton*, their mother, as being simulated and in fraud of plaintiffs' rights as forced heirs. By a supplemental petition, the plaintiffs moreover pray that the emancipation of the said *Jenny Broxton*, and of her husband, *Phillip Broxton*, made many years before the sales of defendants to *Jenny*, be also revoked and set aside for the same reasons.

The question of the validity of the emancipation of *Jenny Broxton* and *Phillip Broxton*, cannot be considered by us. Both of those persons were dead at the time of the institution of the suit; and, even supposing that the action granted by Article 190 of the Civil Code, to revoke an emancipation made in fraud of the portion reserved to forced heirs, may be instituted after the death of the person emancipated, which we doubt, yet no issue has been joined upon this portion of the case, by any person claiming capacity to represent *Phillip* or *Jenny Broxton*.

The defendants except to the action, "because the same is disrespectful to the memory of the father and mother of plaintiffs, and such action cannot be sustained or allowed in a court of justice, as it casts a stain upon the character and reputation of their ancestors."

It is viewed by us as settled, that the children of the deceased, to the extent of the *legitime*, are not considered as heirs, but as creditors of their father's estate (*Rachal v. Rachal*, 4 An. 500); and that the law gives to the children the revocatory action, only for the enforcement of their *legitime*. *Succession of Trimmell*, decided in December, 1854, but not reported.

In the last mentioned case, the language of the court, through its organ, Chief Justice Slidell, was as follows:

For their *legitime*, they are, in legal contemplation, creditors. Beyond it, they are mere ordinary heirs, and as such cannot be heard to allege the turpitude, or defeat the judicial confession of their ancestors." Opinion Book 24, page 323.

In the present case, the verdict of the jury affirms the simulation of the two sales from *Nathan Maples* to *Jenny Broxton*, set forth in the petition, namely: 1st. That of defendant *Mitty* and her child *Joseph Robigo*, on the 11th October, 1831; and, 2d, that of defendant *Sarah* and her three children, *Arabella, Susan and Mary Jane*, on the 31st January, 1840.

With regard to the first of these sales, the record does not enable us to say, with confidence, that the conclusion of the jury was erroneous. There was a

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conflict of testimony; and in such cases much weight is due to the jury's appreciation of the credibility of the witnesses who testified before them, and who were personally known to them.

Supposing the sale of *Mitty* and her child to have been simulated, we are next to inquire, (under the ruling in the case of *Trimmell's Succession*,) whether the said pretended sale prejudiced the plaintiffs' *legitima*. On this point, *Abraham Penn*, a witness of plaintiffs, testifies that *Mitty* and her child were worth, in his opinion, from eight hundred to one thousand dollars, in 1831; and *John A. P. Maples*, one of the plaintiffs, examined as a witness on the same side without objection, estimates the value of *Mitty* and her child, at the time of the sale, at one thousand dollars. *Nathan Maples*, the father of plaintiffs, died in 1841. His inventory is in evidence, and shows him to have been possessed, at the time of his death, of property to the amount of three thousand one hundred and thirty-eight dollars. It is not shown that his succession owed any debts.

From these facts, we conclude that the value of *Mitty* and her child did not equal the disposable portion of *Nathan Maples'* estate, being one-third of the same; and, consequently, that plaintiffs cannot revoke the sale of *Mitty* by their father, on the ground of simulation.

As to the sale of *Sarah* and her children, we are of opinion that the evidence disproves the charge of simulation. The consideration of that sale, expressed in the deed, was "eight hundred dollars, all cash in hand well and truly paid, the receipt of which is hereby acknowledged, and acquittance granted therefor." On the same day, (31st of January, 1840,) and before the same notary, (the parish Judge of the parish of St. Tammany,) on which and before whom the sale of *Sarah* from *Nathan Maples* to *Jenny Broxton* was passed, the vendee, *Jenny Broxton*, made a sale to *Mrs. Mary Maples*, wife of *Nathan Maples*, and by him authorized, of two lots of ground in the town of Covington, with all the buildings and improvements thereon situated," for and in consideration of the sum of eight hundred dollars, all cash in hand paid, the receipt of which is hereby acknowledged by the said vendor and an entire acquittance and discharge granted therefor." The price of the lots sold by *Jenny Broxton*, and that of the slaves purchased by her, thus appear to be identical; and the probability is, that the transaction was in reality an exchange of the slaves for the lots, although the vendor of the slaves was *Nathan Maples*, and the vendee of the lots was *Nathan Maples'* wife. For *Mrs. Maples* was a party to the sale by her husband, for the purpose of renouncing her mortgages and privileges; and *Nathan Maples*, as we have seen, was a party to the sale of the lots, for the purpose of authorizing and assisting his wife to make the purchase.

The lots thus sold appear to have been treated in subsequent proceedings, as *Nathan Maples'* property, with his wife's acquiescence. As such, they were inventoried; and were subsequently purchased by his widow, at the probate sale of his effects, for the price of their estimation in the inventory, six hundred dollars. The title of *Jenny* to the lots thus sold by her, is proved by other evidence in the record. There is no doubt, therefore, of the reality of the sale of the said lots by *Jenny*. It is true, that they are shown to have originally cost *Jenny* only one hundred and twenty dollars, and that the same lots were subsequently adjudicated to *Mrs. Halsey*, at the probate sale of the effects of *Mrs. Mary Maples*, for one hundred dollars. But these variations of the market value of the lots, do not avail to make out the case of plaintiffs. Granting that *Nathan Maples* and his wife gave much more for the lots than

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they were worth, yet lesion is very different from simulation. The plea of simulation denies the reality of the sale. It does not seek relief on account of the inadequacy of the consideration. Here, the proof leaves no doubt on our minds that there was a real *bona fide* consideration for the sale of Sarah and her children, passing from Jenny Broxton to Nathan Maples.

It is, therefore, adjudged and decreed, that the verdict and judgment appealed from be reversed; and that there be judgment in favor of defendants; the plaintiffs and appellees to pay costs of both courts.

MERRICK, C. J., declined taking part in the decision of this case.

### EDWARD S. BODETT V. WILLIAM LEES & CO.

The mere delay to make payment of the amount of an award, when the debtor has taken no steps to set it aside and has not denied its obligatory force, and when no formal demand upon him to enforce it has been made, will not subject the debtor to the payment of the stipulated penalty in addition to the amount of the award.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
P. E. Bonford, for plaintiff. J. Q. A. Fellows, for defendants and appellants.

MERRICK, C. J. This suit is brought upon the following award and agreement, viz:

We, John McClain and John G. Poindexter, chosen as arbitrators by William Lees & Co., of this city, and Edward T. Bodett, also of this city, after a full and impartial examination of all the points of difference between said parties, and taking into consideration the whole subject-matter thereof, agree that the following statement, made by us, shall be considered as final and just, and recommend that the parties accept the same, and let it be the end of said controversy.

NEW ORLEANS, April 16th, 1855.

William Lees & Co.

To Edward S. Bodett, Dr.

To this, admitted by your acceptances..... \$115 30

To full pay, as per contract for one month..... 125 00

To this amount, for levee expenses..... 30 00

To this amount, for expenses and time while sick..... 47 20

Total..... \$317 50

Having agreed to the above, we hereunto sign our names in our aforesaid capacities, on the 16th day of April, 1855, at the city of New Orleans.

[Signed]

JOHN McCLAIN.

"

JOHN G. POINDEXTER.

"We hereby bind and obligate ourselves, our heirs, and assigns, each to the other, in the just and full sum of two hundred and fifty dollars, lawful money of the United States, to agree to, and be bound by, the decision above rendered by the arbitrators as chosen by us.

[Signed]

EDWARD S. BODETT.

"

WILLIAM LEES & CO.

NEW ORLEANS, April 16th, 1855.

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The plaintiff, in addition to his demand for the amount of the award, alleges that the defendants have "wholly failed and neglected to pay petitioner the amount awarded him as aforesaid, notwithstanding their obligation so to do and amicable demand, whereby they have become indebted to petitioner in the further sum of two hundred and fifty dollars, the penalty fixed by said bond as liquidated damages."

The defendants admit the correctness of plaintiffs' demand for the amount of the award, and plead the want of an amicable demand for the same, and deny all the other allegations of the petition. The court having sustained plaintiffs' pretensions the defendant has appealed.

The testimony does not show, that any demand had been made upon the defendants to pay the award previous to the institution of the suit. Even if such demand had been made we are by no means prepared to say, that the mere neglect of the defendants to make payment would have rendered them liable for both the award and the penalty.

Art. 1929, C. C., declares, that "The damages due for the delay in the performance of an obligation to pay money are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more."

Art. 2121, "The penal clause is the compensation for the damages which the creditor sustains by the non-execution of the principal obligation. He cannot demand the principal and the penalty together, unless the latter be stipulated for mere delay."

And by Art. 3073, C. C., it is announced, that "It is usual to undergo (impose) a penalty of a certain sum of money in the submission which the person who shall contravene the award, or bring an appeal therefrom, shall be bound to pay to the other who is willing to abide by it: but this covenant is not obligatory, (*essentielle*), and the submission may subsist without the penalty."

By Art. 3097, it is provided, that if a party appeals from the award he should first pay the penalty, but if he reverses the same on the appeal, the penalty shall be refunded him, but not if the award is affirmed.

In view of all these provisions of law we think it is clear, that the plaintiff has neither alleged nor proven a sufficient ground upon which the penalty of the bond can be declared forfeited. The defendants merely "bound and obligated themselves," under the penalty, "to agree to, and be bound by, the decision rendered by the arbitrators." They do not appear to have taken any steps to set aside the award, nor have they denied its obligatory force. Their delay to make payment, at least without a formal demand upon them, cannot be construed into such a forfeiture.

So much, therefore, of the judgment of the lower court as gives the plaintiff the penalty in addition to the award is erroneous.

The want of an amicable demand is not urged in this court as a ground of reversal of the judgment as to the costs.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and it is now ordered, adjudged and decreed by this court, that *George Edwards*, curator of the succession of *Edward S. Bodett*, deceased, do have and recover judgment against the defendants, *William Lees* and *Maxwell Felton*, *in solido*, for the sum of three hundred and seventeen dollars and fifty cents, with legal interest thereon from the 16th day of April, 1855, until paid; the plaintiff and appellee paying the

costs of the appeal, and the defendants the costs of the principal demand in the lower court, the costs of the sequestration having been disposed of by our former decree.

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BRITTON BENNETT v. J. H. WHEELER.

The Board of Underwriters in New Orleans being a body composed of private individuals, without being incorporated, and through their treasurer having received on deposit money to which the plaintiff was entitled, it was held: that a suit to recover the money could be maintained against the treasurer in his individual capacity.

APPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
A. T. W. Collins, for plaintiff. M. M. Cohen, for defendant and appellant.

MERRICK, C. J. The defendant acts as the secretary and the treasurer of the Board of Underwriters in this city. He is also a member of such board as well as secretary of the Home Mutual Insurance Company. The objects of the formation of the Board of Underwriters is stated by the president, who was examined as a witness in this case, to be, "To establish uniform rates of premium; that uniform policies may be issued; that uniform usages and customs of the port may be established; for the establishment of agents at home and abroad; to control generally the underwriting of New Orleans; to receive salvage money by consent, and to distribute it."

The plaintiff having the sum of \$932 50 in the hands of C. P. Bennett, his brother, deposited it with Messrs. Cleveland, Brothers & Co. of this city.

It appears that the plaintiff had been second clerk on the steamboat T. P. Leathers, and had obtained this money, or the principal part, by salvage of cotton thrown overboard at Tompkins' Bend in 1854, to save the T. P. Leathers from sinking. The plaintiff was discharged at the time of the accident, it seems, to enable him to remain and save the cotton and claim salvage: the steamboat, which was barely able to keep afloat, having proceeded to New Orleans for repairs.

C. P. Bennett was the captain and owner or part owner of the T. P. Leathers, and had a claim for insurance against the Home and Sun Mutual Insurance offices. Being informed that the insurance companies would not settle with him unless the money was paid over, he directed Cleveland, Brothers & Co. to pay over this money to the defendant. They, without doubting C. P. Bennett's authority to direct the payment, complied with the request.

Under the direction of the president of the Board of Underwriters, or some other member of the same, the defendant gave the following receipt, viz:

NEW ORLEANS, December 4th, 1854.

"Received of Messrs. Cleveland, Brothers & Co., nine hundred and thirty-two dollars and fifty cents.

\$932 50.

[Signed]

JAMES H. WHEELER,

Secretary of the Board of Underwriters of New Orleans."

The defendant, as the treasurer of the Board of underwriters, it appears, has the money still in his possession. The present action is brought against him

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individually, to recover back the sum of money deposited with him by *Messrs. Cleveland, Brothers & Co.* (as plaintiff alleges) without authority.

We understood the defendant's counsel in his oral argument to waive the question, whether the plaintiff could, after his alleged discharge as clerk, claim salvage on the cotton saved by him. The money, it is clearly shown, was deposited with *Cleveland, Brothers & Co.* by the plaintiff. Now, in a controversy between the plaintiff and the defendant, or the Board of Underwriters, for this sum of money, it is difficult to perceive by what argument they can successfully contest the right of the plaintiff to the fund. If it should turn out that the plaintiff is bound to refund any portion of the money to any other person, as improperly received by him, it would be no answer to such demand, that plaintiff's agents had improperly deposited it with the Board of Underwriters, who refuse to surrender the same. Plaintiff would in such case be bound to answer for the conduct of his agents.

The question then which presents the only real difficulty, as we conceive, is whether the suit can be maintained against the defendant in his individual capacity? Were the Board of Underwriters an incorporated company, and the defendant only acting as the secretary and treasurer of such incorporated company it is most clear, that the action could not be maintained in its present form. And it is possible that if the Board of Underwriters had in this transaction considered themselves as the mere agents of the Home and Sun Mutual Insurance Companies, and placed this sum of money to their credit, that the action could not have been maintained without a demand first made upon those companies and without making them parties to the suit.

But, as the case now stands, we find the Board of Underwriters to be a body composed of private individuals, who undertake to act as *quasi* agents for the benefit of several insurance companies in matters principally commercial. We do not understand their acts to be binding upon the companies except so far as special power is granted, or their acts are ratified. They appear to maintain a separate organization, having a distinct treasury, and are maintained by voluntary assessment upon the companies for which they assume to act. In the instance before us they have departed from their usual line of duties, and received a sum of money from a third person on deposit: for it is not pretended, that the Board of Underwriters themselves have any claim to this fund.

The president of the board, who is also president of the Crescent Mutual Insurance Company, says, that "He does not set up any claim to this money, nor does the office he represents." Did the Home and Sun Mutual Insurance companies conceive that they had any valid claim they would doubtless have intervened in these proceedings.

In regard to all business transacted by the Board of Underwriters in which they do not assume to act as agents, and which have not the express sanction of the respective insurance companies recognizing them as their agents, and particularly in the receipt of this sum of money, in which their agency is not apparent, they must be considered as partners. Whether they are to be considered as commercial partners, and bound *in solido* as such, or not, we do not think it important further to inquire: for if it be conceded, that the other partners have equally with the defendant received the irregular deposit, Art. No. 2928, C. C., binds *each* of them to restore the same.

The fact, therefore, that the defendant acted as secretary and treasurer as

well as a member of the Board of Underwriters, cannot relieve him from responsibility. If he be not responsible as secretary and treasurer, he is responsible as a member of the board; and, being treasurer, he will not find it difficult to free himself from liability by restoring the money, which he has in possession, to him who appears to be the legal owner.

Judgment affirmed.

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### R. W. RAYNE v. DAVID TAYLOR & Co.

Entries made by a Clerk in his employer's books, are *prima facie* evidence in favor of the former against the latter, when it is shown that the books were annually examined by the employer and that balance-sheets were semi-annually furnished to him, which embraced the disputed items.

**A**PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*C. D. Singleton*, for plaintiff. *Durant & Hornor*, for defendants and appellants.

**SPOFFORD, J.** There was no error in overruling the peremptory exception. There were no partnership accounts to settle, and it was competent for the plaintiff to demand the balance due him on the "loan account" merely. If there had been any equally liquidated sum due by the plaintiff to the defendant on other accounts, it might have been pleaded in compensation.

The reconventional demand was unconnected with the main action, and was properly disregarded.

It being proven that the books kept by the plaintiff's son were annually examined by the defendant, who spent a portion of his time each year in New Orleans, and that balance-sheets, including the account sued upon, were forwarded to him semi-annually, we think there was no error in admitting the books in evidence. The defendant appears to have found no fault with the entries when they were communicated to him. Coupled with the oral testimony they make out a *prima facie* case for the plaintiff, which has not been rebutted by evidence on the part of the defendant.

There was error in allowing interest at the rate of eight per cent., in the absence of a legal contract to that effect.

It is, therefore, ordered, that the judgment of the District Court be so amended as to reduce the interest upon the principal sum therein awarded, from eight per cent. to five per cent. *per annum*, and that, as thus amended, the said judgment be affirmed; the costs of this appeal to be borne by the plaintiff and appellee.

MERRICK, C. J., not present at the argument, took no part in the decision.

## JOHN S. SPENCER v. THOMAS AND CHARLOTTE BANISTER.

Where in a suit to enjoin a seizure of property as illegal and to recover damages, the judgment maintaining the injunction is silent as to damages, it is equivalent to a rejection of the claim for damages, and will sustain the plea of *res judicata* in a subsequent suit for damages.

**A**PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*S. L. Wooldridge*, for plaintiff. *Durant & Hornor*, for defendants and appellants.

BUCHANAN, J. The plaintiff having hired a house of the defendant, *Charlotte Banister*, at the rent of seventy-five dollars per month, payable monthly, became indebted in two months rent, which he neglected to pay; and defendant sued out a writ of provisional seizure in the Fourth District Court of New Orleans. Plaintiff, by a separate action in the same court, enjoined the execution of the writ of provisional seizure, on the ground that the Sheriff had seized and taken into possession under the same, the instruments, tools and furniture necessary for the carrying on of his profession, also of his bed and bedding, &c., all which plaintiff alleged were exempt by law from seizure; wherefore he prayed that the injunction be perpetuated, and for damages in the sum of five hundred dollars against said *Charlotte Banister*, for the illegal seizure. After hearing evidence upon this petition, the Fourth District Court rendered, on the 23d of April, 1855, the following judgment:

"It is adjudged and decreed, that the injunction be maintained, so far as the same applies to the articles above mentioned, and that the said injunction be dissolved and dismissed as regards any other articles seized, the plaintiff paying costs of suit."

It will be observed, that this judgment, although it partially perpetuates the injunction, awards no damages as claimed. On the 15th of May, 1855, being eighteen days after the signature of the judgment of the Fourth District Court just recited, the plaintiff brought the present action in the Sixth District Court of New Orleans, claiming three thousand dollars damages for an illegal seizure of his bed and bedding, and the tools and implements by which plaintiff gains a livelihood, "which by law are exempt from seizure and sale."

The seizure mentioned in this petition, is the same which was the subject of the injunction in the Fourth District Court. The plea of *res judicata* put in by the defendant, *Charlotte Banister*, to the present action, should have been maintained by the court below. The silence of the judgment of the Fourth District Court upon the plaintiff's claim for damages for the same seizure, was equivalent to a rejection of that claim. *Delahaye v. Pellerin*, 2 Mart. 149; *Robertson v. Penn*, 2 La. 61; *Williams v. Painpade*, decided in December, 1855, and not reported. See Opinion Book 25, p. 463.

The difference in the amount of damages claimed in the present action, from that previously claimed, is of no consequence. The cause of action is substantially the same; an illegal seizure of effects exempted by law from seizure.

As to the defendant, *Thomas Banister*, he seems to have merely appeared in the suit for rent, to assist and authorize his wife, for whose behoof alone judgment was prayed, and who made the affidavit for the provisional seizure.

Judgment reversed, and judgment for defendants, with costs in both courts.

W. B. PARTEE, Trustee, &c. v. SUCCESSION OF H. R. W. HILL—MRS.  
MARY R. LESTER, Intervenor.

The appointment by will of trustees to receive a sum of money bequeathed by the testator and to pay the interest on it annually to the legatee, will be disregarded if the legatee refuses to acquiesce in the creation of such an agency.

The legatee under such a disposition, is capable of standing in court and directly demanding payment of the legacy.

*Fidei-commessa*, the trusts of the English law, cannot be created in Louisiana and enforced in our courts.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*L. Hunton*, for plaintiff and appellant. *C. T. Estlin*, for defendant. *J. N. Brickell*, for intervenor.

SPOFFORD, J. The late *James Dick* made the following bequest in his last will:

"I give and bequeath to my niece *Mary R. Todd*, wife of *Sterling H. Lester*, and to her heirs, forty thousand dollars, and appoint as trustees, to invest the same and pay to her after receipts thereof, the interest annually, my friends *James Lea McLane* and *William B. Partee*, or either of them, in case of resignation or death of the other."

By another clause of the will, the legacy was not demandable until seven years had elapsed after the testator's death.

That time having expired, and *McLane*, one of the persons named as "trustees," having resigned or declined to act, *Partee* brought this suit against the representative of *Dick's* succession, for so much of the legacy as he averred to be due to *Mrs. Mary R. Lester*. That lady, assisted by her husband, intervened in the suit, and denied the right of the trustee, *Partee*, to claim the sum bequeathed to her, averring that he had become wholly insolvent, and that the clause of the will appointing him trustee was void by the provisions and policy of our law. She claimed a judgment in her own favor for the fund sued for by *Partee*. Her pretensions were sustained in the lower court, and *Partee* has appealed.

It is clear that the bequest was to *Mary R. Todd*, wife of *Sterling H. Lester*, and her alone. No interest in this legacy was to vest in any one else. If the clause referring to the trustees be considered as mandatory, in other words, as a condition or mode clogging the title of *Mrs. Lester*, then it is void, and must be considered as not written. New titles cannot be invented by testators. Absolute ownership bequeathed to a specific person, cannot be crippled by the appointment of supervisors of a class unknown to our laws, who shall, for the period of their natural lives, keep the owner out of possession against his will, and manage for him what he is capable of managing for himself. *Fidei-commessa*, the trusts of the English law, cannot be created in Louisiana and enforced in our courts. *C. C. 1507, 1506; Clague's Widow v. Clague's Executor*, 13 La. 7; *Harper v. Stanborough*, 2 An. 381; *Succession of Franklin*, 7 An. 412.

If the clause concerning the trustees be regarded as advisory merely, it need not be expunged from the will. If the legatee had chosen to avail herself of the testator's recommendation, *Partee* might have sued; for her acquiescence

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would have made him her agent, and he would have derived his powers from her, not from the mere force of the testator's will. We have expressed our views upon this subject in the case of the *Society for Orphan Boys v. New Orleans*, 12 An. 63.

But as she repudiates his authority, he is acting against his principal and cannot be heard; the will gave him no such interest in this legacy as would entitle him to demand it against the remonstrance of the party to whom it was bequeathed. She is capable of standing in court, and the judgment in her favor must be affirmed.

Judgment affirmed.

MERRICK, C. J., took no part in the decision of this cause, not having heard the argument.

CHARLES FONDA, Dative Testamentary Executor, v. G. L. BROOM  
AND D. N. HENNEN.

In a suit for damages where one of the defendants is charged with aiding and abetting the other in the commission of a wrong or injury, he has a right to demand a severance, and trial by jury.

**A**PPEAL from the Sixth District Court of New Orleans. Tried by a Jury before *Cotton, J. Durant & Hornor*, for plaintiff and appellant. *Benjamin, Bradford & Finney*, for defendant *Hennen*, appellee.

SPOFFORD, J. So far as the defendant *Hennen* is personally concerned, this must be regarded as an action in damages against him for wilfully aiding *Geo. L. Broom*, as executor of the will of *Samuel Broom*, to waste the estate and defraud the heirs and creditors.

Under such allegations as those made in the petition, and the separate answer of *Hennen*, there was no error in permitting a severance or a trial by jury as to *Hennen*, who is the only appellee. The discretion of the District Judge in this matter was not restrained by any arbitrary rule in the Code of Practice.

An examination of the record has not enabled us to say, that the jury and the court below erred in concluding that the charges of fraud and mal-practice against the appellee were insufficiently proven.

Judgment affirmed.

MUNICIPALITY No. 1, Praying for the Opening of Bienville Street, v.  
LAURENT MILLAUDON.

The confirmation of the tableau of assessment against property owners for their share of the benefit conferred by opening and improving streets, will not authorize the ordinary writ of *fi. fa.* to be issued against the party assessed.

The statute regulating that subject specially prescribes the mode of procedure, and being in derogation of the ordinary rules of practice should, therefore, be strictly pursued.

**A**PPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*Parker & Davis*, for plaintiff and appellant. *Benjamin, Bradford & Finney*, for defendant.

SPOFFORD, J. Proceedings were taken under the Act of March 30, 1832, p. 131, to open and improve Bienville street, in the city of New Orleans. In pursuance of the provisions of that statute, the report of the commissioners, assessing various sums against the appellee, *Millaudon*, for his share of the benefit conferred by the improvement, was duly "confirmed."

The appellants then took a rule on *Millaudon* to show cause why execution should not issue against him for the sums thus assessed; and they have taken this appeal from a judgment dismissing the rule.

The question whether execution will issue upon a confirmed report of commissioners in regard to the opening and improvement of streets, as upon money judgments, is to be solved by the terms of the Act of 1832. That Act provided an entirely new and artificial method of procedure, in derogation of the ordinary rules of practice. The Act, therefore, should be strictly pursued. We find no warrant in any of its sections or provisions for the position assumed by the appellants, that the confirmation of the tableau of assessment by the court, will authorize the ordinary writ of *fi. fa.* to be issued against a party whose proportional contribution is assessed by the report. On the contrary, a different mode of procedure upon the confirmation of the report, is specially prescribed and must be followed. Section seventh excludes the inference that execution was to issue upon the confirmed report as upon a judgment; it declares that the sums so assessed, "shall be borne, reimbursed and paid, together with six per cent. interest thereon from 30 days after the confirmation of said reports, \*\*\*" by the parties benefited; "and the sums so assessed shall be a lien on the lands" as a mortgage, when recorded; "and the owners of said property shall also be liable in a personal action for the same"; "and the personal action and the action to enforce the privilege may be cumulated; and, in default of payment of the same," or if the owners of the lots assessed be not found, "the corporation may, by resolution, direct orders of seizure and sale to be sued out of the court by which said assessment was confirmed, against the property assessed as aforesaid," &c., &c.

So, by the sixth section, the reciprocal remedy of the owner in whose favor an assessment has been made by the report against the city, after an unsuccessful application for payment, is to sue for and recover the same of the city, with six per cent. interest.

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We are not permitted to depart from the plain terms of such a statute as this, and, under the guise of construction, to give additional remedies in aid of its supposed objects.

Judgment affirmed.

BUCHANAN, J., took no part in this case.

S. J. HOGGATT v. MARTHA A. GIBBS, Tutrix.

BUCHANAN, J. The testator, who lived in Mississippi, owned, besides his property in that State, a large real estate in Louisiana, worth \$340,000. He bequeathed to his daughter, a married woman, \$30,000, upon the express condition that she should renounce, within twelve months after his decease, all claims upon the property of his succession situated in Louisiana: failing in which, she should forfeit the legacy of \$30,000. This sum was paid to her, and a deed of relinquishment executed by her in accordance with the requirements of the will. She received also the further sum of \$25,000 from the property of the father's succession situated in Mississippi. *Held*: That the receipt of these sums did not amount to a valid ratification of the act of relinquishment of her claims upon the estate of her father situated in Louisiana; that this deed of relinquishment was without effect, whether tested by the law of Mississippi or of this State. If the law of the former State is to govern, the deed would be void for want of the acknowledgment of the grantor, a married woman, apart from her husband, before a Judge or Justice of the Peace, that she signed, &c., without threats or compulsion of her husband. If the Mississippi statute, prescribing these formalities, be laid out of view, the general principle of the common law, which prevails in Mississippi, that a married woman being considered *sub potestate viri*, can, in general, do no act to bind her, would render this deed equally inoperative. 2. If the deed of relinquishment be judged by the law of Louisiana, it is equally void, as not having a lawful purpose. The testator left three children, who are his forced heirs, as to his real estate and slaves, situated in Louisiana, and the clause of his will requiring one of them to relinquish her lawful claim as heir to one-third of his Louisiana property, exceeding in amount to \$100,000, on receiving \$20,000 cash from his executors, under the penalty of being completely disinherited, was contrary to law, and, therefore, not a valid cause or consideration for the deed of relinquishment. The two sums of \$30,000 and \$25,000 must be viewed simply as so much received by her on account of her inheritance, and which she may be bound to collate.

SPOFFORD, J., concurring. *Held*: That in so far as the deed of relinquishment affected property situated in Louisiana, its force and effect must be determined by the law of this State, but expressed no opinion upon the validity of the deed, under the law of Mississippi.

MERRICK, C. J., also concurred in the opinion of BUCHANAN, J., but did not consider it clear that the deed of relinquishment should be considered as void; and doubted whether this deed should be set aside without plaintiffs first tendering to the defendants the \$45,000 which was received as his consideration out of the Mississippi estate, and which the testator had a right to withhold from his daughter.

**A**PPEAL from the District Court of Madison, *Farrar, J.*

*G. Eustis and H. Gaither*, for plaintiff and appellant. *C. Roselius and A. Snyder*, for defendant.

BUCHANAN, J. The defence to this action consists of the following exceptions; upon which the cause was dismissed in the District Court:

1st. That plaintiff is estopped from maintaining this action, because his mother, *Mrs. Agnes Williams*, through whom he claims, did, on the 22d of April, 1854, make a full ratification of her deceased father's will, and renounced all claim to the property mentioned in the petition.

2d. That plaintiff's mother received the legacy of twenty thousand dollars bequeathed by her father, and thereby ratified the will.

8d. That plaintiff's mother again ratified the will of her father by receiving, in accordance with the terms thereof, her proportion as residuary legatee, to wit, the sum of twenty-five thousand dollars.

4th. The plaintiff's action of rescission on account of lesion, is barred by the prescription of one year.

Upon the first of these exceptions the question arises, whether the form and effect of the deed of relinquishment and quit claim of the 22d of April, 1854, are to be governed by the law of Mississippi or of Louisiana.

The deed was made in Mississippi; and it was intended to have effect both in Mississippi and in Louisiana—in Mississippi, because both the grantor and the grantees (the children of *Anthony Hoggatt*) resided in Mississippi; and in Louisiana, because the thing conveyed or relinquished by the deed, was an interest in land, &c., in Louisiana.

If the law of Mississippi is to govern, the deed would be void for want of the acknowledgment of the grantor, a married woman, apart from her husband, before a Judge or Justice of the Peace, that she signed, sealed, and delivered the same as her voluntary act and deed, freely, without any threats or compulsion of her husband. See *Hutchinson's Digest*, page 608. And if it be objected that the Mississippi statute here quoted, refers by its terms only to lands lying and being in that State, yet it seems to be a general principle of the common law which prevails in Mississippi, that a married woman can, in general, do no act to bind her; she is said to be *sub potestate viri*, and subject to his will and control. 1 Peters, 339. That law presumes a *feme covert* to act under the coercion of her husband, unless before a court of record, a Judge, or some commissioner in England, by a separate acknowledgment out of the presence of her husband; and in these States, before some court or judicial officer authorized to take and certify such acknowledgment. 12 Peters, 375.

And if the relinquishment and quit claim of the 22d of April, 1854, be judged by the law of Louisiana, it is equally void. For that law requires that every contract should have a lawful purpose or motive. Civil Code, Art. 1772. An obligation without a cause, or with an unlawful cause, can have no effect. C. C. 1887.

Now, the cause or motive of the contract in question is stated on its face to be, a provision or provisions in the last will of the late *Nathaniel Hoggatt*, the father of the grantor and the grandfather of the grantees, by which the said *Hoggatt* devised to the grantees, as surviving children of his son *Anthony*, his lands, slaves, &c., in Madison parish, Louisiana, which the record shows to be worth three hundred and forty thousand dollars, and to his daughter, *Mrs. Agnes Williams*, the grantor, a sum of twenty thousand dollars in cash; and further, that if the said *Agnes Williams* should fail to make and deliver to said *Nathaniel's* executors, within one year after his decease, a deed relinquishing all her lawful claims to any share or portion of the property thus devised to the children of *Anthony*, then the devise in favor of said *Agnes* should enure to the testator's son *Anthony* and his lawful children.

*Nathaniel Hoggatt* left three children, *Anthony*, *Charlotte* and *Agnes*. Those three children were his forced heirs, as to his real estate and slaves, situated in the State of Louisiana. Civil Code, Art. 10. The clause of *Nathaniel Hoggatt's* will obliging *Agnes* to relinquish her lawful claim as heir, for one-third of his Louisiana property, which third exceeded one hundred thou-

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sand dollars, upon receiving twenty thousand dollars cash, from his executor, under the penalty of forfeiting those twenty thousand dollars, and thus being completely disinherited, was contrary to law, and is, therefore, not a valid cause, motive, or consideration for the deed which is pleaded as an estoppel, in the first exception of the defendants. C. C. 1613, 1616, 1488, 1506.

The receipts, by plaintiff's mother, of the two sums of twenty thousand and twenty-five thousand dollars respectively, which are pleaded by defendants in bar of this action, cannot have that effect, for reasons above given. They are to be viewed as so much received by *Mrs. Williams*, on account of her inheritance, and which the plaintiff may be bound to collate in the partition, that will take place between the parties. Indeed, so far as relates to the sum of twenty-five thousand dollars, paid to *Mrs. Williams* by the executor, as shown by her receipt, it was a distribution of property of *Nathaniel Hoggatt*, not devised in his will at all; in relation to which he consequently died intestate.

Upon the fourth exception, this action is not viewed by the court as one of rescission of a contract for lesion. C. C. 1855; see also Art. 1870.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; that the exceptions filed herein be overruled, and the cause remanded to be proceeded in according to law; and that defendant and appellee pay costs of appeal; the costs of the court below to abide the final judgment on the merits.

SPOFFORD, J. In so far as the act executed by *Mrs. Agnes Williams*, on the 22d of April, 1854, is to operate upon property situated in Louisiana, its form and effect is to be determined by the law of Louisiana alone. I, therefore, express no opinion upon the validity of that act under the law of Mississippi.

In all other respects, I concur in the opinion of Mr. Justice BUCHANAN.

MERRICK, C. J. It is with great hesitation that I yield to the decree in this case my concurrence.

As it respects this controversy, the effects left at the decease of *Nathaniel Hoggatt* must be considered as forming two successions. The one subject to the laws of his domicil in Mississippi, and composed of his lands and slaves in that State, and such movables as might be considered dependant upon that domicil; the other, his real estate and slaves in Louisiana, governed by the laws of the latter State.

Over the first, he had full power by the laws of Mississippi, to dispose by will, and could give all or a part to strangers or his children, as he should see fit.

The bequest of \$20,000 and the residuary legacy of \$25,000, must be considered as coming from the Mississippi succession. Conceding, therefore, that the will contains a *fidei commissum* prohibited by our law, I have doubts whether affairs had not arrived at that stage, at the time the authentic act was passed before the commissioner *Wood*, to admit of a valid ratification; and, further, whether the plaintiff can now be permitted to set aside the act without first tendering to defendant the \$45,000 which his ancestor has received as its consideration out of the Mississippi estate, and which no law prevented *Nathaniel Hoggatt* from withholding from his daughter.

These doubts I surrender to the clearer considerations of my colleagues.

## LLOYD SKANNEL v. S. W. TAYLOR.

A general printed notice in the newspapers of the dissolution of a copartnership, is not sufficient to bind one who has had dealings therewith; such person is entitled to special notice. Even if special notice is given, accompanied with the notification that certain persons will carry on the business, and settle that of the late commercial firm, these persons will be considered as agents of this firm for the settlement of its indebtedness.

Where a creditor of the former partnership drew on these persons (who continued the social style of the late firm) for account of a balance due him by the former partnership, and his drafts are protested for non-payment, and paid by the drawer *super protest*, a member of the former partnership who is sued for such balance, cannot maintain that there was a novation of the debt; the drafts are to be held as having been drawn on his agents by his authority.

The possession of protested drafts by the drawer is *prima facie* evidence of their payment by him.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*Clark & Bayne*, for plaintiff. *J. B. & C. T. Bemiss*, for defendant and appellant.

BUCHANAN, J. Defendant was partner of a commercial firm with which plaintiff did business. During such partnership, defendant's house fell in debt to plaintiff. On the first of July, 1851, a notice of the dissolution of the partnership was published in the newspapers. In the same notice, it was stated that the business of the firm would be continued by the two persons named, "*who alone will settle that of the late partnership.*"

The two persons named in the notice (neither of them being the defendant) used, it seems, the same social style as the previous house, which had incurred the indebtedness to plaintiff. Plaintiff, several months after the notice of dissolution, drew several drafts upon the house, which were accepted and charged to him in account current, but which were protested at maturity for non-payment, and paid by the plaintiff *super protest*.

Defendant being sued for the balance due plaintiff by his former house, pleads that the debt has been novated, by the acceptance on the part of the plaintiff of a new debtor, to whom he had delegated the payment of this debt by the notice of 1st July, 1851. There is nothing in the transaction amounting either to a delegation on the one side, or the acceptance of a delegation on the other.

A general printed notice in the newspaper of a dissolution of a copartnership, is not sufficient to bind one who has had dealings with the copartnership. Such a person is entitled to special notice. 3 Kent, 67; Story's Partnership, § 160; 7 Annual, 638; 22 Wendall, 194. And notice cannot be inferred in this case, from the fact of plaintiff's drawing bills upon the new house, for the firm or social name was unchanged; and he might have supposed the partners were unchanged. But supposing direct and special notice brought home to plaintiff of the announcement given to the public through the newspapers, still the defendant's case would be in no better a position. For that same announcement informed the public that certain persons (who afterwards chose to use the late social name,) would continue the business, and settle that of the late partnership. For the purposes of settlement of this debt and all similar ones, therefore, the persons named in the

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advertisement were constituted the agents of defendant, who withdrew from the firm; and the drafts drawn by plaintiff afterwards, were drawn upon defendant's agents by his authority.

The possession of the protested drafts by plaintiff, is *prima facie* evidence that he has paid them to the payees or endorsees of the same.

Judgment affirmed, with costs.

#### A. BEER & Co. v. THEIR CREDITORS.

In a contestation between opposing creditors and the syndic of an insolvent, on their opposition to the tableau of distribution filed by the latter, the decision of the court below on each of the claims in litigation, is a separate judgment belonging to the party in whose favor it was rendered, and binding upon all parties who did not appeal from it; nor can such judgment be disturbed on appeal, unless the party having an interest to maintain it is made a party to the appeal.

Creditors whose claims have been disallowed, cannot make themselves parties to the appeal without giving bond; the appeal bond given by the syndic, will not suffice to maintain the appeal on the part of such creditors; these creditors are alone aggrieved by the judgment disallowing their claims, and not the estate represented by the syndic. In conflicts between creditors in which the syndic is without interest, he cannot be permitted to interfere, and cannot maintain an appeal.

**A** PPEAL from the Sixth District Court of New Orleans, *Howell, J.*  
*Roselius*, for the insolvents, appellants. *Phillips and Race & Foster*, for appellees.

VOORHIES, J. *Wilson G. Hunt & Co., Pierson & Dunn, Auguste Wetter, D. Kelham*, and the *Louisiana Mutual Insurance Company*, creditors of the insolvents, opposed the tableau of distribution, filed by the syndic in this case, on the following grounds:

"1. Because the sum of \$4,397 61 of the funds collected by the syndic has been wrongfully retained or diverted from the creditors in the two items \$2,017 65, mostly for syndic's expenses, and the item of \$2,379 96, retained for sundry purposes."

"2. Because the sum of \$4,700 has been wrongfully retained by *Edwards & Fauchet*. The proceeds of sale should be put down at \$9,300 50, instead of \$9,590 50."

"3. Because the syndic has wrongfully placed on the tableau about one hundred and twenty-seven names as creditors for various amounts, when in fact there are no other creditors of this insolvency than these five opponents. These opponents, therefore, aver that each and every one of the other creditors of *A. Beer & Co.* have compromised, or been paid such claim or claims as they may have had against the insolvents, and have ceased to be creditors thereof, and cannot share or participate in the funds in the hands of the syndic, to the prejudice of these opponents and their payment in full, with interest and costs."

1st. On the first ground, the item of \$2,017 65, was reduced to the sum of \$1,179 53, and the one of \$2,379 96 rejected.

2d. On the second, the court held that the sum of \$4,710, instead of \$4,700, was properly retained by *S. Friedlander*, the holder of the notes secured by mortgage on the slaves sold by the Sheriff to him for that sum, in payment of said notes.

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2d. And on the third, the Judge *a quo* considered that it should "be sustained as to all the creditors on the tableau, who had not appeared to establish their claims," giving a list of those who had, &c.

The bilan of the insolvents exhibits a list of one hundred and thirty-two creditors, whose claims amount in the aggregate to \$214,201 70, and of whom only eighty-six appeared at the meeting and voted for syndic, &c. On the trial, according to the statement of the Judge, twenty-six of the creditors who appeared at the meeting and fourteen who did not, failed to appear and make proof of their claims.

An appeal from this judgment was granted to the syndic on his motion in open court, suggesting that there was error in the same, "as well to the prejudice of the creditors of the insolvency as to himself as syndic aforesaid, upon his furnishing bond and security conditioned as the law directs."

On motion of *Alfred Phillips, Esq.*, attorney appointed to represent the absent creditors, it was ordered that he should be permitted to join in the devolutive appeal thus granted to the syndic.

The syndic alone gave a bond of appeal with *David Goodman* as surety, leaving the obligee's name and the title of the suit in blank.

The opponents, *William G. Hunt & Co. et al.*, have moved to dismiss the appeal on three grounds:

"1st. That there has been no legal bond given by the appellants.

"2d. What purports to be the appeal bond does not name the appellants and appellees, nor does it give the title of the suit in which judgment was rendered from which they appeal.

"3d. These opponents are in no wise parties to this appeal, having neither been cited or mentioned in the appeal bond, as appellees."

It is clear that the decision of the court below upon each of the claims in litigation, must be considered a separate judgment belonging to the party in whose favor it was rendered, and binding upon all parties who did not appeal from it. 2 An. 546, *Girod v. His Creditors*. It follows then, as a consequence, that such judgment cannot be disturbed on appeal, unless the party having an interest to maintain the same has been made a party to the appeal. In the case at bar, the syndic's claim for commission, &c., has been reduced, as we have seen. This is a judgment in favor of all the creditors against him, which consequently cannot be disturbed without making them parties to the appeal.

The creditors whose claims have been disallowed by the judgment, are alone aggrieved by it, and not the estate represented by the syndic. In conflicts between creditors, in which the syndic is without interest, he cannot be permitted to interfere. *Ferguson et al. v. Their Creditors*, 19 La. 278; *Kohn, Syndic, et al. v. Wagner et al.*, 1 R., 275; *Pandelly v. His Creditors*, 1 An. 22. In the present case, it would seem to us, that it ought to be a matter of indifference to the syndic whether the claims of those creditors were allowed or not, the effect of which, if disallowed, would only result to the benefit of the others, and not to the detriment of the estate.

It appears to us clear, that the absent creditors whose claims have been disallowed by the judgment of the court below, cannot be considered parties to this appeal, as no bond of appeal appears to have been given by them.

As to the syndic, it appears to us also clear, that his appeal must be dismissed on the ground, that all the parties having an interest in maintaining

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the judgment, have not been made parties to it. Even conceding that the bond thus given be binding upon him in favor of the opponents, still we do not think it could be so considered as to the other creditors who have an interest in maintaining the judgment. This objection is considered fatal, and may be noticed, *ex officio*, at any time, even without any motion to dismiss, by the court. 11 An. 409; *Simmons v. His Creditors*, 12 An.

It is, therefore, decreed, that the appeal be dismissed at the appellant's costs.

H. J. MASSON et al. v. BERTRAND SALOY et al.

A mortgage executed by defendant on property claimed by plaintiff, pending the suit of the latter for its recovery, is without effect against him.

**A**PPEAL from the Second District Court of New Orleans, *Morgan, J.* *Hamner & Hays*, for plaintiffs. *C. Roselius*, for defendants and appellants.

COLE, J. This is an appeal taken by *B. Saloy*, one of the defendants, from a judgment ordering the erasure of certain mortgages made by *James E. Armor*, on the property of plaintiffs.

*James E. Armor*, pretending to be the sole heir of *Josephine Armor*, deceased, caused himself to be put in possession of the property of her succession, by a judgment of the Second District Court, in April, 1854.

In June, 1854, *Henry J. Masson*, one of the plaintiffs, instituted suit in the Second District Court, as heir of *Mrs. Armor*, and claiming of *James E. Armor* the whole succession, alledging that the said *Armor* held the same fraudulently.

In July, 1855, there was judgment in favor of *H. J. Masson*, recognizing him as one of *Mrs. Armor's* heirs, and declaring *James E. Armor* without any rights to said property.

An appeal was taken by *Armor* from this judgment, and subsequently to the appeal, on account of his inability to justify his security for a suspensive appeal, he abandoned all his pretensions, and made a quit claim, putting plaintiffs in possession of all the estate of *Mrs. Armor*, by notarial act.

Pending the suit of *Masson v. Armor*, for the recovery of the estate of *Mrs. Armor*, *James E. Armor* executed two mortgages on certain property belonging to the succession: one on the 20th November, 1854, in favor of *J. McCormick*, the interest of which is now in the defendant, and one on the 10th of January, 1855, in favor of defendant.

As these mortgages were executed on property claimed by *Masson* pending his suit to recover the same, they are without effect so far as he is concerned. C. C. 2427, 2428; *Citizens' Bank v. J. E. Armor et al.*, 11 An. 468.

The allegation of fraud and collusion is not sustained by the evidence.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

THE STATE ex rel. J. B. HARPER & SON v. THE JUDGE OF THE NINTH  
JUDICIAL DISTRICT.

The Act of 19th of March, 1857, providing for an interchange between the Judges of the 7th and 9th Districts, intended that, after the elections of April, 1857, those Judges should first hold the regular series of jury terms, each in his own district, before commencing the interchange.

The meaning of ambiguous words, &c., in a law, may be ascertained by examining and comparing with them the context of the law, and by considering its reason and spirit, and the cause inducing its enactment. C. C. 16, 18.

ON an application for a *mandamus* to the Judge of the Ninth Judicial District, *Harralson, J. U. B. & E. Phillips*, for relator.

SPROFFORD, J. The issue presented by the District Judge in his answer to the application for a *mandamus*, compels us to construe the Act, approved March 19th, 1857 (p. 270,) "to require the Judges of the Seventh and Ninth Judicial Districts to interchange."

It provides that after their election in April next, and after the first terms of their courts in their respective districts, the Judge of the Seventh District shall preside and hold the courts in the Ninth District, and the Judge of the Ninth District shall preside and hold the courts in the Seventh District, and so to continue alternating and interchanging, as not to hold courts consecutively in the same district for the trial of jury cases, as long as there are any recused cases in either of said districts."

Looking not to any single word but to the whole scope of this statutory provision, we think its obvious meaning is, that the Judge of each of the two districts in question, shall hold the regular series of jury terms, first throughout his own district, and then throughout the other district; for the Judge of each district is not required to commence a system of interchange, until he shall first have held "the courts," not a court in his own district; each is then required to preside and hold "the courts," not a court in the neighboring district; and this system thus inaugurated, is to be kept up by each Judge alternately holding the "courts" (i. e., the series of courts) in his own district and in the neighboring district, until the recused cases to be tried by preference are exhausted. The restriction upon the Judges "not to hold courts consecutively in the same district for the trial of jury cases," does not, as the respondent contends, inhibit them from going through the *parishes* of the same district consecutively, to hold a regular series of interchange terms, but was intended to prevent them from holding two series of interchange terms consecutively in the same district.

"Where the words of a law are dubious, their meaning may be sought by examining the context with which the ambiguous words, phrases and sentences, may be compared, in order to ascertain their true meaning." C. C. 16.

"The most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the Legislature to enact it." C. C. 18.

It is, therefore, ordered, that a peremptory *mandamus* issue, commanding the Honorable the Judge of the Ninth District to hold said term of court on Tuesday, the 15th of December instant, as prayed for.

BRIGET E. PORCHE, wife of J. A. LeBLANC, v. J. A. LeBLANC et al.  
and J. A. LeBLANC, Tutor, v. A. MILTENBERGER et als.—MADRIEN  
BREAUX and E. PORCHE, Interveners.

Where the wife renounces, in favor of a mortgage creditor of her husband, her prior tacit mortgage on his property, for the restitution of her paraphernal effects, such renunciation, which is a mere waiver of the rank to which her mortgage was entitled, does not subrogate the creditor to the wife's paraphernal claims against her husband; and this creditor, not being the transferee of those claims, cannot exercise the wife's right of mortgage. In asserting his claims upon the mortgaged property he can look only to his own mortgage, taking effect from the date of its inscription. Such a renunciation by the wife does not contravene Art. 2412 of the C. C. and is expressly authorized by the Act of 1835. A declaration, in the act of renunciation, that it shall deprive the wife irrevocably of all recourse on her husband's property, will not invalidate the contract, but may be treated as mere subterfuge, and is not binding on her. Nor does the husband's having stipulated with his creditor to procure her wife's renunciation affect in the least its validity, without proof of threats of violence on his part, or of fraud.

The vendor of an immovable or slave must cause the act of sale to be duly recorded, in order to preserve his privilege; if not so recorded within six days from its date, if passed in the place where the registry of mortgages is kept, adding one day for every two leagues from the place where it was passed to that where the Register's office is kept, it has no effect as a privilege—4. c. It confers no preference over creditors who have acquired a mortgage in the meantime, which they have recorded before it; but it will still avail as a mortgage, and be good against third persons from the time of its being recorded.

A resolutive condition is implied in every commutative contract, where either party fails to comply with his obligations; but such contract is not dissolved of right, and the party complaining of its breach may either sue for its dissolution, or demand a specific performance.

Compensation must be pleaded specially.

A merchant's books are not evidence in his favor; nor can they be used as such by his creditors to establish a debt claimed as being due to him, especially where no fraud or collusion between the merchant and his alleged debtor is charged or proved; nor can a partner be received as a witness to prove a debt due to the partnership.

Art. 2260, C. C., must be construed as applicable to cases in which the interest of an accendans or descendant of the witness is directly involved.

A bill of exceptions which does not state the grounds on which it is taken cannot be examined.

**A**PPEAL from the District Court of Terrebonne, *Cole, J.*

*L. Busch*, for plaintiff. *A. Beatty & Malhiot*, for defendants, intervenors and appellants.

VOORHIES, J. The forced alienation of the property of *Joseph A. LeBlanc*, made at the instance of several of his judgment creditors, has given rise to various oppositions on the part of some of his other creditors, claiming to be paid by preference out of the proceeds of the sale.

1. *Briget E. Porche*, his wife, alleges that he is indebted to her for her paraphernal property in the sum of \$7081 31, secured by a legal or tacit mortgage, for which she claims to be paid by preference over the other creditors. It is shown, that on the 29th of May, 1851, *A. Miltenberger & Co.* accepted a draft drawn on them by *Joseph A. LeBlanc* for the sum of \$1400, payable on the 20th of February, 1852, for the security of the payment of which the latter mortgaged to the former the property thus sold, stipulating at the same time to procure the renunciation of his wife in their favor. The mortgagees also stipulated to accept the drafts of the mortgagor, for his accommodation, for an additional sum of \$3600, payable at any time after the maturity of the one above described, and to be identified by the Notary with the act of mortgage. The inscription of the mortgage thus given appears to have been made on the

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7th, and the renunciation of the wife on the 30th of June, 1851. The evidence establishes the receipt by *LeBlanc* of the following sums of money for the account of his wife, to wit: in May, 1850, \$250 77; in May, 1851, \$1101 44; in May, 1852, \$749 70; and in May, 1853, \$728 06. In passing on her claim, the court below decreed, in distributing the proceeds of the sale, that *A. Miltenberger & Co.* be allowed \$250 77, "being the amount to which *Mrs. B. E. Porche* is entitled from May, 1850, and to which *A. Miltenberger & Co.* are entitled by virtue of the renunciation of the said *Mrs. LeBlanc*." And further, "to *Mrs. B. E. Porche*, wife of *J. A. LeBlanc*, for the use and benefit of *A. Miltenberger & Co.*, subrogated to her rights by virtue of her renunciation, \$1101 44, due as of May, 1850."

*Briget E. Porche* is appellant from the judgment thus rendered against her in favor of *A. Miltenberger & Co.*

We think the court below erred in holding, that the appellees were subrogated to the rights of the appellant. The rank to which her own mortgage was entitled, was the only thing yielded by the latter's renunciation in favor of the former. A mortgage is merely the accessory to a principal obligation. It follows then, as a natural consequence, that the right of mortgage can only be exercised by the obligee or transferee of the principal obligation. The appellees were not the transferees of the claim of the appellant against her husband; hence they could not exercise her right of mortgage. In asserting their claims to a preference, they could only look therefore to their own mortgage, taking effect from the date of its inscription on the 7th June, 1851. But it is conceded on her part, that the sum of \$250 77 constitutes the only matter in contestation, as the proceeds in question are absorbed by other mortgages acquired previous to the receipt of the other sums by her husband.

The validity of the renunciation, attacked on several grounds, and its admissibility in evidence, are therefore the only remaining questions submitted to our decision. In regard to the latter, as the objection could only go to its effect, we think it was properly overruled by the court below. It is urged that "the wife, under Article 2412 of the Civil Code, whether separated in property by contract, or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage." But the appellant in this case cannot be considered as having contracted any such obligation. It is true the renunciation of the wife in the case of *Gasquet v. Dimitry*, 9 L. R. 589, was considered as having the effect of making her surety for the payment of her husband's debts. But the law then in force, conceding the correctness of that decision, was subsequently so modified by the statute of 1835 as to authorize expressly the wife of full age to make such renunciations as the one under consideration. The declaration in the act of renunciation in the present case, that such renunciation deprived the appellant, irrevocably, of all recourse on the property of her husband, did not have the effect of invalidating her contract, inasmuch as such declaration may be treated as mere surplusage, and not binding upon her. Neither do we consider her husband's stipulation to procure her renunciation as affecting in the least her contract with the appellees, in the absence of any allegation or proof of threats of violence, or fraud on his part. The act of renunciation, in which the description of the property, as well as the nature of her claim upon the same is fully set forth, refers specially to the act of mortgage in favor of the appellees. Both these acts must, therefore, be taken to-

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gether, as the evidence of the contract between the parties; for we are not aware of any law which requires the nature and amount of the debt due by the husband to be specifically set forth in the renunciation which the wife makes of her right of mortgage.

2d. At the judicial sale of the estate of *Oliver LeBlanc*, deceased, made in the parish of Assumption on the 8th of July, 1848, *Joseph A. LeBlanc*, then a resident of the parish of Lafourche, became the purchaser of a slave named *Gabriel* for the price of \$1580, payable one-third in March, 1849; one-third in March, 1850, and one-third in March, 1851; with interest thereon at eight per cent. per annum, from their maturity until paid, for which he gave his three promissory notes, to the order of, and endorsed by, *M. A. LeBlanc*, and identified by the notary with the act of sale. To secure their payment, a special privilege was reserved on the slave.

The act of sale was recorded in the parish of Assumption on the 28th of September, 1848; in the parish of Lafourche on the 4th of September, 1851; and in the parish of Terrebonne, to which *Joseph A. LeBlanc*, the vendee, had removed on the 6th of October, 1851.

*Madame Breaux*, the surviving spouse of the deceased, and administratrix of his succession, claims the vendor's privilege on the proceeds of the slave *Gabriel*, embraced in the property thus seized and sold, and adjudicated to *A. Miltenberger & Co.* for the price of \$1400.

By the judgment of the court below, from which the administratrix is appellant, her claim to a mortgage and privilege was recognized to take effect only from the 6th of October, 1851, the date of the inscription of the act of sale in the parish of Terrebonne, giving the preference over her to the other creditors, whose mortgages and privileges had been previously recorded.

The appellant has submitted two questions for our decision.

"1st. As to the relative rank of the said vendor's privilege, and the tacit and judicial mortgages."

2d. Whether, in case said vendor's privilege should be considered lost from non-registry within due time, any change should be made in the judgment, in view of the danger of *A. Miltenberger & Co.*, as purchasers of the slave *Gabriel* to be evicted by an action in rescission of the adjudication of July, 1848, for non-payment of the price."

In order to preserve his privilege, the law requires the vendor of an immovable or slave to cause the act of sale to be duly recorded. His privilege is valid against third persons from the date of the act, when such act has been duly recorded within six days from its date, if passed in the place where the registry of mortgages is kept, or adding one day more for every two leagues from the place where it was passed to that where the Register's office is kept. C. C. 3238, 3240. But where the act has not been recorded within the time thus prescribed, Article 3241 of the Civil Code declares, "it shall have no effect as a privilege, that is to say, it shall confer no preference on the creditor who holds it, over creditors who have acquired a mortgage in the mean time, which they have recorded before it; it shall, however, still avail as a mortgage, and be good against third persons from the time of its being recorded." In the case at bar it is clear, that the act of sale, in consequence of its non-registry within the time required by law, can have no effect as a privilege. As a mortgage, it can only take effect in favor of the appellant from the date of its inscription on the 6th of October, 1851, as decided by the court below.

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The only question involved in the issue joined between the parties in this case is, whether the appellant is entitled to the vendor's privilege on the slave *Gabriel*. It is clear, therefore, that the question as to the danger of the eviction of the purchasers of the slave can not be raised by the appellant. Had the sale been on credit, in case of such danger, *A. Miltenberger & Co.* alone might, perhaps, avail themselves of the objection to suspend the payment of the price. (C. C. 2535.) But it is plain the appellant could not. Besides it is not very clear that the cause assigned by the appellant, would afford legal grounds of eviction. A resolutive condition is implied in every commutative contract, where either of the parties fail to comply with his engagement. But such contract is not dissolved of right; the party complaining of its breach may either sue for its dissolution, or demand its specific performance. The vendee's failure to pay the price, gives to the vendor the right to claim the dissolution of the sale. C. C. 2041, 2539. Whether the appellant's claim to the vendor's privilege in this case amounted to an implied ratification of the judicial sale, and consequent abandonment of her right to claim the dissolution of the sale from the deceased to the seized debtor, is a question on which we think it is unnecessary for us to express any opinion. We are, therefore, of opinion, that the judgment of the court below on this branch of the case ought not to be disturbed.

3d. On the 10th of April, 1851, *Henry M.* and *Henry C. Thibodeaux* obtained a judgment against *Joseph A. LeBlanc* on two promissory notes, drawn by him and *Dantin*, as commercial partners, each for the sum of \$8500, payable, one in February and the other in March, 1851, to the order of and endorsed by *Evariste Porche*, who was also sued by them as endorser. This judgment, recorded in the parish of Terrebonne on the 17th April, 1851, was transferred to *Evariste Porche* on the 1st of September, 1854, the transferers acknowledging the receipt of \$7000 on the 9th of May, 1851, as the consideration of the transfer with the right of subrogation to him.

*Porche* also filed due opposition in this case, claiming a preference on the Sheriff's sale for the payment of his judgment, secured by a judicial mortgage resulting from the registry thereof.

*A. Miltenberger & Co.* are appellants from the judgment of the court below sustaining his opposition, to which there appears to be no answer either by the appellants or the other seizing creditors.

It is urged in the appellant's brief, that the judgment thus transferred to *Porche* is extinguished by compensation; that he was in the habit of trading with *LeBlanc*, who was a merchant keeping a regular set of books, which exhibit the following balances against him, to wit: \$3219 58, due 1st March, 1849; \$2688 89, due March 1st, 1850; and \$322; making, with 8 per cent. interest thereon from maturity, a few dollars more than the amount of his judgment.

On the trial below, *Porche* objected to the introduction of *LeBlanc's* commercial books, and to the testimony of *Dantin*, on the grounds: 1st, because the evidence was inadmissible under the pleadings, no allegation having been made of his indebtedness to *LeBlanc*; and even had such an allegation been made, the evidence would still have been inadmissible, inasmuch as the claim urged against him is unliquidated, and not allowable as a plea in compensation; 2dly, because the books could not be used in evidence against him in favor of *LeBlanc* or the creditors of *LeBlanc*; and, 3dly, because *Dantin* was incom-

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petent as a witness to prove the correctness of the books or accounts of the firm of *LeBlanc & Dantin*, of which he was a member, on the score of interest.

We think the court below erred in overruling these objections. Conceding, for the sake of argument, that the compensation urged by the appellants against the appellee was at all available, as a matter of defence, it should have been specially pleaded. "The books of a merchant cannot be given in evidence in their favor; they are good evidence against them, &c." C. C. 2344. If the merchant cannot give his books in evidence in his favor, it seems to us to follow as a natural consequence, that his creditors also cannot exercise that right, especially in the absence of any allegation or proof of fraud and collusion between the former and his debtor against the latter.

The objection to *Dantin's* competency as a witness, on the ground stated, appears to us to be well taken, and ought to have been sustained by the court below.

The decision of the question as to the sufficiency of the evidence to sustain the ground of defence urged by the appellants, is therefore considered by us as immaterial. The judicial mortgage in favor of *Evastie Porche* is, therefore, entitled to take effect from the 17th of April, 1851, the date of the recording of his judgment in the parish of Terrebonne.

4. An opposition was also filed by *Joseph A. LeBlanc*, as natural tutor to his minor children by a former marriage, in which he alleges that they are entitled as heirs of *Marie Celina Thibodeaux*, their deceased mother, to the following sums, secured by a legal or tacit mortgage, \$1000, which he received in 1845 on account of his said deceased wife from the estate of her mother, *Marie Rosalie Hymel*, deceased spouse of *Henry M. Thibodeaux*, and converted to his own use and benefit; and \$3710, the one-half of the property of the community between him and his said wife, which was dissolved by her death on the 16th July, 1846.

The court below considered that the minors were entitled to recover the sum of \$1388 32, \$1000 of which as the paraphernal property of their mother, and the residue as her interest in the community, and accordingly gave judgment in their favor.

*A. Miltenberger & Co.* are also appellants from this judgment.

It is insisted by them, that the evidence is insufficient to establish the paraphernal claim of \$1000, without the testimony of *E. Porche* and *L. Barras*, to the admission of which our attention has been directed to two bills of exceptions taken by them on the trial below.

*Porche's* incompetency as a witness is placed on the ground, that *Briget E. Porche*, his daughter, is one of the parties litigant in this case.

The Article 2260 of the Civil Code, on which the appellants rely for the exclusion of this witness, must be construed, in our opinion, as applicable to cases in which the interest of an ascendant or descendant is directly involved in the controversy. In the present case the claim of the minors is opposed only by the appellants. Had it been also opposed by *Briget E. Porche*, then the objection to the competency of the witness would certainly have been good.

The other bill of exceptions merely sets forth, that *L. Barras* on his examination "stated his belief that *H. M. Thibodeaux* had paid *J. A. LeBlanc* the amount coming to the wife of said *J. A. LeBlanc* from the settlement of the estate of her mother, wife of said *H. M. Thibodeaux*, but did not know it

himself, and the creditors objected to such evidence, &c." As the grounds on which this objection rests are not stated in the bill of exceptions, we are not permitted to examine it. *Duplessis v. Kennedy*, 6 L., 242. We have, however, given to the testimony the legal effect or weight to which it is entitled, taking into account the fact, that the witness should have stated the circumstances on which his belief was founded.

The appellants also insist, that the other amount allowed to the minors is not sustained by the evidence. The only question presented on this point is one of fact. A careful perusal of the evidence has satisfied us of the correctness of its decision by the court below.

It is, therefore, decreed, that the judgment of the court below, so far as it declares *A. Miltenberger & Co.* to be subrogated to *Briget E. Porche's* right of mortgage, be amended in favor of the latter by reversing and avoiding the same, as prayed for in her answer to the appeal; that the mortgage claim of said *A. Miltenberger & Co.* be only classed to be paid in preference to that of the said *Briget E. Porche*, by virtue of the renunciation of the latter; and that, in all other respects, said judgment be affirmed, with costs.

SPOFFORD, J., and COLE, J., took no part in this decision.

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#### A. HATCHETT v. STEAMER COMPROMISE AND OWNERS.

The clause in a steamboat's bill of lading reserving the privilege of reshipment, implies an obligation on the part of the boat to reship, if the stage of water in the river does not permit her to prosecute her voyage to her point of destination, and the reshipment is possible; and the additional expense of thus forwarding the goods by another boat, is charged to the boat with which the original contract of affreightment was made, the consignors being bound to pay only the freight specified in the bill of lading.

Low water is not to be classed among the dangers of the river, excepted in the bill of lading, and which absolve the carrier from his obligation to deliver the goods without unnecessary delay and in good order and condition.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*Elmore & King*, for plaintiff. *J. Vanmeter*, for defendant and appellant.

BUCHANAN, J. The plaintiff claims of defendants under a contract of affreightment, by which the latter bound themselves to carry merchandise from New Orleans to Shreveport, for one dollar and fifty cents a barrel, *with the privilege of reshipping*. The Red River being at a low stage of water, the Compromise could not get further up than Alexandria, and availing herself of the clause of the bill of lading, transferred the freight to a boat of less draft, the White Cliffs, to be taken from Alexandria to Shreveport. But the White Cliffs put the freight ashore upon the banks of the river at points short of the port of destination; and the plaintiff was only able finally to obtain his goods, by making a contract directly with the White Cliffs, for a very greatly advanced rate of freight. He brings this suit to be reimbursed the difference between what he contracted to pay the defendants, and what it actually cost him, to get his goods to Shreveport.

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We are of opinion, that the clause in the bill of lading in this record, "with privilege of reshipment," implied an obligation to reship, if the stage of water in the Red River did not permit the Compromise to prosecute her voyage to Shreveport, and if reshipment was possible in any steamboat that could make the voyage; and that the additional expense of forwarding the freight by another boat, is chargeable to the Compromise. The obligation of this common carrier under his bill of lading, was to deliver the goods at Shreveport, without unnecessary delay, in good order and condition, unto the consignees, or assigns, they paying the specified freight and no more (the dangers of the river and fire only excepted). Low water is not to be classed among the dangers of the river, which absolve the carrier from this conventional obligation.

The judgment of the District Court is, therefore, affirmed with costs.

#### HOLLAND v. DUCHAMP.

An appeal will not lie to the Supreme Court in an injunction suit to arrest the execution of an order of seizure and sale for a less amount than three hundred dollars, although the property seized is worth more than \$300, and the plaintiff in injunction claims in his petition a larger sum for damages and attorney's fees.

**A** PPEAL from the Third District Court of New Orleans, *Duvigneaud, J.* *J. Livingston*, for plaintiff and appellant. *H. Pedesclaux*, for defendant.

**COLE, J.** A motion has been made to dismiss this appeal on the ground, that the matter in dispute does not exceed three hundred dollars.

Plaintiff sued out an injunction to arrest the execution of an order of seizure and sale, granted on a mortgage note of \$250.

He maintains that this court has jurisdiction, because the land seized on which the mortgages existed, is worth more than \$300, and because he has asked, in the petition of injunction, for five hundred dollars damages and one hundred dollars attorney's fees.

The value of the land seized, cannot invest this court with jurisdiction, because in order to relieve the land from the seizure, it would be necessary to assume jurisdiction over a suit of an amount less than \$300.

The same objection applies to the damages claimed, for they are averred to have been suffered from the illegal and premature issuing of an order of seizure and sale for an amount less than \$300, and we could only decide on the liability of appellee for the damages, by inquiring into the correctness of that judgment.

It is clear that this court is without jurisdiction of this cause.

It is, therefore, ordered, adjudged and decreed, that this appeal be dismissed with costs.

## JAMISON &amp; McINTOSH v. L. C. DUNCAN.

The Art. 671 C. C. being derogatory of the right of property must be strictly construed. The right granted thereby to the first proprietor of lands in cities, who builds, to take possession of the land of his neighbor for the foundation of his building, must be confined to the side walls, and cannot prevent the latter, who afterwards builds, from occupying the whole front of his land; but he has no right to avail himself of the side wall before paying half the cost of its execution. Damages refused to a builder against whom an injunction has been sued out, where the whole foundation of his claim for damages is a supposed hindrance thrown in his way in executing a building contract which confessedly required for its execution the use of a side wall erected by the plaintiff in the injunction, and for which he has not been compensated, where the party against whom damages are sought to be recovered, has resorted to legal means to maintain what he conceives in good faith to be his just rights.

The courts should restrain within reasonable bounds, the infliction of pecuniary penalties against a party who has only attempted to pursue what he in good faith supposed to be his legal rights, according to the forms of law.

**A**PPPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*Durant & Horner*, for plaintiffs. *G. B. Duncan, C. Roselius, and J. McConnell*, for defendant and appellant.

**BUCHANAN, J.** This suit has grown out of that of *Duncan v. Labouisse* and others, reported in 9th Annual.

Its history may be stated as follows: *Lucius C. Duncan*, the defendant, being the owner of a lot of ground on Carondelet street, in the city of New Orleans, on which he erected a house, availed himself of the right given him by the Art. 671 of the Code, to put one-half of the side-wall of his house on a lot adjoining, which was then vacant. Subsequently, *Mr. Labouisse*, the owner of the vacant lot, intending to improve the same, made a contract with *Jamison & McIntosh*, the plaintiffs, by which the latter agreed to erect for *Labouisse*, for a price stipulated, a five story store, of which the depth from the street, height of stories, size of timbers, openings, slating, copper and tin works, flooring, partitions, plastering, stairways, marble mantels, flagging, water-works, and all other works and materials, whether specified or not, were to be of the same quality and finish as the adjoining store (above mentioned), belonging to *Lucius C. Duncan*, with some exceptions specified; of which one was, that the entire front of the store was to be of the best Quincy granite, built and finished off precisely in the same manner as another store indicated.

Now, the store of *Mr. Duncan* was supported in front upon cast iron columns of which one faced the side wall, on the side towards *Labouisse's* lot; one-half of said column standing in front of the portion of the side wall which had been built on *Labouisse's* land.

In the execution of the contract with *Labouisse*, *Jamison & McIntosh* proceeded to make use of the side wall erected by *Duncan*, as a wall in common, without having made the previous indemnification required by Art. 672 of the Code, in order to render it such. They also commenced cutting the cast iron column at the corner of the wall in two, perpendicularly, for the purpose of removing the one-half thereof, and replacing the half thus removed by a column of Quincy granite, in conformity with their contract aforesaid. At this stage of the proceedings, *Duncan* commenced suit against *Labouisse* and *Jamison & McIntosh*, alleging that the iron column in question had been erected

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by express agreement with *Labouisse*, and that the half of the side wall, erected by *Duncan*, had not been paid for by *Labouisse*. The petition concluded with a prayer for an injunction to prevent *Labouisse* and *Jamison & McIntosh*, "from proceeding to the injury or destruction of the said wall or any part thereof." A writ of injunction issued upon this petition, commanding *Jamison & McIntosh* and *Labouisse* "not to injure the iron column of the wall of the building."

Judgment was rendered in that suit in the District Court, decreeing "that the injunction so far as it prohibits the use of the division wall between the properties of the plaintiff and the defendant *Labouisse*, be maintained, and that the defendants be prohibited from the further construction of any works upon said wall until it shall have been made a wall in common, as provided by law; and that as respects the cutting of the iron pillar in front of said wall, up to the division line of the two properties, that the injunction be dissolved." From this judgment a suspensive appeal was taken to this court, and the judgment of the District Court was affirmed, "without prejudice to *Duncan's* right of action for damages for the breach of *Labouisse* of the alleged parol agreement between *Labouisse* and *Duncan*, mentioned in the petition." 9 An, 49 and 607.

It appears that *Jamison & McIntosh* suspended all work upon the building from the time that the injunction was served upon them (April, 1853), until after the judgment of the Supreme Court was rendered (January, 1854); and have brought the present action for a thousand dollars and upwards, damages alleged to have been incurred by the issuing of the injunction aforesaid, and stated in a bill of particulars annexed to the petition under the heads:

- 1st. Of interest upon the installments of the price of contract, while the building was suspended.
- 2d. Of increase in the price of building materials between the periods of suspension and resumption of the work.
- 3d. Of extra labor in removing granite.
- 4th. Of lawyer's fees paid in defending the injunction suit.

The District Court, acting upon the evidence adduced upon these different items (except the last, upon which there was no proof), has given judgment in favor of plaintiffs for six hundred and ninety-eight dollars and twenty-five cents, from which the defendant appeals.

It is manifest that the elements of damage which make up the judgment herein, are erroneous. There was no reason for the suspension of the work upon the building contract, except the volition of plaintiffs. The writ of injunction served upon them, merely required of them not to injure or destroy the iron column. And the evidence, even of plaintiffs' witnesses, proves that the building might have been completed according to contract, without disobedience to this injunction. The only consequence would have been, that as thus completed, the corner of *Labouisse's* front wall adjoining *Duncan*, would have been supported by an iron column instead of a granite one, which the contract called for. It is proved by several witnesses, and the statement is not contradicted, that the iron column would have supported the additional weight. Supposing that the building had been thus completed, the evidence shows us that, upon the dissolution of the injunction, the iron column, or the half of it, could have been removed without difficulty or danger, and a granite column substituted in its place. The column to be substituted would necessarily have been of the same height as the one removed, for we have seen that

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the building contract refers to *Duncan's* store, as the guide for the height of the stories. The extra cost of this operation is all that the plaintiffs could have been properly entitled to under the evidence.

Parties are too prone to exaggerate their own damages; and there is nothing which more frequently requires the careful attention of the courts, than the restraining within reasonable bounds the infliction of pecuniary penalties in civil suits, for acts of commission or omission. And this attention is the more required, when, as in the present case, a party is sued for damages for having attempted to pursue what he supposed, in good faith, to be his legal rights, according to the forms of law.

In the case of *Duncan v. Labouisse*, this court, for the first time, interpreted the law of walls in common, in a very important particular. Basing ourselves upon the doctrine of one of the most eminent of French commentators (Toullier), we held that the Article 671 of our Code, was derogatory of the right of property, and should therefore be strictly construed; and that the right of the first proprietor of land in cities, who builds, to take possession of the land of his neighbor for the foundation of his building, must be strictly confined to the side walls, and cannot prevent his neighbor, who afterwards builds, from occupying the whole front of his land, as shown by his titles, in such a manner as his taste may dictate. That this question was by no means unattended with difficulty, in its application to this case at least, is proved by the fact, that two of the five Judges of this court dissented from the judgment rendered.

And it is proper that the regard for the right of property, which has dictated the strictness of our rule as to one of the parties, should also have effect in construing the rights of the other.

Accordingly, it was held by the judgment of the District Court in the case of *Duncan v. Labouisse*, which we affirmed, that those plaintiffs had no right to make use of the side wall which *Duncan* had erected at his sole expense, before paying *Duncan* the half of the cost of erecting the same; and the evidence shows that the plaintiffs paid nothing towards the cost of the said wall, until after judgment of the District Court pronounced in the injunction suit. Yet the whole foundation of the present claim for damages is a supposed hindrance thrown in the way of plaintiffs in executing a building contract, which confessedly required for its execution the use of the side wall thus erected by the defendant.

He who seeks equity must do equity. We are of opinion that plaintiffs have failed to make out a cause of action.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and judgment is hereby rendered for the heirs of defendant, with costs of both courts.

POLICE JURY OF THE PARISH OF JEFFERSON *v.* MANUEL VILLAVIADO.

The Supreme Court is without jurisdiction to determine whether an ordinance of a municipal corporation levying a tax, or imposing a fine, forfeiture, or penalty, less than \$300, has or has not been repealed by an Act of the State Legislature.

**A**PPEAL from the District Court of Jefferson, *Burthe, J.*  
*Purvis & Dugué*, for plaintiff. *B. C. Elliott*, for defendant and appellant.

MERRICK, C. J. This suit was brought to recover of the defendant two hundred dollars, under an ordinance of the Police Jury of said parish, on account of retailing spirituous liquors, as the keeper of a coffee house, without a license.

It is evident that this court can only consider the legality of the ordinance in question and not the facts upon which the decision rests.

The defendant's counsel arrives at the illegality of the tax by the following reasoning:

"We assert," he says, "that said proceedings (of the Police Jury) are irregular, and of no binding force and effect for this. The Legislature of the State has defined the mode to be pursued by Police Juries of the several parishes, in assessing and collecting taxes on property, professions, &c. Revised Statutes, p. 410, sec. 20: 'The Police Juries of the several parishes of this State, before they shall fix and decide on the amount of taxes to be assessed for the current year, shall cause to be made out an estimate exhibiting the various items of expenditure, and shall cause the same to be published in one newspaper published in the parish at least thirty days before the meeting to fix and decide on the amount of taxes to be assessed as aforesaid.' Sec. 17: 'A vote of a majority of all the members elect of the Police Juries shall be required to levy any parish tax, and in levying any parish taxes the Police Jury shall levy a uniform *per centum* on every species of property, trade or profession.'

"Now, it will be seen," so the counsel continues, "that the ordinances under which the plaintiff proceeds is of date anterior to 1849, and by the Act of the Legislature (1856) quoted above and now in force, is virtually repealed; the Act of the Legislature requiring a yearly assessing and levying of taxes on trades, professions, &c., and a condition precedent, in the making and publishing of a statement of the various items of expenditure, and at least thirty days before the meeting to fix and decide the amount of taxes to be raised as aforesaid.

"The ordinance under which they sue is obsolete and has no legal existence. They have not passed the ordinance for the current year, have not made out and published the yearly statement, as required, thirty days before passing any ordinance levying or fixing the tax on professions, trades, &c.; and, lastly, they have not, in accordance with law, by a vote of the majority of all the members elect of the Police Jury, laid, fixed, or levied, the tax on professions, &c."

From this statement of defendant's case it appears, that the question which he desires to submit to us is whether the ordinance contained in a pamphlet

printed in 1849, which he presents with his brief, was *repealed* by the Act of the Legislature in 1856. This court has not jurisdiction to revise the *construction* which the lower court may have put upon the latter Act by its decree in this case. The court could only consider the legality or constitutionality of the Act, and not a mere question of repeal. See *State v. Third Justice of the Peace of New Orleans*, 12th An.

The defendant's counsel further considers, that the bringing of the suit is itself a license to the defendant to retail spiritous liquors for a year. The bringing of the suit was a fact, and the District Court alone was authorized to make deductions from the facts, and this court cannot revise its findings.

In conclusion, we see no ground presented by the appellant, which will justify us in assuming jurisdiction in this case.

It is, therefore, ordered, adjudged and decreed by the court, that the appeal in this case be dismissed, at the costs of the appellant.

SPORFORD, J., dissenting. I think the question, whether an ordinance of a municipal corporation levying any tax or imposing any fine, forfeiture, or penalty, has been repealed by an Act of the State Legislature, is a question within the appellate jurisdiction of this court, although the matter in dispute does not exceed \$300. *Constitution, Article 62.*

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THE STATE ex rel. GREGORY and CAROLINE OSER v. THE THIRD JUSTICE OF THE PEACE OF THE PARISH OF ORLEANS.

Where the amount in controversy does not exceed \$300 the Supreme Court is without jurisdiction, unless the case involves the constitutionality or legality of some tax, toll, or impost, or of some fine, forfeiture, or penalty of a municipal corporation. Such a case is not presented in a suit by the farmer or lessee of a market to recover the dues or rents of stands in such market, as fixed by ordinance of the Common Council of New Orleans.

If laws and ordinances of a municipal corporation, not unconstitutional in themselves, are misapplied by the inferior tribunal, it is not in the power of the Supreme Court to relieve the parties where the amount involved is insufficient to give jurisdiction.

ON Application for a *Mandamus* to the Third Justice of the Peace of the city of New Orleans. *J. W. Dirrhammer*, for the Relator.

MERRICK, C. J. A rule has been taken against the defendant to show cause why a writ of *mandamus* should not issue against him, to compel him to rescind an order setting aside an appeal to this court, which he had previously allowed the relators in four suits before him, wherein he had rendered judgment against them and in favor of one *Tourné*.

In answer to the rule, the defendant shows for cause why said *mandamus* should not issue, that said cases were instituted by the farmer of the St. Mary's Market for the recovery of dues owing to him, for the rent of two coffee stands in said market; that the defendants were the occupants and tenants of the stands, and the dues were payable daily; that on the failure of relators to pay their *per diem* rent, suits were brought at the end of each week amounting to the sum of twenty-four dollars, and that he considered that the cases could not come under the provisions of Art. 62 of the Constitution, as they involved merely an ordinary question of rent due for the occupation of two stands in the market of which the plaintiff was the rightful farmer and lessee.

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It is clear, that the matters in controversy are not within our appellate jurisdiction, unless these cases bring in contestation the constitutionality or legality of some tax, toll, or impost, or of some fine, forfeiture or penalty imposed by a municipal corporation.

The answer of the defendant, which is not controverted, shows that none of the above questions were before the lower court for trial. But if we look into the petition of the relators, to ascertain the grounds of their complaint, we find that they complain that ordinance No. 3872 of the Common Council of New Orleans is illegal and unconstitutional as being *ex post facto*, and especially contrary to Article No. 105 of the Constitution of the State.

The ordinance is in these words: "Resolved, that the provisions contained in Article 33 of the ordinance No. 418, approved November 20th, 1852, so far as relates to coffee stands, be made to apply to all the public markets in this city. Provided, that this resolution shall not be construed in such manner as shall impair or interfere with the right and privilege of any lessees of said markets. And provided further, this resolution shall not be construed so as to conflict with any of the provisions contained in ordinance No. 2458, approved November 29th, 1855."

No. 33 of ordinance 418 is in these words: "Art. 33. That the farmers or lessees of the vegetable markets of the Second District shall not be entitled to collect other dues than those hereinafter mentioned, viz: For each vegetable table of four feet, and each stand for the sale of poultry, game, bread, fruit, fifteen cents: it being understood for every table or stand situated at the end of any of the rows of the tables in the market, the farmer shall be entitled to charge twenty cents, and it shall be the duty of the Surveyor to designate which are corner tables; and for each coffee stand one dollar."

It is apparent from an examination of these ordinances, that they do not *per se* impose *ex post facto* any fine, forfeiture, or penalty.

If laws and ordinances, not unconstitutional in themselves, have been misapplied by the inferior tribunal for want of a correct appreciation of the facts in cases where the amount involved is under three hundred dollars, it is not in the power of this court to relieve the parties. See case of *Board of Health v. Pooley, Nicol & Co.*, 11th An., 743.

As in these cases we have no power to revise the facts, this court at least is bound to suppose they have been rightfully determined.

Rule discharged at the costs of relators.

#### JAMISON & McINTOSH v. DANIEL FAIRÈS.

Plaintiffs purchased certain premises of which defendant had been the lessee of their vendor for a term of years, already expired, they assuming to prosecute to final judgment a suit commenced by him to oust his lessee, who claimed a tacit reconduction of the lease. This suit resulted in a judgment in their favor, under which defendant surrendered the property to them. *Held*: That a written notice given by the plaintiff to defendant of their purchase, and that they would look to him for the rent, was not an agreement on their part to charge the same rent as was stipulated in the expired lease.

**A** PPEAL from the Sixth District Court of New Orleans, *Kennedy*, Judge of the Third District Court, presiding. *Durant & Hornor*, for plaintiffs. *Brevelius* and *Phillips*, for defendant and appellant.

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VOORHIES, J. On the 26th of November, 1856, the plaintiffs in this case purchased from one *Joseph Duma*, a certain lot of ground and the buildings thereon. In the sale, the plaintiffs declared their knowledge of the pendency of a suit involving the question as to the defendant's right of lease to this property; and, being subrogated expressly to the rights of their vendor, stipulated to prosecute said suit to a final judgment, which was accordingly done.

The defendant, it appears, held the property under a contract of lease with *Joseph Duma*, for the term of three years from the 1st of June, 1853, for which he stipulated to pay a monthly rent of \$100, and to make all such repairs as might become necessary. At the expiration of the term, he insisted on his right to renew the lease on the same conditions, but his claim was rejected by a judgment in favor of the plaintiffs, under which he surrendered the property to the latter on the 27th of January, 1857.

The refusal of *Duma* to renew the lease, is then conclusively shown. We do not think the written notice of the plaintiffs to the defendant of their purchase, and that they would look to him for the rent, can be fairly construed into any agreement on their part to charge the same rent as that stipulated in the original lease which had expired, as we have seen.

The amount claimed by the plaintiffs for the rent of the property, is proved to be reasonable.

Judgment affirmed.

MERRICK, C. J. The opposition by and refusal of the plaintiffs to re-let the property to the defendant, precludes all idea of a tacit reconduction. I concur, therefore, in the opinion of Mr. Justice VOORHIES in this case.

#### E. GIROD v. M. J. BELKNAP.

The knowledge of the existence of a disease in a slave by the buyer, which would deprive him of his action to rescind the sale for a redhibitory vice, must be clearly established. It will not be sufficient to prove merely, that there was some conversation about the health of the slave, although the vendee may have said "he knew all about the slave."

APPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*A Dufour*, for plaintiff. *Kounts* and *J. J. Michel*, for defendant and appellant.

COLE, J. This is a suit for the rescission of the sale of a slave, on the ground of a redhibitory disease. There was judgment in the lower court for plaintiff.

The evidence shows, that the slave is afflicted with stricture of the rectum, and that plaintiff has done all in her power to effect a cure; she caused, under the advice of physicians, a surgical operation to be performed, which relieved her slightly.

It appears from the testimony, that a perfect cure cannot be attained.

*Dr. Chaillé* testifies, that the operation was performed by himself, assisted by *Dr. Mercier*, that she was temporarily relieved thereby, but he expected at the time she left the hospital that the stricture would return as bad as before, and that the relief would not be permanent, and thought that success in this particular case was very doubtful—he also states that such a disease, during its existence, most assuredly disables a slave, unless relieved or removed by an operation.

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*Dr. Dumont* testifies, that she is incapable of rendering any services for she is too weak.

*Dr. Turpin* says, that a slave afflicted with this disease is perfectly useless, for it induces every species of disorders.

*Drs. Turpin and Dumont* believe that this disease existed in the slave before the sale.

*Dr. Kennedy* declares, that he does not think a stricture of the rectum can be cured even if taken before it becomes chronic, from the fact that the commencement of this disease is not suspected, and when once made manifest by symptoms, the probability is that it has progressed so far as to be ultimately incurable.

Defendant has tried to show by some conversations that occurred about the time of the sale by her to plaintiff, that the latter was cognizant of the disease before the sale and consequently cannot now plead it as a valid ground for the rescission of the sale: but these conversations do not show that the nature and extent of the disease were explained to plaintiff.

In order to make knowledge of the existence of a disease, fatal to a claimant for a rescission of a sale for redhibitory defects, it must be clearly established, that the vendee was aware of the disease for which the redhibitory action is instituted, and it is not sufficient to prove merely, that there was some conversation about the health of the slave, and that the vendee said, "she knew all about the slave," for it may be that the slave may be affected with some disease only known to the vendor.

The evidence shows, that the vendee refused to pay the money for the slave unless the clause of warranty was inserted. It might be concluded from this, that during these conversations, the vendor insisted that the slave was but slightly affected; but that, notwithstanding this, plaintiff insisted on the insertion of the clause.

The opinion of the physicians as to the existence of this disease before the sale is corroborated by the fact, that a previous owner of the slave sold her to *Bernard Kendig*, the vendor to defendant, and only warranted her in title; and also by the conversations between plaintiff and defendant just before passing the sale; which show, that the slave was spoken of as being in some way sick, although neither the nature nor extent of the disease were made known to plaintiff.

We think there is no error in the judgment.

Defendant suggests, that even if the sale is rescinded, she ought not to be held liable for the costs of the first trial.

It appears there was a judgment of nonsuit on the first trial against plaintiff, because she had not alleged that the disease existed anterior to the sale, but the Judge afterwards granted a new trial, and allowed plaintiff to amend by making this averment; it also appears that the evidence taken on the first trial was by agreement of counsel admitted *de novo* in evidence, with the exception of *Dr. Chaillé's* testimony.

We are of opinion that defendant is liable for the costs of the first trial.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

## JAMES SAUNDERS v. JOSEPH W. CARROLL et al.

It is a sound rule of construction never to consider laws as applicable to cases which arose previous to their passage, unless the Legislature have in express terms declared such to be their intention.

The Act of the Legislature declaring, that debts shall bear interest at the rate of five per cent. per annum from the time they become due, unless otherwise stipulated, is not applicable to debts which were contracted and became due before the passage of that law.

**A**PPEAL from the Fourth District Court of New Orleans. Tried by Jury.  
*Price, J. Simonds & Fenner*, for plaintiff and appellant. *Singleton & Clark and Elmore & King*, for defendant.

**SPOFFORD, J.** The only question now at issue is, whether the defendants, acceptors of a bill of exchange, are liable to the plaintiff for any interest thereupon after maturity and prior to judicial demand.

*Crutcher & McRaven* of Vicksburg, Mississippi, being indebted to *James Saunders* of Lynchburg, Virginia, on the 15th of March, 1851, drew their bill upon *Buchanan, Carroll & Co.* of New Orleans, at eight months after date, to the order of *James Saunders*, for \$2991 48, and afterwards put the drawees in funds to meet the same at maturity.

The bill was drawn in duplicate upon one piece of paper and thus remitted by letter to the drawees, with instructions to accept it and remit it to the payee (the plaintiff *Saunders*) at Lynchburg, Virginia. With these instructions the acceptors complied immediately and literally, and requested *Saunders* to acknowledge the receipt to *Crutcher & McRaven*. It would also seem, from evidence offered by the plaintiff, that the acceptors advised their constituents, *Crutcher & McRaven*, that they had complied with instructions, by forwarding the accepted bill.

It appears that the plaintiff, nearly five years after the maturity of this bill, found it in an old box of papers in his house at Lynchburg. Meanwhile, he had done nothing in relation to it, and it would seem that, until a short time previous to this search among the papers in his house he was unaware of its existence, although he had been in business relations with *Crutcher & McRaven* all the time, and had claims upon them for an unliquidated balance.

The explanation of this singular occurrence, so far as it is to be gathered from the record is, that at the time of the arrival of *Buchanan, Carroll & Co's* letter containing the bills, and for many weeks afterwards, the plaintiff was absent from Lynchburg on public business; that his son, who managed at least some part of his business and took his letters from the post office, received and opened the letter of *Buchanan, Carroll & Co*; that he put the bill away among the papers where it was finally found; that before the return of his father he was killed; and thus, that no communication was had between the father and son relative to the matter.

The ground upon which the plaintiff seems mainly to rely to charge the defendants with interest from the maturity of the paper, although no demand was made, is, that the demand was rendered impossible by the negligence of the acceptors in forwarding the first and second of exchange upon one paper and in one letter to Lynchburg, instead of retaining the duplicate.

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The duty of *Buchanan, Carroll & Co.* was to obey the directions of *Crutcher & McRaven*, who were their only principals in this matter. This they seem to have done. No intimation was given them, that they were expected to retain the duplicate. On the contrary, the two bills were remitted to them as one instrument unsevered, with instructions to remit it to *Saunders*. And if they would have been justified in severing the paper, it does not appear that the plaintiff has suffered at all from their neglect to do so. If they had retained the duplicate and forwarded it within a short time by a succeeding mail, it would, in all likelihood, have shared the same fate with the original. At any rate, the plaintiff received both; and it appears, that he sent both in one envelope (for they are still unsevered) to his agents in New Orleans, for the purpose of making this demand, thereby committing the same error of judgment, if error it be, in his own affairs, which he charges upon the defendants.

His tardy recovery of the instrument is not attributable to a fault of the defendants; the evidence shows, that it is directly attributable to his own loose mode of conducting his business, his neglect of proper directions as to the disposition of his letters and bills receivable in his absence from home, and his failure to keep proper accounts and a business correspondence with his debtors, *Crutcher & McRaven*. The bill was negotiable in form, and the acceptors had no ground to suppose that it was still in the hands of the payee; or, that he had failed to receive it. It was not their duty to institute a search for it, but they had a right to await its presentation at their counting room by the holder, whoever he might be.

Interest was not due from the maturity of the bill, there being no stipulation to that effect, and no putting in default shown.

But it is contended, that interest is recoverable from the passage of the Act of 9th March, 1852; Sess. Acts, 95.) "All debts shall bear interest at the rate of five per cent. per annum from the time they become due, unless otherwise stipulated."

The debt was contracted and had become due before the passage of that law. If it were competent for the Legislature to annex a new condition to the contract of the parties, we should be bound to presume that they did not intend to do so, unless their language could bear no other interpretation. Retrospective laws, and laws affecting contracts already made, are so repugnant to logic and natural justice, that it cannot readily be supposed that the lawgiver intended to pass them; see C. C., Art. 8. It has repeatedly been held in this court to be a sound rule of construction, never to consider laws as applicable to cases which arose previous to their passage, unless the Legislature have, in express terms, declared such to be their intention. See cases cited in Hennen's Digest, p. 829, No. 4. *Succession of Taylor*, 10 An., 511. And in general, the courts both of England and America strive so to interpret statutes as to give them a prospective operation only. See *Moon v. Durdan*, 2 Exchequer R. 22. In *Baily v. the Mayor, &c.*, 7 Hill, 146, it was held, on this principle, that a statute authorizing interest to be taxed upon verdicts did not apply to verdicts rendered before the Act was passed, although the language of the Act was broad enough to embrace them. See also *Plumb v. Sawyer*, 21 Conn. 351.

And so we think that by the Act of March 9th, 1852, the Legislature did not intend to supply any new ingredient in existing contracts. They only provided, that in all contracts thereafter made, and debts thereafter created, it

was to be implied, that interest at five per cent. should be due by the obligor after maturity, unless otherwise stipulated. In the case of *Barnes v. Crandell*, 19 An. 112, we held, that interest cannot be claimed on a judgment which does not bear interest on its face, and which was rendered when no general law was in force by which interest was superadded to it.

The agreement as to interest was one of the tacit clauses in the contract of these acceptors. To find out what they agreed upon in that regard, we must have recourse to the laws in force at the date of the contract. Article 1940, No. 1 of the Civil Code declares, "that no general or special legislative Act can be so construed as to avoid or *modify* a legal contract previously made." C. C. Art. 8.

"Pour *suppléer les clauses* non exprimées dans un contrat, il est clair qu'on ne peut se reporter qu'à la loi qui existait au jour où il a été passé. Dans ce cas, en effet, c'est l'intention des parties qu'il s'agit de rechercher; or, ce n'est pas à une loi qui n'existait pas encore que la pensée de ces parties s'est reportée pour régler ce qu'elles laissaient inexpliqué dans leur acte. Compléter cet acte par les règles de la loi nouvelle, ce serait donc la faire *rétroagir*." 1 *Marché*, No. 53.

Finally, it was contended, that interest is due from the inception of a suit previously commenced upon this cause of action, but in which a nonsuit was taken by the plaintiff. It suffices to say, that prior to the institution of that suit the defendants had tendered payment of all that we find to have been due upon the bill, which was refused unless the interest wrongfully demanded were paid also.

Judgment affirmed.

#### D. F. LOWBER v. T. J. MCCOY.

The lack of full and explicit pleadings, will not compel the rejection of pertinent evidence, the existence of which was previously known to the party objecting to its introduction.

By a contract made in Alabama and which was not recorded in Louisiana, defendant put it in the power of W. so to act, that an innocent purchaser in Louisiana might be deceived and defrauded. Plaintiff was deceived and purchased in good faith a slave, which the defendant, without plaintiff's consent, afterwards got possession of and carried away—defendant was condemned to return the slave or to pay his value in damages.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*

*Clarke & Bayne*, for plaintiff. *Benjamin, Bradford & Finney*, for defendant and appellant.

*Sporrord, J.* There is but one bill of exceptions in the record. It was taken to the admission in evidence of a notarial act of sale passed in New Orleans, from *Jacob B. Walker* (the original owner of the slave in controversy) to *Stephen Truslues*, the vendor of the plaintiff *Lowber*. The objection is based upon the ground that no such title had been set forth in the plaintiff's pleadings.

Whatever difficulty this question might have presented under other circumstances, appears to be removed by a portion of the evidence which has been

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received without objection. The object of pleading is to notify the adverse party of the nature of the claim or defence, that he may be prepared to rebut it and not be surprised on the trial. On various occasions, this court has held, that if the record discloses notice previously brought home to the party so that it was impossible for him to have been surprised, the lack of more full and explicit pleadings will not compel the rejection of pertinent evidence, the existence of which was previously known to the party objecting to its introduction.

In this case, it appears from a letter written by the defendant to the plaintiff before the institution of this suit, that he was apprised of the fact that the plaintiff derived his title from *Walker*, and that the validity of this title was to be tested by a lawsuit. *Lowber* was in possession of the slave for many months under a title in the State of Louisiana. *McCoy* wishing to avail himself of the supposed advantages of possession and perhaps of an Alabama forum, took the slave away from Louisiana without the consent or knowledge of *Lowber*. He then wrote *Lowber* the letter above referred to; it is in these words:

"When I saw you yesterday, I told you that I would not take *James*, but afterwards I consulted a lawyer and he advised me to a different course, so I took him away peaceably. Now all I want is to try who owns him, and I say I do, but the court will determine that; if he is not mine, I have nothing more to say, but I know I paid for him fourteen months ago, a long time before Mr. *Walker* disposed of him in New Orleans."

It thus appears that the defendant was aware that both parties were to claim under *Walker*, the common vendor, and that the question to be litigated was, which of *Walker's* deeds conferred the better right. Accordingly we find him in his answer, charging the defendant *Lowber* and his immediate vendor, *Trustlues*, with acquiring their pretended rights to the slave *James*, in bad faith and with notice of the transfer from *Walker* to himself.

We are of opinion that the defendant should derive no benefit from his act of removing the slave without leave from this State, and from the control of the party who had a lawful possession under title.

The sole question is, can the title of *McCoy* under *Walker* prevail over that of *Lowber* under *Walker*? There is written and oral evidence unobjected to, of a power from *Walker* to *Rowley* to sell his slaves then in the possession of *Rowley*, among which it is established that the slave *James* was included. The acts of sale from *Walker* to *Trustlues* and from *Trustlues* to *Lowber*, are translatives of property, and it is proven that possession followed both acts, so that there was a continuous adverse possession in the plaintiff and his vendor as against *Walker* and *McCoy*, from the 27th of May, 1853, the date of the sale from *Walker* to *Trustlues*, up to the 19th of May, 1854, when *McCoy*, who never had possession before, carried off the slave without leave, and against his promise to *Lowber*.

*McCoy* claims under an act executed in Alabama, on the 17th of March, 1853, by *Walker* to himself, purporting to be a sale of several slaves, (including the boy *James*), with the condition "that the possession of the said slave should remain with the said *Walker* for the space of twelve months." The evidence shows that this was really a conditional sale, amounting to a species of mortgage for an antecedent debt, as one of the attesting witnesses deposed that the slave *James* was, at the date of this act, in New Orleans, and that there

was an agreement at the time, that if the amount of the debt was not paid in twelve months, the slaves were to be given up to *McCoy*.

By this peculiar contract, (which has never been of record in Louisiana, although recorded in Mobile on the 20th of April, 1853,) the defendant put it in the power of *Walker* so to act, that an innocent purchaser in Louisiana might be deceived and defrauded. *Lowber* purchased in good faith and without notice a slave, to which his vendor in Louisiana exhibited a complete title from one who is conceded to have been the original owner in Alabama. Can such a vendee or mortgagee as *McCoy*, who, in contracting for his own security, assented to a clause giving the control of the slave for twelve months, in Louisiana, to his vendor or mortgagor, oust an innocent purchaser, like *Lowber*, who bought her, within the twelve months, and received possession under a chain of title from *Walker*, without any notice of the legal or equitable claims of *McCoy* in Alabama?

The defendant's allegation that *Lowber* had notice of his claims, is unsupported by evidence.

On account of the usurpation of possession of *McCoy*, and his removal of the slave from this State under the circumstances disclosed, he cannot shelter himself from responsibility by pleading the non-registry of the private acts of sale from *Truslues* to *Lowber*. He has no title himself recorded in Louisiana, and he knew that *Lowber* was in possession under title. His own acts led to the deception of *Lowber*, and he cannot be permitted to profit by his wrong.

The judgment is in the alternative for the restitution of the slave, or damages to the extent of his value with hire. We think the damages should not be reduced.

Judgment affirmed.

*Lowber*  
v.  
*McCoy*.

#### WATTS, GIVENS & Co. v. SHROPSHIRE & SON.

Where it appeared that defendants had sold the barge that plaintiffs illegally attached—*Held*: That defendants could not maintain an action of damages for loss of freight, by reason of the illegal seizure.

**A**PPPEAL from the District Court of Jefferson, *Burthe, J.*

*Mott & Fraser*, for plaintiffs. *Duncan & McConnell*, for defendants and appellants.

MERRICK, C. J. This suit was commenced by attachment in the parish of Jefferson, upon two acceptances of the defendants. The attachment was levied upon a barge, the *Jenny Lind*, which was subsequently released by a dissolution of the attachment, it being proven that the defendants were residents of and domiciled in New Orleans, though temporarily absent at the time the attachment issued.

The defendants have set up a reconventional demand, wherein they claim \$2,250 damages occasioned by the loss of freight which they would have been enabled to earn under a contract they had made, if the barge had not been seized under the writ of attachment.

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v.  
SHROPSHIRE.

We think with the District Judge, that the defendants had parted with their interest in the barge at the time the seizure was made; hence, they had no right of ownership in the barge to vindicate. The loss of freight was not defendants' loss. It is true that the proof does not show that *actual* delivery had been made by the *Shropshires'* agent, at the time the seizure was made. The witness, *J. M. Savage*, says that the barge was in his possession and under his control, as agent for defendants, and while he was in treaty for the sale of the barge, but before he had made the sale, the defendants telegraphed him from Cincinnati, Ohio, that they had sold the barge to a *Mr. Greer*, of Covington, Ky., and instructed him to deliver the barge to said *Greer's* order; that *Mr. Greer* subsequently gave him an order for the delivery of the barge to *Mr. Emerson*, the Captain of the steamer *Henry Lewis*, and that subsequently to receiving the dispatch that the barge had been sold, and before he had received the order for the delivery, the barge was attached in this suit. The vendees took possession of the barge after the dissolution of the attachment.

Whether the dispatch to *Savage* would amount to a constructive delivery, sufficient to defeat the attachment had it been properly levied, is a question not necessary to determine. For it is clear that the mere contract of sale had divested the defendants as between themselves and *Greer* and *Greer's* vendee, of all ownership in the property. C. C. 2431. The subsequent taking of possession by *Greer's* vendee, must relate back to the date of the original sale. As it is not pretended that the vendee complains of any obstacles thrown in the way of the delivery of the barge to him, and inasmuch as the defendants complain only of an injury to their rights of property as owners, we think that the reconventional demand cannot be maintained.

Judgment affirmed with costs.

#### A. M. FELTUS v. T. O. STARKE.

Suit was brought in Mississippi against defendant by attachment. No service of process was made upon him, and the only evidence of his appearance was an entry on the minutes, that "defendant waives proof of publication, and saying nothing in bar or preclusion of the plaintiff's action, but herein wholly make default whereby the same remains altogether undefended." *Held*: the judgment against the defendant by the laws of Mississippi was not personal, and no action can be maintained upon it, as such, in our courts.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.* *Cotton* and *Dorsey*, for plaintiff. *J. S. Holt, jr.*, for defendant and appellant.

MERRICK, C. J. This suit is brought upon a judgment rendered in the State of Mississippi on proceedings in an attachment. No service of process was made upon the defendant. The only evidence of the defendant's appearance to the action is found in the following entry, viz:

"And afterwards, to wit, at a Circuit Court continued and held in and for the county of Wilkinson, at the court house in Woodville, on the nineteenth day of June, 1849, came the said plaintiff by his attorney, and the said defendant waives proof of publication, and saying nothing in bar or preclusion of

the said plaintiff's action, but herein wholly make default whereby the same remains altogether undefended."

The plaintiff contends, that the above proves the appearance of the defendant, and that the judgment was properly regarded by the lower court as one *in personam*.

The defendant on the other hand contends, that the recital in the minutes, under the decisions of the courts of Mississippi, proves nothing, as there was no service of process, and that the judgment only operated upon the property attached.

Although the defendant filed no plea, and entered no formal appearance, we should have been inclined, on reference to the common law authorities, to consider the entry on the minutes of the court as sufficient proof of his appearance were it not for the decisions of the courts of Mississippi, wherein it appears to be held: that where there has been no *actual service* such recital is insufficient. See *Miller v. Ewing*, 8 Smedes & Marshall, 421; 2 S. & M., 213, 307; 1 Howard, 53; 4 Howard, 402; Dutch Code, 807.

The judgment, therefore, could only operate on the property attached, and cannot be made the basis of a judgment against the defendant personally. See 2 An., 571; *Ridley v. Ridley*, 2 Cush. R. 656; Hutchinson's Code, p. 807; 3 Bouvier Inst., 201; *Cloughton v. Black*, 24 Miss. 185; 1 Tidd's Practice, 238, 240; *Ib.* 505, 507.

We do not think defendant has established his reconventional demand with sufficient certainty to entitle him to recover, but that he ought to be left to seek his remedy in the courts of equity of the State where the land lies, and which he says would grant relief in a like case.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that the plaintiff's demand, as well as defendant's reconventional demand, be dismissed as in case of nonsuit, the plaintiff paying the costs of both courts.

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#### JACOB MUSSINA v. WILLIAM ALLING et al.

It is competent for the court to order the plaintiff to furnish security for costs, where the Clerk has neglected to exact such security, or has taken insufficient security.

The defendant cannot proceed by rule against the security on a bond for costs of suit, but must proceed by an ordinary action. A summary remedy is provided by law for Clerks and Sheriffs against plaintiffs for their costs, and where the plaintiff does not reside in the parish where the suit is instituted, they have the same remedy against the surety for costs.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*Singleton & Clack*, for appellants. *Bonford* and *H. D. Ogden*, for appellees.

COLE, J. The first question in this case is whether a court has the right to order the plaintiff to furnish security for costs. We think that it has this power in all cases where the Clerk has neglected to take security, or where he has taken insufficient security. R. S., p. 125, § 9; *Houghton v. Houghton*, 11 A. 200.

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v.  
ALLING.

The second question is, whether the defendant in a suit can proceed by rule against the security on a bond for costs of suit; we think that he cannot, but must proceed by an ordinary action.

In *Baker et al. v. Doane et al.*, 3 An. p. 484, the court say: "Summary proceedings being departures from the rules which govern actions generally, cannot be extended beyond the cases expressly authorized by law."

The law provides a summary remedy for Clerks and Sheriffs against plaintiffs for *their* costs, and whenever the plaintiff does not reside in the parish in which the suit is instituted, they have the same remedy against the surety for costs. R. S. p. 124, §7. But the law has not authorized the defendant in a suit to pursue a summary remedy against the security for costs; and, however judicious such a remedy might be, it cannot be deemed a legal mode of procedure, as long as another course is pointed out by law, and that is the ordinary action.

We are, then, of opinion, that the exception to the summary proceeding by rule, ought to have been sustained.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed; and that the rule be dismissed, reserving to appellees the right to proceed by ordinary action for the recovery of their claim. It is further ordered, that appellees pay the costs of both courts.

#### J. SWASEY & Co. v. STEAMER MONTGOMERY.

Privileges must be regulated by the law of the forum, and none can be claimed except such as are granted in the Civil Code, Art. 3152, and statutes amendatory thereof.

**A**PPEAL from the Fourth District Court of New Orleans, *Reynolds, J. L. Spring*, for plaintiffs. *Mott & Fraser*, for defendant. *Race & Foster*, for intervenor and appellant.

VOORHIES, J. The only question which is presented in this case is, whether the claim of *John Grant* should be classed as a privilege in the distribution of the proceeds of the steamer *Montgomery*.

His claim is based on a statute of the State of Alabama, granting him a privilege to demand toll of vessels passing through a channel excavated by him between Dauphin Island and Cider Point.

Whether any lien is granted to him on the vessel for the payment of such toll under that statute, even in the State of Alabama, is far from being clear to us. But be this as it may, we consider it settled under the decision in the case of *Lee v. His Creditors*, (2 An. 600,) that privileges must be regulated by the law of the forum, and that none can be claimed except such as are expressly granted in the Civil Code. Article 3152, and statutes amendatory thereof.

Judgment affirmed.

## S. CONDON v. E. SAMORY.

A party who appeals from a judgment homologating an account, must make the heirs and creditors who are interested in maintaining it, parties to the appeal.  
The Supreme Court will notice the want of proper parties to an appeal, without a motion to dismiss.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*J. B. Cotton* and *H. Griffon*, for opponent and appellant. *J. L. Tissot*, for defendant.

BUCHANAN, J. *Claude Samory*, testamentary executor and one of the heirs of his mother, rendered his account of executorship to the Second District Court of New Orleans, on the 11th of June, 1857, showing the amount of the effects of the succession, a detailed statement of its debts, and the names of the creditors (with the exception of two notes, payable to bearer, of which the holders are not named); and, finally, the distributive share of each of the heirs of the testatrix (including the said executor), in the balance that would remain to the credit of the succession after payment of its debts.

On the 24th of June, 1857, judgment of homologation was rendered in the following terms:

"On motion of counsel for the executor of the deceased, and upon producing to the court due proof of the publications required by law of the filing of the account herein presented by him, and no opposition having been made thereto—

It is ordered, adjudged and decreed, that said account be approved and homologated, and the funds distributed accordingly."

This judgment was signed on the 29th of June, 1857; and on the same day, the appellant, *Stephen Condon*, became the purchaser, at Sheriff's sale, made under execution of a judgment against *Claude Samory*, of all the rights, title and interest, and hereditary share of *Claude Samory*, in the succession of his mother, being three-fourths of her estate.

On the 20th of July, 1857, *Stephen Condon* filed a petition of appeal from the judgment of homologation of the account of executorship abovementioned, alleging himself to be aggrieved thereby, and annexed to his petition, as evidence of his interest in the case, a Sheriff's deed conveying the property adjudicated to him at the Sheriff's sale aforesaid.

The petition of appeal prayed for citation to *Claude Samory*, both in his capacity of testamentary executor and in his individual capacity. An appeal bond was also filed in favor of *Claude Samory* in both those capacities, as obligee.

A motion has been made to dismiss this appeal on various grounds, of which it is only necessary to notice the second, which reads as follows:

"Because appellant has not made proper parties to the appeal."

Apart from the creditors whose claims against the succession are recognized by this account, and who are of course interested in maintaining it, there are the co-heirs of *Claude Samory*, who have the amount of their distributive share fixed by the judgment. It may be assumed, that the appellant can only

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v.  
SAMORY.

be aggrieved by this judgment, if the distributive share *Claude Samory* has been fixed by the same, at a less sum than he was justly entitled to. But any increase in that share will necessarily be at the expense of his co-heirs, who have not complained of the judgment. It seems to us that those co-heirs, and also the creditors who were named, and whose credits were recognized, were necessary parties to this appeal, under the well settled practice of this court. *Ferguson & Hall v. Creditors*, 29 L. R. 279; *Armstrong v. Creditors*, 8 An. 367; *Matthews, Finlay & Co. v. Creditors*, Opinion Book, 25, p. 487; *Beer v. Creditors*, ante 774.

As the case stands before us, it presents this anomalous feature, that appellant claims in the right of that very party, whom alone he has made appellee, and leaves out of his appeal all those parties who have an interest under the judgment appealed from, adverse to the party whom he, appellant, claims to represent.

It has been argued, that this motion to dismiss comes too late, having been filed more than three days after the appeal was filed. The cases cited by appellant on this point, are inapplicable. This is something more than a mere irregularity in bringing up the appeal. It has repeatedly been held that the court will notice the want of proper parties even without a motion. *Sweeney v. McDaniel*, 12 Rob. 205; *Robert v. Ride*, 11 An. 410.

It is, therefore, adjudged and decreed, that this appeal be dismissed at cost of appellant.

#### STATE OF LOUISIANA v. THE MERCHANTS' INSURANCE COMPANY.

The Act of the Legislature of the 25th of April, 1853, since repealed, which declared "that each and every incorporated Insurance Company and agency of foreign Insurance Company, in the city of New Orleans, shall be taxed five hundred dollars per annum, was in contravention of Article 123 of the Constitution, declaring that taxes should be equal and uniform throughout the State.

The fact that the Act provided that the amount of the tax should be paid into the treasury department to be divided equally between the different Fire, Hose and Hook and Ladder Companies of New Orleans, did not render it a local assessment for local benefit.

**A**PPEAL from the Third District Court of New Orleans, *Duvignaud, J.*  
*E. W. Moise*, Attorney General, for the State. *Collens & Wooldridge*  
and *C. D. Choiseul*, for plaintiff and appellant. *Levi Peirce*, for defendant.

**SPOFFORD, J.** An Act entitled "an Act to tax the Insurance Companies of the city of New Orleans for the benefit of the Fire Companies in the city," was approved on the 25th of April, 1853, (Acts, page 136,) declaring "that each and every incorporated Insurance Company and agency of foreign Insurance Company in the city of New Orleans, shall be taxed five hundred dollars per annum; said tax to be collected by the State Tax Collector for the parish of Orleans, and as soon as collected, the amount of said tax shall be paid into the City Treasury to the credit of the Fire Department, to be divided equally between the different Fire, Hose and Hook and Ladder Companies, in such manner as may be determined by a majority of the Firemen of said companies."

This Act was expressly repealed on the 16th of March, 1857. Acts, p. 142.

The present suit was instituted on behalf of the State, to recover of the Merchants' Insurance Company in New Orleans \$2,000, as arrearages of taxes due under the law aforesaid, for the years 1853, 1854, 1855 and 1856.

The defence that the law was unconstitutional was sustained by the District Judge and the State has appealed.

We regard this annual imposition as a tax. It is levied by the State. It is collectible by the State Tax Collector. It is now sued for by the State alone. Article 133 of the Constitution applies to such a case as this: "Taxation shall be equal and uniform throughout the State. All property on which taxes may be levied in this State shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value, on which taxes shall be levied; the Legislature shall have power to levy an income tax, and to tax all persons pursuing any occupation, trade or profession."

The Legislature has not the power to tax a portion of the persons pursuing a given occupation, trade or profession. If it taxes one it must tax all in the State of the same class. Indeed, it has done so in the Revenue Act of March 15th, 1855, sec. 3, pp. 504, 5, by which it seems that an annual tax of \$500 was levied to be collected "from each insurance company incorporated by the laws of this State and transacting an insurance business herein." Revised Statutes, p. 461.

But it has been argued that this case comes within the principles announced in *Yeatman v. Crandall*, 11 An. 220, and the cases there cited; in other words, this is not a State tax, but a local assessment for a local benefit.

We do not perceive the analogy. The tax here sued for, is not an assessment upon property for a benefit done in saving or improving that identical property, and thereby directly enriching its owner, as was the case in regard to the alluvial lands preserved from inundation by levees, or the swamps in the rear of New Orleans reclaimed by the draining company, or the city lots made accessible and valuable for building purposes by opening of new streets, or the adjacent properties enhanced in value by the construction of banquettes and the paving and shelling of highways. In such cases there is a direct, palpable and necessary connection between the burden and the benefit, and a fair and equal adjustment can be made by both.

But in the case before us there is no property improved or assessed; all is conjectural and arbitrary; one class of corporations is taxed an invariable sum for the benefit of another class; there is no possibility of ascertaining whether the tax is a *quid pro quo*; the fire companies are not compelled by the law to do anything for the insurance companies; a bounty is secured to the fire department by confiscating the money of the defendants, without providing that any service shall be rendered to the defendants by the fire department; and even if this could, for a moment, be regarded as an assessment for benefits conferred, its inequality is glaring; every owner of buildings and other combustible property in New Orleans, who is either wholly or in part his own underwriter, is presumed to be benefited by the fire department in the same way as the insurance companies are. Why should the companies alone pay taxes for this common benefit? Again: large amounts of property in New Orleans are insured abroad in offices which have no public agencies here; those offices are likewise as much benefited by the fire department as

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the New Orleans offices are; and yet they can be made to pay no tax under this law which is personal to the companies domiciled or represented in New Orleans.

Finally, it was urged that the cases of the *Charity Hospital v. De Bar*, 11 An. 385; *The Same v. Stickney*, 3 An. 657 and 2 An. 551, are precedents from which the constitutionality of the tax in this case might be inferred. We do not think so. Those cases only affirmed the constitutionality of a law which exacts as a prerequisite to a license for every public ball or concert, ten dollars; for each theatre, annually, five hundred dollars; for each circus, one hundred and fifty dollars; for every managerie, fifty dollars; and every show, twenty-five dollars; for which the exhibitors of these spectacles must furnish to the Mayor of New Orleans the receipt of the Treasurer of the Charity Hospital. Revised Statutes, p. 74, sec. 10. This was correctly held to be, in no just sense, an exercise of the power of taxation, but only a proper exercise of the police power inherent in the State sovereignty. Public spectacles concern the State, as they affect the public order and morals; they may be suppressed or licensed, and if licensed, the supreme power may always impose such conditions as it sees fit upon the managers; if the charitable institutions of the country are aided by the price demanded for licenses for theatrical and other public shows, no provision of the Constitution is infringed thereby.

But an attempt to tax unequally and partially the business of insurance upon marine and fire risks, (a business not only lawful, but in the highest degree commendable and useful,) cannot be rendered constitutional even by handing over the proceeds of the taxes to another equally useful class of men. The imposition is neither an assessment upon property for a benefit conferred and in proportion to the benefit, nor yet an exercise of the police power in affixing terms to the granting of licenses for a pursuit which affects public order and good morals; but it is, in effect, an arbitrary exercise of the State power of taxation upon a portion of those who follow a certain occupation to the exclusion of the rest, and, as such, must be pronounced unconstitutional, null and void.

Judgment affirmed.

BUCHANAN, J. The Act of 1853, taxing insurance companies doing business in the city of New Orleans is, to my mind, a clear violation of the first clause of the 123d Article of the Constitution of 1852, which ordains that taxation shall be equal and uniform throughout the State.

For this reason I concur in the decree in this case.

MERRICK, C. J. Conceding that the Legislature may direct taxes to be levied upon subdivisions of the State for local purposes, still it does not appear to me that the tax in the present instance is equal and uniform. I therefore concur in the decree.

## STATE v. SLAVE KITTY.

The Act of March 9th, 1855, "to provide for the trial of slaves accused of capital crimes in the parish of Orleans," was not repealed by the Act of 19th March, 1857, "relative to slaves." The Acts are not upon the same "subject matter." The former is a local law providing a local tribunal for certain specified cases; the latter is a general law applicable to the State at large, and the rule is, that a general statute without negative words will not repeal the particular provisions of a former one, unless the two Acts are irreconcilably inconsistent.

The Act of 19th March, 1857, "relative to slaves," repeals all laws, so far as the offences of slaves, specially made such by statutes relative to slaves, alone, are concerned, for the former Act contains no clause saving pending prosecutions or providing for the punishment of persons who had committed crimes under the repealed laws.

The word "whoever" in the Act of 14th March, 1855, "relative to crimes and offences," as used in the first section thereof, comprehends slaves considered as persons, as well as free men. And slaves, in our law, when held to answer for offences, are treated as persons, and may be punished under the general laws relative to crimes and offences, as well as under special statutes framed exclusively for that class of our population.

It is too late to raise objections in the Supreme Court as to the time of calling the jury and the notice to the master of the slave where no such objections were made at the trial.

The voluntary statements of the prisoner before accusation received against her.

APPEAL from the First District Court of New Orleans, *Hunt, J.*  
*E. W. Moise*, Attorney General, for the State :

The judgment in this case is sought to be reversed on the ground, that the court erred in admitting the confessions of the prisoner, (Record, p. 8.) The bill of exceptions shows, that *Kitty* went to the witness and said, "I am *Kitty*, the slave of *Mr. Smelser*; I have something to reveal to you about *Mr. Smelser's* death. He was a poisoned man." Up to this time the witness had not said a word to *Kitty*. She had sought him voluntarily—voluntarily stated to him, that *Smelser* had been poisoned—and that she had something to reveal about it. The determination to confess seems to have been upon her mind—and the interview desired by her with the witness appears to have been for the purpose of carrying out this determination. After calling a by-stander—the witness observed to *Kitty* that "she must now tell me all about it, that it would be better for her to do so, that it would be better for her to tell the whole truth about the matter."

It would be difficult to exclude this confession, if judged by the standard of defendant's counsel, (pp. 6, 7,) as fairly considered, one would suppose that the advice given by the witness could not have induced her to criminate herself, had she not previously resolved to make a clean breast of it. But the rule of law, as will be presently shown, is now well settled, that the inducement that will exclude a confession *must be actually, or constructively held out by a person in authority*.

For many years there appears to have been much difference of opinion among the English Judges, as to the admissibility of confessions made under inducement to private persons—but latterly the doctrine has been established as heretofore stated. In *Rex v. Dunn*, and *Rex v. Slaughter*, 4 C. & P. 545, (cited by defendant's counsel,) Bousanquet, J., excluded confessions made after inducements by persons not in authority. So also did Parke and Littledale, JJ. in *Rex v. Kingston*, 4 C. & P., 387. So also did Gurny, B., in *Rex v. Walkly* and another, C. C. & P. 175, and Patteson, J., in *Rex v. Thomas*, C. C. & P. 353. Alderson, B., entertained strong objections to the admissibility of confessions under these circumstances, but said there were opinions which he was bound to respect opposed to his own: *Rex v. Pountney*, 7 C. & P., 302; and Parke, B., said, that there was a difference of opinion among the Judges on this subject, 7 C. & P. 796, *Rex v. Spencer*. This was in 1838. After this a conference seems to have taken place among the Judges, the result of which was announced by Patteson, J. in 1839. He said: "It is the opinion of the Judges that evidence of any confession is receivable unless there

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has been some inducement *held out by some person in authority.*" *Regina v. Sarah Taylor*, 8 C. & P., 733. This announcement of the opinion of the Judges seems to have rendered the subsequent decisions uniform. In *Regina v. Laughler*, 2 C. & K., 225, the confession was excluded because, though made to a person not in authority, yet it was made in the presence of a person in authority—a constable. In *Regina v. Garner*, 2 C. & K. 920, it was held: that "in order to exclude evidence of a prisoner's confession, it must appear affirmatively, that some inducement to confess was held out to him *by, or in the presence of, some one holding authority.*" These two last decisions were in 1846. Afterwards (1852) the subject was considered by the court of criminal appeal (established in 1848), Baron Parke said, "The cases on this subject have gone quite far enough, and ought not to be extended \* \* \* if the threat or inducement has been held out, actually, or constructively by a person in authority, it cannot be received, however slight the threat or inducement, and the prosecutor, magistrate, or constable is such a person, and the master or mistress may be. *If not held out by one in authority they are clearly admissible.*" *Regina v. Moore*, 12 E. L. & Eq. 506. *Regina v. Baldry* was also a case reserved. The same eminent Judge said: "By the law of England in order to render a confession admissible in evidence, it must be perfectly voluntary, and there is no doubt that any inducement in the nature of a promise, or of threat held out by a person in authority, vitiates a confession. The decisions to that effect have gone a long way. Whether it would not have been better to have left the whole to go to the jury, it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess, I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confession,—and I agree with the observation of Mr. Pitt Taylor, that the rule has been extended quite too far, and that justice and common sense have been sacrificed at the shrine of mercy." *Regina v. Sleeman*, 22 E. L. & Eq. 606.

The counsel for defendant cites Greenleaf, who differs with Mr. Jay only in this: the former considered that there was a difference of opinion among the Judges on the question in controversy—while the latter lays down the rule that is urged by the State. The first edition of Greenleaf was published in 1842. At the time the text on the subject of discussion was written by Mr. G., he probably, had not seen, as he does not cite, the opinion of the Judges as announced in 1839 by Patteson, J., in *Regina v. Sarah Taylor*. The subsequent cases cited in this brief were certainly unknown to him, as the earliest of them was not rendered until 1846. In the edition of 1852, Mr. G. publishes in full the opinion of the Court of Criminal Appeal in *Regina v. Moore*.

But if the rule which Mr Greenleaf considers the best, and which Baron Parke said "it would have been better to have held," be adopted by this Court—the result will be the same. Under that rule the inquiry would be: "*were the promises of the witness sufficient to overcome the mind of the prisoner?*"

Test the admissibility of the confession by this rule. Kitty was not under arrest—she was not suspected—it was not known that Smelser had died of any but natural causes. He had been publicly interred—there had been no coroner's inquest. Kitty of her own free will went to the witness—to whom she was a stranger—although he was not to her. She voluntarily told him that Smelser had been poisoned—when the witness—after calling a by-stander said to her "it would be better for her to tell the whole truth about the matter"—"it would be better for her to do so"—and these words, uttered under these circumstances, are to be construed into "*a promise sufficient to overcome the mind of the prisoner.*" With great respect, it is submitted that such a decision would belong to the class of those cases in which Baron Parke says "justice and common sense have been sacrificed at the shrine of mercy."

In reference to the case of the *Commonwealth v. Knapp*, cited on the other side, it is to be observed—that the rule as laid down was *not* as stated by the Court—at least the rule in England—whatever it may have been in Massachusetts—as it is clear that there was a difference of opinion among the English Judges. Indeed, Morton, J., said "he has doubted whether confessions, with the accompanying circumstances, ought not always to be received in evidence." And of the same opinion was the late Judge Preston. See *State v. Havelin*, 6 An., 168-9.

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Morehouse was not a person in authority. The counsel for prisoner calls him the prosecutor—but for what reason does not appear.  
As to Kitty's being handcuffed—see *State v. Nelson*, 3 A., 497.

*R. H. Browne*, for the prisoner and appellant :

The only question to be decided, is, whether the Judge *a quo* erred in permitting these confessions to go to the jury ?

This is a case of extra-judicial confessions. The confessions were made to a person who became the prosecutor of the prisoner.

A confession must never be received in evidence, where the defendant has been influenced by *any* threat or promise. To say that it will be better for him if he will confess, or worse if he will not, is sufficient to exclude the declarations of the prisoner.—*Starkie's Ev.* The law cannot measure the force of the influence used, or decide upon its effect on the mind, and therefore excludes the declaration, if *any degree* of influence has been exerted.—2 Russell on Cr. 645, marg. ; 2 *Starkie's Ev.* 49, marg.

If any inducement, by promise of favor or by threat, be held out to the prisoner, as by telling him he had better tell all he knew, or he had better tell where he got it, &c., his confession cannot be given in evidence against him.—1 Archb. Cr. Pr. and Pl. 125.

And where a threat or promise is thus used, it must appear to have been used by some person concerned in apprehending, examining or prosecuting the prisoner, or by the person to whom the confession is made, to have the effect of preventing such confession from being given in evidence.—1 Arch. Cr. Pr. and Pl. 128.

Its admissibility is made to depend on its being free from suspicion, that it was obtained by any threats of severity, or promise of favor and every influence, even the minutest.—*State v. Field and Webber*, Peck's Rep. 140 ; *Phil. Ev. C. & H.* notes, vol ii, No. 206, p. 236.

It was held in the case of the *Queen v. Garner*, (decided in 1848) that the language "it would be better for her to confess," when addressed by the mistress' physician, in presence of the mistress, to a servant girl, was an inducement, and the confession was excluded. 61 Eng. C. L. Rep. 920.

The same decision was affirmed by a full bench of the High Court of Criminal Appeals in England, as late as 1852, [*Regina v. Baldry*, 12 Eng. L. and E. Rep. 596], Lord Chief Baron Pollock, deciding that, "when the admonition to speak the truth had been coupled with any expression importing that it would be better for him to do so, the confession was not receivable, the objectionable words being, that 'it would be better to speak the truth,' because that imported it would be better for him to say something."

Saying to a prisoner that "it would be better for him to confess," or words to that effect, has been repeatedly held to be such an inducement offered, as will exclude his confessions.—*State v. Nelson*, 3 An., 499. See also *Rez v. Walkley et al*, 6 Car. and P. 175.

It may be urged that Morehouse had no authority over the defendant at the time she made her statement, and hence her confessions were properly admitted in evidence.

Mr. Joy, on Confessions, maintains the unqualified proposition that "a confession is admissible in evidence, although an inducement is held out, if such an inducement is held out by a person not in authority over the prisoner." But our own accurate and learned writer on the Law of Evidence, Mr. Greenleaf, after examining the authorities cited by Mr. Joy, says : "Upon a deliberate revision of the point, I have concluded to leave it where the learned Judges have stated it to stand—as one on which they were divided in opinion." 1 Greenl. Ev. § 223, note 1.

In this country there is a growing unwillingness to rest convictions on confessions alone. The confessions of a party, it has been held in several States, not made in open court, or on examination before a magistrate, but to an individual, uncorroborated by circumstances, and without proof *aliunde* that a crime has been committed, will not justify a conviction.—*People v. Hennessy*, 15 Wend., 147 ; *State v. Field*, Peck's Rep., 148 ; *State v. Long*, 1 Hayw., 455.

"A confession, at least in a capital case, from the nature of the thing, is a very doubtful species of evidence, and to be received with great caution.—*State v. Long*, 1 Hayw., (N. Ca.) Rep., 455.

On referring to Wharton's Criminal Law, p. 260, note X, it will be seen that

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most of the German States have adopted our own system : "a voluntary confession, says Mittermain, (2 Strafenfahren, 114), is not now to be made the basis of a prosecution; that the fact that such an accusation is an unsolicited confession, in consequence of its unnaturalness, must excite a doubt of the intelligence of the self-accuser, and it therefore becomes the duty of the Judge not to content himself with such a confession, but be more than doubly cautious in the exposition of the *res gestae*, &c."

SPOFFORD, J. The slave *Kitty* was tried before the Judge of the First District Court of New Orleans and a jury of six slave holders, pursuant to the Act of March 9th, 1855, (Session Acts p. 37.) The accusation drawn up by the District Attorney contained two counts, one for administering poison to *Levi Smelser*, and the other for the murder of said *Smelser*.

The prisoner was found "guilty without capital punishment," and she was sentenced to hard labor in the penitentiary for life by the Judge of the First District Court of New Orleans on the 24th March, 1857.

She has appealed to this court.

It is suggested, that the tribunal which tried and sentenced her was without jurisdiction; that the Act of March 9th, 1855, "to provide for the trial of slaves accused of capital crimes in the parish of Orleans," was repealed by the Act of March 19th, 1857, "relative to slaves." Session Acts, 229.

These Acts are not upon the same "subject matter." The former is a local law providing a local tribunal for certain specified cases. The latter is a general law applicable to the State at large.

The rule upon this subject is well stated in the recent work of Mr. Sedgwick upon statutory and constitutional law, 123: "In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule, that a general statute, without negative words, will not repeal the particular provisions of a former one, unless the two Acts are irreconcilably inconsistent: as, for instance, the statute 5 Eliz. C. 4, that *none shall use a trade without being apprentice*, did not take away the previous statute 4 and 5 Philip and Mary, C. 5, declaring that *no weaver shall use, &c.* The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner and not expressly contradicting the original Act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter Act such a construction, in order that its words shall have any meaning at all."

In the *Succession of Fletcher*, 12 An., 498, (a case quite analogous to the present; for, in that case, the last of the two Acts had the same repealing clause,) we held: that it is only where there is an obvious and necessary inconsistency between the two Acts, that the earlier statute must be considered as repealed by the latter.

We there decided, that a power given generally in sweeping terms, to the Auditor of Public Accounts to employ attorneys to recover money due the State from any cause whatever, was exclusive of the Supreme and District Courts of the city of New Orleans, so as to save a previous local statute directing the Attorney General to represent the State in such cases in the city of New Orleans.

The doctrine of that case should control the present.

For, in this case as in that, the two statutes may well stand together. In-

deed, both were originally passed at the same session of the General Assembly in 1855, as parts of one general system of revised statutes; but the Act of March 15th, 1855 (p. 377) "relative to slaves and free colored persons," having been declared unconstitutional by this court in the case of the *State v. Slave Harrison*, 11 An., 722, some parts of it, including the general provisions in question, relative to the trial of slaves, were reenacted without alteration in the Act of March 19th, 1857, "relative to slaves," in such a form as it was supposed would obviate the constitutional objection found against the former Act.

The local Act of March 9th, 1855, under which the prisoner was tried, is, therefore, held to be in force. It has also been objected, that the law of March 19th, 1857, "relative to slaves," which denounces certain offences of slaves and prescribes the punishment therefor, repeals all laws upon the same subject-matter, and, therefore, repeals all statutes in force at the time the prisoner was tried and convicted, relative to the crimes with which she stands charged. So far as the offences of slaves, specially made such by statutes relative to slaves alone, are concerned, this doctrine is correct, as was held by this court in various cases decided last summer at Monroe, Alexandria and Opelousas. For the Act of March 19th, 1857, contains no clause saving pending prosecutions, or providing for the punishment of persons who had committed crimes under the repealed laws. The first count in this accusation charging the prisoner with having administered poison to *Levi Smelser* could not now, therefore, sustain a judgment of conviction.

But the second count contains a formal charge of murder. And the Act of March 14th, 1855, "relative to crimes and offences," in its first section declares, that "whoever shall commit the crime of willful murder, on conviction thereof, shall suffer death." The word "whoever" comprehends slaves considered as persons, as well as free men. And slaves, in our law, when held to answer for offences, are treated as persons; and it has been decided, that they may be punished under the general laws relative to crimes and offences as well as under the special statutes framed exclusively for that class of our population. *State v. Dick*, 4 An. 183; *State v. Jerry*, ib., 191.

The count for murder would, therefore, support a verdict and judgment for that offence, charged to have been committed by the prisoner on the 7th May, 1855.

The objections as to the time of calling the jury and the want of proper notice to the master of the slave, should have been made in the tribunal before which the prisoner appeared, pleaded and submitted to a trial. She was there represented by counsel who interposed no objections of that kind, and it is too late to raise them here.

One question alone remains. It grows out of a bill of exceptions taken to the refusal of the Judge to instruct the jury to disregard certain confessions of the prisoner. The bill is in these words: "Be it remembered, that upon the trial of this cause, and upon the cross-examination of *Joseph Morehouse*, a witness for the prosecution, to prove the confessions of the accused, the witness said: "the accused came to my yard where my shop is, she said she came voluntarily, of her own accord; she said she came to me because she knew I was the friend of her master; she said that she had been hand-cuffed; she had the manacles on her hands; that she was afraid she was going to be carried out of the State to Texas. I did not know who *Kitty* was. She approached

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me just as *Mr. Hall* was leaving the gate; she said, "I am *Kitty*, the slave of *Mr. Smelser*; I have something to reveal to you about *Mr. Smelser's* death. He was a poisoned man." This startled me, and I immediately called *Mr. Hall* back. I, then, in the presence of *Mr. Hall*, said to her, that "she must now tell all about it, that it would be better for her to do so, that it would be better for her to tell the whole truth about the matter." Whereupon the counsel for the accused asked the court to instruct the jury to disregard the confessions of the accused, upon the ground, that they were inadmissible: the court refused, and the accused by her counsel tendered this bill of exceptions," &c., &c.

It would seem from this bill, that whatever confessions the prisoner made had already gone to the jury before any objections were taken; and, that the matter of inducement having been drawn out in the cross-examination of the party to whom the confessions were made, the prisoner's counsel then asked the court to charge the jury to disregard all that they had heard from this witness tending to implicate her with the crime, upon the ground that her statements were not voluntary.

A statement to a party accused by a person in authority, that it would be better for him to confess, will vitiate a subsequent confession. 1 *Greenleaf Ev.* § 219 *et seq.*

But it must here be observed, that so far as we are informed by the bill of exceptions, no charge had been made against the prisoner, and no suspicion excited; indeed, it would seem from the expression of the witness, that he was startled to hear that *Smelser* had been poisoned, that it was not supposed he had died other than a natural death. The prisoner sought the witness voluntarily and unaccused; she volunteered the statement, that the deceased had been poisoned; the subsequent remark of the witness, a person not in authority over her, that it would be better for her to tell the whole truth about the matter, did not point to a confession by *Kitty* of any complicity on her part with the poisoning; she was not told to *confess*; indeed, it does not appear, that she was led to think herself suspected; how, then, can it be reasonably inferred that by the remark of the witness she was induced to criminate herself? We think this combination of circumstances is sufficient to justify the refusal of the Judge to instruct the jury to disregard entirely the confessions of the accused. "Promises and threats by private persons," says *Greenleaf*, vol. 1 § 223, "may perhaps, be treated as mixed questions of law and fact; the principle of law, that the confession must be voluntary, being strictly adhered to, and the question, whether the promises or threats of the private individuals who employed them were sufficient to overcome the mind of the prisoner, being left to the discretion of the Judge, under all the circumstances of the case." The case of the *State v. Jonas*, 6 An., 695, goes much further that this in favor of the admissibility of the confessions of slaves.

It is, therefore, ordered, that the judgment appealed from be affirmed, with costs.

**BUCHANAN, J.**, concurring. The appellant was tried and convicted on the 14th March, 1857, five days previous to the passage of the Act of 1857, No. 232, relative to slaves; which, by its 43 section, was in force from and after its passage.

That statute can, therefore, have no operation upon this case.

I concur in the decree affirming the judgment of the District Court.

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COLL, J., dissenting. I am of opinion that the law is repealed under which the special tribunal for the trial of the accused was formed. She was tried under Act No. 43, p. 37, Session Acts, 1855, being "an Act to provide for the trial of slaves accused of capital crimes in the parish of Orleans."

On the 10th of March, 1857, "an Act relative to slaves" was passed. Session Acts, 1857, p. 229.

An examination of this Act shows that it was intended for the whole State; it enacts the different crimes for which slaves may be prosecuted and punished, and declares the mode of prosecution and the constitution of the tribunal which is to have jurisdiction.

This Act appoints the place of execution of slaves, and the way they are previously to be appraised, and how the owner is to be paid the value of his slaves that are condemned.

It points out the nature of evidence that may be received, and the degrees of consanguinity within which a person shall not be a good juror for the trial of slaves.

In *De Armes*' case, 10 M. 172, Martin, J., says: "A statute is said to repeal a former one when it is contrary thereto in matter." *Leges posteriores, priores contrarias abrogant.*

The statute of 33 H. 8, 8, provided, that any person examined before the king's counsel, who confesses treason, shall be tried in the county where the king pleases, and it was held to be repealed by that of 2 Ph. and M., which directs that all trials for treason shall be according to the common law.

The reason is apparent, says Judge Martin, "for the latter statute directed that all trials for treason, which include those of persons mentioned in the statute of Hen. 8, should be in the course pointed out by the common law, and this was contrary to the provision of the statute of H. 8.

"A statute is also said to repeal a former one, where it enacts a thing inconsistent with it. So the statute of 1 Ed. 3, 2, which provided that 'process shall be in the king's name,' was held to be repealed by that of 1 and 2 Ph. and M. 2, which provides, that 'all ecclesiastical jurisdiction of bishops, &c., shall be in the same estate as to process, as it was in the time of H. 8.' 'For the two provisions were inconsistent.'"

In the same case of *De Armas*, Judge Martin says: "That old laws are abrogated and repealed by those which are posterior, only when the latter are couched in negative terms, or are so clearly repugnant to the former, as to imply a negative. Second, a particular law is not repealed by a subsequent general law, unless there be such repugnancy between them, that they cannot both be complied with under any circumstances."

If we apply these principles to the case at bar, it will appear that the Act of 1855, No. 43, under which the prisoner was tried, has been repealed:

The form and mode of trial of slaves under the Act of 1857, is materially different from that of 1855; the latter Act provides, "That such slaves as may be accused of capital crimes in the parish of Orleans, shall be tried by a tribunal composed of the Judge of the First District Court of New Orleans and six citizens, slaveholders in said parish, chosen and convoked by said Judge." The Act of 1857, provides, "That whenever it shall be necessary to try a slave accused of a capital offence, the Justice of the Peace before whom the complaint shall have been made, shall notify another Justice in the parish of the charges that have been preferred against such slave, and shall require such

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Justice to attend at his office the day after the receipt of such notification, or as soon afterwards as practicable, for the purpose of choosing ten persons, owners of slaves, to assist at the trial of the accused."

It cannot be denied that the Act of 1857 is a general law for slaves in every part of the State, because it contains an enumeration of the crimes of slaves; of their mode of trial; of their appraisement when condemned; of the mode of being paid; of the number of jurors a slave accused of a capital crime has the right to challenge peremptorily; and provides, that no slave shall be entitled to his freedom, under the pretence that he has been, with or without the consent of his owner, in a country where slavery does not exist, or in any of the States where slavery is prohibited; that no slave shall be admitted as a witness either in civil or criminal matters, for or against a free person of color, except in case such free individual be charged with having raised or attempted to raise an insurrection among the slaves of the State, or adhering to them by giving them aid and comfort in any manner whatever.

It must also be admitted, that the Act of 1857 is inconsistent with that of 1855, so far as the mode of trial is concerned, and they are so repugnant to one another, that both cannot exist.

The Act of '55 gives the slave in capital trials only, the Judge and six jurors; the Act of '57, entitles them, in capital cases, to two Justices and ten jurors, of which one justice and nine jurors shall constitute a quorum.

The Act of '57 also contains some privileges, such as the number the slave is entitled to challenge without cause, and the exclusion of certain relations of the proprietor of the accused which are not in the Act of '55.

As I consider the Act of 1857 is a general law for slaves in the whole State, and as its provisions are inconsistent with and repugnant to the Act of '55, and as there is no repealing clause in the Act of 1857, of all laws or parts of laws conflicting with the provisions of this Act, and all laws on the same subject matter, I believe the Act of 1855 is repealed, and the judgment ought to be reversed.

MERRICK, C. J., dissenting. I am not able to concur in the decree in this case. I think with Mr. Justice Cole, that the Act approved the 9th of March, 1855, to provide for the trial of slaves accused of capital offences in the parish of Orleans is repealed.

That Act, by itself, is wholly inadequate for the trial of slaves, as has been shown by Mr. Justice Cole. It can only have effect when its provisions are aided by the general law on the subject of the trial of slaves. It is within the express provisions of the repealing clause of the Act approved 19th of March, 1857, and it is but reasonable to suppose it is also within the intendment of that Act; for it cannot have any effect without the aid of the very statute which declares its repeal.

But I think there is an objection to this prosecution, of a character still more grave. The law, in my opinion, punishing the offence, has been repealed. The repeal of a penal statute during the pendency of a criminal prosecution under it, has always been held to be fatal to the prosecution, even though the action might be pending on appeal. This well settled rule of law has been recognized by this court and enforced under this statute, as has been remarked in the opinion in this case just pronounced. See also *State v. Johnson*, 12 L. R. 547; *Bishop's Criminal Law*, sec. 103.

It is conceded that the offence charged in the first count of the information, viz., that of having administered poison to *Levi Smelzer*, is repealed, because, as I understand the argument, the offence is punished by the 5th section of the Act of 1857 in question, it being specially applicable to slaves, and the general statute on the subject of crimes makes no mention of an offence in precisely the same terms; that of administering poison with an intent to commit the crime of murder, being alone punished by the Act relative to crimes and offences.

This concession makes it only necessary to consider the offence charged in the second count. The latter count charges that the prisoner at, &c., willfully, feloniously, and of her malice aforethought, did kill and murder one *Levi Smelzer*, contrary to the form of the statute, &c.

Now, I find that the first section of the Act of 1857, relative to slaves, is in these words:

"Be it enacted, &c., That any slave who shall commit the crime of murder, shall be punished with death."

If I concede that the Act of 1855, relative to crimes and offences, which declared in its first section that whoever shall commit the crime of murder shall suffer death, could be applied to slaves, I do but admit that there was a law or a part of a law on the *subject-matter*, of the punishment of a slave who should commit murder, in force on the 19th day of March, 1857. For if it be applied to the punishment of slaves in whole or in part, it embraces in its *subject-matter* the punishment of the crime of murder, when committed by slaves. Now, if I refer to the repealing clause of the Act approved that day, I find, in the most sweeping terms, it repeals all laws and parts of laws conflicting with the provisions of this Act, and all laws on the same *subject-matter*.

Again, if I read the first section of the Act relative to crimes in this way, every person, whether white, black or a slave, who shall commit the crime of willful murder, on conviction thereof, shall suffer death, I shall find that I have brought the same in conflict with the first section of the Act relative to slaves, which has provided for the punishment of the slave who should commit murder. The first section of the Act of 1855, relative to crimes and offences, is therefore repealed, so far as it affects slaves, both because it is on the same *subject-matter* and because it is in conflict with the Act of 1857.

If it be objected that the crime of murder is of that atrocious character that it cannot be supposed that the Legislature intended a general pardon and amnesty to all slaves under prosecution for such offence, I can only reply, that it is admitted that the Act in question operates the general pardon of the heinous offences committed by the same class of persons. Moreover, it is in conformity to the repealing clause of the Act of 1855 relative to slaves and free persons of color held unconstitutional, and the Act relative to dealing with slaves, also approved the 19th day of March, 1857, p. 183.

The rule of law on the subject of the effect of a general repeal of a penal statute is well known, and the repealing clause is explicit. It is sufficient, I think that *ita lex scripta est*.

## POOLEY, NICHOL &amp; Co. v. THOMAS A. SNOW.

The garnishees, in answer to interrogatories, denied indebtedness to defendant, but acknowledged the possession of a note past due and protested which the garnishees had received from the defendant (payee of the note) who was their debtor; the said note exceeding the amount which was due them by defendant and received with an agreement that when paid, its proceeds should be applied, 1st, to the payment of defendant's indebtedness to garnishees; 2d, to that of various other creditors of defendant. Judgment was rendered condemning the garnishees to pay the judgment of plaintiff against defendant, or, in default thereof, to deposit in court the promissory note abovementioned. *Held*: The judgment appealed from is manifestly erroneous. No money judgment could be rendered against the garnishees, because the answer denied indebtedness and the traverse neither alleged nor was it proved that any money of defendant came into the hands of the garnishees. As to the alternative judgment for the delivery of the note, we hold it to be irregular, because it annuls the pledge of the note for the security of defendant's debt to the garnishees, a contract which could only be annulled by a direct action.

**A** PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*Mott & Fraser*, for plaintiffs. *Clarke & Bayne*, for defendant and appellant.

BUCHANAN, J. Upon judgment in favor of plaintiffs against defendant, execution issued, upon which a seizure was made in the hands of Voorhies, Griggs & Co., and interrogatories were propounded to said firm as garnishees. Their answers to interrogatories denied indebtedness to defendant, but acknowledged the possession of a note, past due and protested, which the garnishees had received from defendant (payee of the note) who was their debtor; the said note exceeding the amount which was due them by defendant, and received, with an agreement that, when paid, its proceeds should be applied, first, to the payment of defendant's indebtedness to garnishees, and secondly, to that of various other creditors of defendant. The answers of garnishees to interrogatories were traversed, on the ground that they disclosed an illegal and fraudulent preference, and that the note held by plaintiff ought to be delivered up in satisfaction of the execution. Upon this issue, the District Court rendered a judgment condemning the garnishees to pay the judgment of plaintiffs against the defendant, and in default thereof, to deposit in court the promissory note mentioned in the answers to interrogatories.

The garnishees have appealed. The judgment appealed from is manifestly erroneous. No money judgment could be rendered against the garnishees for the amount of the judgment of plaintiffs against defendant, or for any other sum, because the answers denied indebtedness; and the traverse neither alleged nor was it proved, that any money of defendant had come into the hands of garnishees. As to the alternative judgment for the delivery of the note, we hold it to be irregular, because it annuls the pledge of the note for the security of defendant's debt to garnishees, a contract which could only be annulled by a direct action.

Judgment reversed, and judgment for garnishees and appellants with costs in both courts.

VOORHIES, J. recused himself for relationship to one of the parties.

MERRICK, C. J. The execution is the basis of the proceeding in garnishment, without which the latter cannot be sustained. 8 Rob., 244; 3 An., 300; 9 An., 460. After the death of Thos. A. Snow, 6th of September, the execu-

tion ought to have been returned and the proceeding should have been cumulated with the mortuary proceedings or conducted contradictorily with the administrator.

It was not then the proper proceeding to attack the pledge of *Griggs, Voorhies & Co.* nor to enforce a preference against *Snow's* estate. I therefore concur in the judgment in this case.

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HEZEKIAH HAWLEY v. A. G. SLOO.

A promissory note payable generally must bear the rate of interest of the place where it is made. If the place of performance is different from that of the contract the interest will be according to the latter.

APPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*  
*Elmore & King*, for plaintiff. *Mott & Frazer*, for defendant and appellant.

MERRICK, C. J. Plaintiff alleges in his petition that defendant is a resident of Indiana. He commenced the present suit against him by attachment as such absentee. It is admitted that the plaintiff resides in Tennessee and that the rate of interest in that State is six per cent.

The obligation sued on is in these words:

\$5,325 10. On the first day of December next, I promise to pay to the order of Hezekiah Hawley five thousand three hundred and twenty-five dollars for value received. Witness my hand and seal this 18th November 1854.

(Signed)

A. G. SLOO. [Seal.]

We do not consider the words "Hezekiah Hawley, Memphis, Tenn." as forming any part of the instrument, it being probably a mere label upon the note put there by the holder for his convenience and security.

The judgment of the lower court decrees in favor of the plaintiff six per cent. interest upon the amount of the note, according to the law of Tennessee. The defendant has appealed and contends that plaintiff cannot recover more than five per cent. interest.

Plaintiff's counsel maintains that the decision of the lower court is correct on these grounds, viz: that it must be presumed from the domicile of both plaintiff and defendant, that the note was executed in a common law State; that this court will take judicial notice of the common law, by which "It is a general rule that where there is a precedent debt or duty, the creditor need not allege or prove any demand of payment before the action brought, it being the duty of the debtor to find out his creditor and tender him the money," (*Chitty on Bills*, p. 249, 7th edition) and that the note sued on was therefore payable in the State of Tennessee, the domicile of the creditor, and drew the rate of interest allowed in that State.

For the purpose of the decision of this case, we will allow the somewhat forced presumption that the note was made in a common law State.

The passage quoted above from *Chitty on bills*, we think, has reference particularly to the defence of the maker of a note and acceptor of a bill on an

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action to be brought on the bill of exchange or promissory note. We do not suppose the learned author intended to assert that it was the duty of an Englishman, without any special promise so to do, to follow his creditor out of the realm, say to New York or California, and there make payment according to the rate of interest allowed by those States. The contrary seems to be clearly established by the common law writers as well as by the decisions of this court. The subject is considered by Story on promissory notes, sec. 41. He says: "In the next place, as to the place where a promissory note is made or is payable. By our law, it is not essential that any place of making or of payment should be specified on the face of the note, unless specially provided for by statute. It is usual indeed, in the date, to include the place where the note is made; and this in many cases may be very important, in order to ascertain the proper rules by which it is to be interpreted; for the interpretation will be, or may be essentially governed by the law of the State where it is made. But, in the absence of any place stated on the face of the note, resort may be had to parol evidence to establish the validity of the note as well as to impeach it. But very different considerations will apply to the place of payment; for, if the note is intended to be paid at any particular place, *that place must be stated in the instrument, and parol evidence is not admissible to show that although no place of payment is therein stated, yet the parties agreed that it should be payable at a particular place.* It is not sufficient to make the note payable at a particular place, that there should be a memorandum of the place where it is payable, at the foot or in the margin thereof, but it should be in the body of the note itself and constitute a part thereof." See also Chitty on Bills, 151, 154, 165. 11th American from 9th London edition.

Chief Justice Parker, cited by Mr. Justice Story, says: "When a merchant of France, Holland or England enters into a contract in his own country, he must be supposed conversant with the laws of the place where he is, and to expect that his contract is to be judged of and carried into effect according to those laws; and the merchant with whom he deals, if a foreigner, must be supposed to submit himself to the same laws, *unless he has taken care to stipulate for a performance in some other country, or has in some way excepted his particular contract from the laws of the country where he is.*" Story, Conflict of Laws, § 278.

So bills drawn in Ireland to be filled up in England, as to dates, sums, times of payment and drawees, relate back to the date of the original signature of the drawer, and are to be deemed Irish bills. *Smith v. Mingay*, 1 M. & Selwyn, 87.

Kent says in his Commentaries that "parties are presumed to contract in reference to the laws of the country in which the contract is made; and it is a maxim that *locus regit actum* unless the intention of the parties to the contrary be clearly shown." 2 Kent, p. 258, 2d edition.

Chitty says that "effect is also to be given to the intention of the parties according to the law of the country where the contract is made and in which it is to be performed, and not according to the law of the country into which either or all of them may remove. \*\*\*\*. The construction and interpretation of the contract must be governed by the laws of the country where made—*lex loci contractus*; the mode of suing and the time within which the action must be brought must be governed by the law of the country where the action is brought: *in ordinandis judiciis, loci consuetudo ubi agitur.*" Same edition,

p. 168. In note 1 to p. 169, it is said "that as the law of the place where the contract is made regulates the rights and duties of the parties, if a bill be drawn and endorsed in a place by a person resident there, he is answerable upon such endorsement only so far as the laws of that country bind him upon a bill so drawn and endorsed. See also *Powers v. Lynch*, 3 Mass., 77; *Hicks v. Brown*, 12 John, 142.

Story, Conflict of Laws, also says in another place that "a contract to pay generally is governed by the law of the place where it is made; for the debt is payable there as well as in any other place." Sec. 317. The same doctrine is held in the recent case of *Peck v. Hibbard*, 26 Vermont, (Deane,) 698.

It follows that a note payable generally must bear the rate of interest of the place where made, for the general rule is that "by the common law the *lex loci contractus* will in all cases give the rule of interest following out the doctrines of the civil law *Quum judicio bonae fidei disceptatur, arbitrio judicis usurarum modus, ex more regionis ubi contractum constituitur; ita tamen ut legi non offendant*. And if the place of performance is different from that of the contract, the interest will be according to that of the former." Story, Con., § 296, 343, 345. See the case of *Brey v. Winter*, 4 N. S., 277; also 8 Savigny, p. 282, sec. 374, Berlin edition, and 3 An., 402, and C. C. Art. 10.

It is not shown or pretended by the argument that the note sued on was executed in Tennessee. If it be conceded that it was executed in Indiana, still, as it does not appear what rate of interest is there allowed, we must presume that it is the same as allowed in Louisiana, viz, five per cent.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and it is now ordered, adjudged and decreed, that said Hezekiah Hawley do recover and have judgment against said Albert G. Sloo for the sum of five thousand three hundred and twenty-five dollars, with five per cent. interest thereon from the first day of December, 1854, until paid, with a privilege on the property attached, the plaintiff paying the costs of appeal and the defendant those of the lower court.

#### STADEKER v. HIS CREDITORS.—LABATT, Syndic.

Where a rule to inflict on a syndic the penalty for not keeping a bank book, &c., &c., has been passed upon by the court in homologating the syndic's account, a second rule, on the same grounds, cannot be taken, unless the right was reserved in the dismissal of the first rule.

Nor can the debtor take the rule on the pretence that he is the transferee of claims of creditor unless he has been legally subrogated to those claims.

**A**PPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*McCay & Edwards*, for plaintiff and appellant. *M. M. Cohen*, for defendant.

COLE, J. On the 27th of November, 1856, a rule taken on the 5th of said month by *J. Stadeker*, the insolvent, on *D. C. Labatt*, syndic, to produce his bank-book properly balanced, was dismissed, reserving to the plaintiff in rule all his rights in the premises.

On the 6th of November, 1856, the final tableau of the syndic was homologated so far as not opposed.

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On the 28th of November, 1856, the said insolvent took a rule on the Syndic to hold him responsible under the 2d and 3d sections of the Act of 1855, entitled "An Act to regulate and define the duties and powers of administrators, executors, curators and Syndics," (session Acts of 1855, p. 78) for not having deposited the money received by him in his official capacity in one of the chartered banks of the State, and for not having kept a bank book in his capacity of syndic.

The insolvent also alledged that he had obtained an acquittance and release by payment to his creditors of all their claims except a trifling amount of his original liability.

This rule was dismissed with costs on the 11th March, 1857, and the insolvent has appealed.

A final tableau having been homologated so far as not opposed, this second rule was taken too late, unless the reservation in the dismissal of the first rule of all the rights of the insolvent in the premises signified he should have the privilege of taking a second rule. (*Succession of Anderson*, 12 An., p. 95).

There is however a fatal objection to the success of appellant.

Certain dividends were transferred by some of his creditors to him, and paid to him by the syndic, but the appellant was never subrogated to their rights, if any they had, for damages and interest due as a penalty for violating said Act of 1855.

Appellant has therefore no cause of action.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

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CITY OF NEW ORLEANS v. THE HEIRS OF GUILLOTTE.—ON A RE-  
HEARING.

The city of New Orleans having voluntarily accepted a partnership with individuals in the profits to be derived from a market-house, cannot claim to be on a different footing as regards its social rights, at least in what regards the financial administration of the partnership property, from another partner. The peculiar quality of this corporation, clothed by the Constitution with many of the most important functions of government, does not take from the other party to the partnership the right to be consulted in matters which concerned the social interest.

**A**PPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*J. J. Michel*, for plaintiff and appellant. *F. Buisson* and *R. N. Ogden*,  
for defendants.

**BUCHANAN, J.** In this case, it has been decreed by this court, in conformity to the demand of the plaintiff's petition, that a partition should be made of the Magazine street market, held in partnership by plaintiff and defendants; and, as the impossibility of making the partition in kind was proved, it was ordered that the partition should be made by licitation. See Opinion Book 27, p. 12.

As the year for which the market was farmed was approaching its termination, when this judgment was rendered, the city council, by resolution, ordered that this particular market should not be farmed for the coming year, to the highest bidder, as the other markets, but that the commissary of the market should collect the market dues to the day of sale, rendering an account

and paying over to the City Treasurer, day by day, the dues thus received. The defendants remonstrated against this change in the mode of administering the revenues of the market, as injurious to their interest; and notified the council that a person named by them, and who would give unquestionable security, was prepared to give at the rate of fifteen thousand dollars a year, or twelve hundred and fifty dollars a month, for the privilege of collecting the revenues of the market in question, until the sale of the market be effected under the judgment of partition. This proposition was rejected by the council, and a rule was taken in the suit by defendants, to compel the plaintiff to submit to this provisional arrangement, as being for the interest of both parties concerned. The rule was, upon hearing of the argument and evidence, made absolute, and plaintiff has appealed.

The price offered for the farm of the revenues of the market, is proved to be eleven per cent. greater than that which was received last year, and no evidence has been offered by plaintiff impugning either the sufficiency of the rent, or of the security offered for its payment. The solvency of the sureties offered has been proved, on the part of defendants, by the evidence of those sureties themselves. This is not contradicted, the plaintiffs resting altogether upon their claim of an exclusive right of the city government to regulate the administration of the revenues of the public markets of the city.

A more mature consideration of this interesting question, upon a re-hearing granted, has satisfied us that circumstances of this case make it an exception to the rule governing the administration of the markets of New Orleans in general.

The city has voluntarily accepted a partnership with individuals, in the profits to be derived from a market-house. Having done so, it cannot claim to be on a different footing, as regards its social rights, at least in what regards the financial administration of the partnership property, from another partner. In vain does the city appeal to its peculiar quality of a corporation clothed by the Constitution and laws of the State, with many of the most important functions of government. Its partners, the defendants, had a right to be consulted in a matter which concerned the social interest. If, indeed, the defendants had asked to disturb and innovate upon the practice established by law and usage in the administration of the market, the case would have been very different. But it is, on the contrary, the city which, to the injury of the defendants, as the evidence seems to demonstrate, commits an invasion of that kind.

The judgment heretofore rendered by us on this appeal, is, therefore, set aside and annulled; and it is adjudged and decreed, that the judgment of the district court be affirmed with costs.

Mr. Justice Cole took no part in this decision.

MERRICK, C. J., dissenting. I see no reason to depart from the doctrines and conclusions contained in the opinion of this court first pronounced in this case. The joint ownership of the soil by the *Heirs of Guillotte* with the city, gives the former no right to interfere with the police of the market nor the regulations which the city authorities may deem it necessary from time to time to ordain, for the sale of provisions within the market. The power to establish markets and regulate the administration of the same, has been conferred by the people and the Legislature upon the common council. It is a portion of the sovereign power delegated to them. *First Municipality v. Cutting*, 4 An. 336,

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If a private person allows the city to hold a market over his soil, he must submit to such regulations as the city authorities see fit to enact. He may withdraw his property from the city, or claim an indemnity for the same, but so long as he suffers his property to be used as a market, he submits it to the authorities having the power to regulate, and, as a consequence, administer the market. So also as to the joint owner with the city. He may compel a partition if he chooses, but he cannot interfere with the regulations which the city may adopt for its control, management and police; nor can he prevent the city from discontinuing the market altogether, when it shall deem that the public interest requires such discontinuance. Having conceded this much as incontestible, I find myself unable to bring about a conclusion differing from that arrived at on the former occasion.

It appears to me to follow, that the common council alone have the power to judge of the expediency of farming the market or of placing the collection of the dues under the direction of an officer, such as the commissary of the market. They have also the power to decide upon the fitness of the person who is to exercise the functions of such office. Should it appear to them that the public interest would be better protected; that there would be better order, less extortion, and a more certain and efficient collection of the dues, by placing a market in a populous portion of the city under the control of an officer of the police (as they attempted to do in this instance), in my opinion they had not only the right, but it was their duty to note such regulation in the interests of public order.

Although a market may not be a *locus publicus* in the sense that the ownership of the soil is necessarily vested in the public, still it is a public place in this sense. It is a place to which all persons have a right to resort daily, to supply themselves with such provisions and necessities as are there vended. And as order and cleanliness are essential to the public welfare and health, the market, which is thronged at certain hours with all classes of persons and filled with all manner of perishable comestibles, must, of necessity, be under the control of a vigorous and efficient police to prevent it from becoming an intolerable nuisance. It is, therefore, a public place, because it is submitted to the exclusive control and government of the city authorities. In the case of *Cutting*, just cited, this court said: "The right to establish markets is a branch of the sovereign power and the right of regulating them, is necessarily a power of municipal police. See Blackstone Com. 1 vol., 274; Domat Droit Public, lib. 1, sec. 3. This is vested by positive law in the Mayor and council of each municipality, upon whom rests the responsibility of the peace, comfort and order of the assemblages collected at fixed hours at these great thoroughfares."

I will add that markets are not established as sources of public or private profit, but for the public good.

There is but one way of judging of the exercise of the legislative power which may be conferred upon municipal corporations. It is to inquire whether they violate any principles of the Constitutions of the State and the United States, and any legislative enactments. If they do not, the ordinances of such bodies on the subjects delegated to them, have the force of supreme law, and the courts have no option but to compel obedience to the same. To control them would be to legislate for them. 7 M. R. 4, *Claiborne v. Police Jury*.

Looking at the ordinance of the common council in this light, I find the de-

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defendants anxious that the joint property shall still be administered as a market, and that the common council have legislated upon a subject-matter submitted to their control. Does it violate any provision of the Constitution or any statute law? I cannot find that it does.

But it is said that the defendants have tendered to the court a person who will lease the market and will give the city eleven per cent. more than was given the year previous.

Supposing the individual a suitable person to take charge of the market, and that he will be prompt and efficient, and practice no injustice or extortion, still it does not appear to me that the resolutions in question work any injustice to the defendants.

The markets are regulated and the dues and revenues are collected under ordinances and regulations of the city. As the farmer and lessee cannot exact more than allowed by the regulations, so it is not to be supposed that the officer charged with making the collections will receive less. If the joint proprietor, therefore, receives his proportion of the exact income of the market, there is no room for complaint. Certain it is, he does not expect the city to join in an unjust speculation to be made out of the lessee whom he tenders to take the control and the revenues of the market.

Neither have I heard it objected that the commissary of this market, to whom the collection of the dues are intrusted by the ordinance, is wanting in integrity, or that he is not energetic and efficient.

Suppose the courts to take from the city the control of the markets, where can they find powers for their government and police? Their powers are judicial and not legislative.

I cannot, therefore, see any sufficient justification for a judicial interference with the common council of New Orleans in a matter by law left to their control as a legislative body to whom a portion of the sovereign power has been delegated, and whose official acts as such on all things within their jurisdiction, have the force of law.

## OVERRULED OPINIONS.

COLL, J. The parties are joint owners of the Magazine street market, and are entitled to receive their respective share of its revenues in the proportion fixed by a final judgment, signed 29th December, 1858. On the 17th of November, 1856, this court having decided that this market should be sold for the purpose of effecting a partition among the co-proprietors, the city of New Orleans did not sell the lease thereof for the year 1857, but passed a resolution authorizing the commissary of the market to collect its revenues under existing ordinances, and to pay the same into the treasury of the city, where an account thereof is kept.

The defendants were not satisfied with this proceeding of the council, and on the 28d of December, 1856, took a rule on the city to show cause, why they should not be ordered to accept a certain proposal, made by *L. Armingaud*, who had offered to the city council to collect the revenues of the said market-house, and to account for the same, at the rate of \$15,000 per year, until the sale of the property for the purpose of partition should be made.

The District Court made the rule absolute ordering him to collect the revenues, and to pay monthly into the hands of the City Treasurer a sum of \$1,250.

He was also ordered to furnish a bond in the sum of \$20,000.

From this judgment the city has appealed.

The question in this case is, whether the city of New Orleans has the exclusive control of collecting the revenues of the Magazine street market?

This must be answered in the affirmative.

The authorities of the city of New Orleans alone have, by law, the right to ordain in what places markets shall be held; they have then the right of regulating this market; of authorising therein the sale of some articles and of prohibiting that of other commodities. They can also make it a source of revenue to the city by requiring the vendors therein to pay certain prices for the privilege of selling, and they have the right to collect the same by any one they think proper, or to farm out, for a fixed price, the right of collecting and keeping the revenues of the said market.

These prerogatives constitute a part of the police power of the city.

Appellees seem to think they have a right to a joint control of the collection of the revenues, because they and the city are joint owners of the market-house; their error consists in mingling the right of property in the market-house, with the right to the market therein held. The market-house

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and the market therein held are distinct; the former may be joint property, but the latter is created by the city, the vendors therein derive their right from the city, and it alone can ordain how much they shall pay for the privilege of selling and collect the revenues for the same. Although, then, the parties are joint owners of the property, and entitled to a partition of revenues in due time, according to their respective shares, yet they are not joint owners of the right to give authority to sell in the market-house, to regulate the price, or to collect the revenues. It is not a valid reason to take from the city its police power, because it may in error have built a market-house on private property.

If authority to constitute a market exists alone in the city, then the prerogative of fixing prices for the privilege of selling therein, and of collecting the revenues thereof, is vested solely in the authorities. Vide *First Municipality v. Cutting*, 4 An, 836; Act amending Act to incorporate the city of New Orleans, approved March 14th, 1816; Bullard and Curry, p. 101, 1st sec.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed; and proceeding to render such judgment as ought to have been rendered by the lower court, it is ordered, adjudged and decreed, that the rule taken in this case by defendants, be discharged with costs in both courts.

VOORHIES, J., dissenting. In our former decision between the parties, in remanding the case for a partition by licitation, we observed: "It appears to us erroneous to style the Magazine street market a *locus publicus*. Market-houses are not included in the enumeration of *public* things, contained in Articles 444, 445 and 446 of the Civil Code. A market-house may well be the subject of *private* ownership. In many cities, butcher's meat, fish and vegetables are sold in shops, like any other commodity. Even in New Orleans there are to be found market-houses which belong to individuals, &c.

But from this general power of establishing markets and regulating butchers, it does not seem to follow, that the city corporation must needs be the owner of all the market-houses within its limits, any more than of all the bakeries and taverns, whose occupants are subjected to the same municipal supervision, &c." A. R.

It cannot be denied, that the police of the city extends over all the market-houses within its limits, whether held by lessees under it, or owned by individuals. Neither can it be denied that the city has the exclusive right to fix the rent of its own market-houses, and regulate the mode of collecting the same. But has it the exclusive right either to lease or to direct the mode of collecting the rent of market-houses belonging to individuals? Clearly not. Then, in her joint ownership of such property, as in the case at bar, it is difficult to perceive any good reason why the city should be vested with any more right than the other party in fixing and collecting the rents thereof.

The plaintiff is appellant from a judgment making the following rule absolute, and claims the exclusive right to collect the rents of the property in question, pending the litigation, viz:

"On motion, &c.—It is ordered by the court, that plaintiff do show cause why they should not accept the proposal of *Louis Armingaud* to collect the revenue of the lower Magazine street market from and after the 1st January, 1857, and to account to the owners of said market at the rate of \$1,838 33 per month, until the sale of said market be effected, pursuant to the judgment of the Supreme Court."

The court *quo* considering it necessary, in order to secure the interest of both parties in the collection of the revenues until the partition by licitation under the decree of this court, ordered that the plaintiff "proceed at once to farm out the collection of said revenues in the usual manner, and after due advertisements, by sale at public auction, the farmer or lessee to take the same only up to the said licitation, and that in the meantime and until the plaintiff shall have so farmed said revenues, *Louis Armingaud* be appointed and authorized to collect said revenues from and after the 1st of January, 1857, and to account for the same at the rate of \$15,000 per annum, and to pay over to the City Treasurer on the last day of every month, the sum of \$1,250, on his entering into bond in the sum of \$20,000 in favor of plaintiff and defendants, according to their respective rights, for the faithful performance of his duties," &c.

By a judgment of the Sixth District Court of New Orleans between the parties, their respective proportions in the property in question has been finally fixed.

The only ground urged in answer to the rule is, "that the collection of the revenues of the markets of this city is entrusted to the Common Council of the city of New Orleans, and they cannot be divested of said trust. That the maintaining of the rule would cause plaintiff damages in the sum of \$500."

It is evident that the proposition assumed, can only apply to market-houses of which the city is the exclusive or sole owner, and not to such as belong to individuals, or of which it is a joint owner, as in the present case. It is difficult to perceive in what respect the appellant is aggrieved by the order of the court authorizing a third person, under a heavy bond, in consequence of the disagreement of the parties, to collect the revenues of the property and to account to them for the same, as we have seen. There is not an iota of evidence in the record, to show the alleged damages. On the contrary, both parties are damaged by the course of the City Council. Neither party having the exclusive possession or control of the property, it was therefore fit and proper, under the peculiar circumstances of the case, for the court, in the exercise of its discretionary and equitable power, thus to protect the interest of both parties, and to make the property bring as large a revenue as possible. And it must be observed, that the plaintiff complains with bad grace, for the order has conferred upon it more authority than that sanctioned under the rules prescribed by law, as to the rights and obligations of parties in regard to private ownership. The appellees, perhaps, would have the right to complain, but they have not done so.

I am, therefore, of opinion, that the judgment of the court below ought to be affirmed.

SPOFFORD, J., concurred in this opinion.

## J. M. DENMAN &amp; Co. v. S. M. LOPEZ &amp; Co.

The provisions of our laws on letting and hiring do not favor abrogation of leases, where the loss or inconvenience is not caused by the fault of the lessor. Except in extreme cases the remedy of the lessee is for indemnification.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*Clarke & Bayne*, for plaintiffs. *Collins and Foulhouse*, for defendants and appellants.

COLL, J. The plaintiffs leased to the defendants the "Falcon House," from the 1st November, 1854, until the 31st of October, 1855, for the yearly rent of \$2,100, payable on the first day of each month.

On the 28th of November the defendants abandoned the premises.

On the 30th, plaintiffs obtained a provisional seizure, and instituted suit for the year's rent; the defendants admit the execution of the lease, but allege that it was dissolved by a *fortuitous* event, which occurred on the 20th Nov.: "a fire which destroyed the adjacent building, the walls of which fell upon and against the western wall of the building leased, and thereby destroyed the said wall, so shaking and injuring said wall, that the building became totally unfit for the purpose for which it was leased, untenable and insecure."

The leased premises were occupied as a coffee-house, called the *Falcon House*, situated on Gravier street, north side, and separated from "Placide's Varieties" by an alley some twelve or fourteen feet wide.

The theatre made the "Falcon House" a valuable stand for the sale of liquor by the glass and as a restaurant. Its chief value, for that purpose, depended upon the existence of the theatre there.

On the 21st November, 1854, the theatre was burned, and the defendants aver, that the "Falcon House" was so damaged by the fall of the wall of the "Varieties Theatre" on its side wall, as to authorize them to quit the premises and to consider the lease terminated; that even if the building was not materially damaged, yet if they had reasonable grounds to believe that it was not safe to be inhabited, they then had the right to abandon the premises and deem the lease cancelled; particularly as the lessors, according to their averment, never offered to furnish them with another lodging during the repairs.

It appears from the evidence, that on the 27th November, 1844, *M. Pilié*, the City Surveyor, gave a certificate in his official capacity, that the western wall of the "Falcon House" was badly cracked, occasioned by the falling of the walls of the "Placide's Theatre," lately destroyed by fire, that said wall was dangerous and ought to be pulled down and rebuilt.

The record shows, that this opinion of *Pilié* was incorrect; that the building was but slightly injured; \$180 or 200, being all the expense of the repairs.

It was standing at the time of the trial in April, 1856, and has been occupied in the upper part for the storage of carriages since November, 1855. Heavy weights have been placed therein, without any injury or causing uneasiness. One of the witnesses says, he has seen as many as ten or twelve carriages on the first floor and perhaps four or five on the second floor.

*Pilié*, in his examination in court, says, if he had thought that the wall was

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sprung from settlement of the wall and not from the fire and commotion, he might not have condemned it. In his cross-examination he testified, that "nothing in the 'Falcon House' appeared to be injured by the fire."

The opinion of *Pilié*, as to the danger, was corroborated only by men who have had no experience in building, whilst several builders testified, that there was no danger; and it is also shown, that the repairs could have been done, if necessary, in fifteen days.

The lapse of time has established the error of *Mr. Pilié's* opinion.

It appears to us, that defendants cannot base a claim for relief on Arts. 2663, 2667 or 2669.

The provisions of our laws on letting and hiring do not favor abrogation of leases, when the loss or inconvenience is not caused by the fault of the lessor, but specifies indemnity as the proper remedy except in extreme cases.

This was the doctrine of the court in the case of *Fanny Dussuan & Husband v. L. F. Generia*, 6 An., 279, where the tenant suffered a temporary inconvenience from the overflow produced by a crevasse, and also in the case of *Dorville v. Amat*, 6 An. 566, where the adjoining proprietor found it necessary to demolish the party-wall, in order to erect a more substantial one to suit the character of the building he was about erecting.

In the case of *Pontalba v. Domingon et al.*, 11 L. 192, it was held, that the lessee is bound to allow the necessary repairs to be made on the leased premises, but may have an allowance by a suspension of the rent for the time he is obliged to quit for this purpose.

The case of *Coffin v. Redon*, 6 A., 487, quoted in defendant's brief, was decided in favor of the lessee, because there was an original defect in the construction of the building, and a part of the building had to be reconstructed; the lessor's implied warranty was violated, and the lessee had the right to demand the dissolution of the lease.

In the case at bar there was no original or latent defect in the building; but repairs became necessary from a cause independent of the control of the plaintiff.

Defendants cannot shelter themselves behind the certificate of *Pilié*: it is true, they may have acted prudently in removing, if they believed it, but they must incur the risk of being held liable, if the certificate is found to have been given in error.

The certificate of the City Surveyor in the case at bar is not binding on this court.

If such a doctrine should be adopted, then the tenure of leases would depend upon the opinion of the City Surveyor as to the safety or danger of buildings.

Defendants may have quit the premises under the impression of the building being dangerous, but as that impression is not sustained by the evidence, they are liable to plaintiffs on the lease.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

## W. C. AULD v. J. B. WALTON. \*

Appeals in cases of contested elections must be considered as falling within the general rules applicable to appeals in all civil cases and where proper and necessary the return day may be extended.

**A**PPPEAL from the First District Court of New Orleans, *Robertson, J.*  
*Benjamin, Bradford & Finney*, for plaintiff and appellant. *R. Hunt*, for defendant.

**VOORHIES, J.** The defendant has filed a motion for the dismissal of this appeal, on the ground that it was not made returnable by the District Court within the time imperatively fixed by law.

This is a contested election case, in which the grounds of action are fully set forth in plaintiff's petition.

The election in question was held, as required by law, on the 5th of Nov., 1855, for the office of Clerk of the Fourth District Court of New Orleans.

The case was tried by a jury, and resulted in a verdict in favor of the defendant. The District Judge, after refusing a new trial, rendered a final judgment in accordance with the verdict on the 26th of May, 1856. On the 4th of June, 1856, the plaintiff obtained an order from the Judge granting him an appeal from the judgment, returnable on the fourth Monday of the same month. In the meantime, on the 16th of June, the plaintiff filed an application in this court for an extension of time to bring up the transcript, based on the certificate of the Clerk of the court below, that he could not have the transcript ready for the return day—the fourth Monday of June. Nothing appears to have been done with this motion, owing, probably, to the adjournment of this court previous to the time within which the appellant was bound to file the transcript.

The 11th section of the Act of 1855, provides: "That in all cases in which the right of office is involved, and an appeal is taken from the judgment of the District Court, returnable before the Supreme Court, holding session in New Orleans, it shall be returnable in ten days after judgment of the lower court, and the Supreme Court, on the motion of either party, shall proceed to try the same by preference." Session Acts of 1855, 314.

This enactment, it is contended by the appellee, is conclusive upon the subject, leaving nothing to the discretion of the court.

The section quoted does not, in our opinion, apply to the present case. It was originally enacted in 1853, when an appeal did not lie in cases of contested elections, but only in certain cases involving title to office, in which the usual remedy was by *mandamus* or *quo warranto*; and reenacted in 1855. It is clear, therefore, that it formed only an exception to the general rule on the subject of appeals in all civil cases.

The 1st section of the Act of 1856, under which this appeal was taken, provides: "That in all contested elections, brought before the courts of this State, the party cast shall have the right of appeal to the Supreme Court, as in other

\* Omitted in the Reports of 1856.

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civil cases, where it is shown in the record that the amount of the emoluments of the office in contest is over \$300, &c." Session Acts of 1856.

Under the provisions of this enactment it appears to us obvious, that all appeals in cases of contested elections must be considered as falling within the general rule applicable to appeals in all civil cases. Adopting a different construction, would, in our opinion, have the effect of substituting the exception to the general rule, defeating thereby the clearly expressed will of the Legislature. For it must be obvious, that there is a manifest difference between a case like the present and one in which the title only to office is involved. In the first, the election may be declared null and sent back to the people, neither party being entitled to the office; whereas, in the other, it must be adjudged, that one of the litigants is entitled to the office.

Considering our construction of the law to be correct, it follows, that the order of the Judge fixing the return of the appeal cannot be viewed as erroneous. To require the return day to be made within a delay in which it was impossible to make out the transcript, would be, it seems to us, requiring a vain thing to be done. As the record is voluminous, containing upwards of 340 pages, even an extension of the return day in this case might, therefore, have been necessary and proper. 9 A., 14; 10 A., 778.

It is, therefore, ordered, that the motion to dismiss the appeal be overruled at the appellee's costs.

MERRICK, C. J., concurring. I am inclined to the opinion, that the Acts of the Legislature of 12th and 30th of April, 1853, and of February 14th, 1854, are *in pari materia*; and, consequently, that it was the duty of the District Judge to make the appeal returnable within ten days after the rendition of the judgment.

But it does not appear, that the irregularity in the order was attributable to the appellant. It is, therefore, cured by the statute of 1839, reenacted in 1853. See section 14, p. 315.

For this reason, I concur in the decree.

#### JOHN DAVIDSON v. WIDOW POYDRAS DE LALLANDE.

In cases requiring proof of dates of delivery of a great variety of articles, &c., a memorandum, made at the time, may be referred to by a witness, because of the difficulty, and often impossibility, of making the proof with certainty without such reference.

Where a plantation, slaves, &c., were sold at public auction, testimony offered by the purchaser to establish his claim to certain articles alleged by him to have formed a part of his purchase, was properly excluded on the objection, that they were not embraced either in the printed advertisement or in the inventory read at the sale.

A witness may be interrogated on cross-examination upon matters unconnected with those on which he was examined in chief.

**A** PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*  
*Duncan & McConnel*, for plaintiff and appellant. *Janin & Griffon*, for defendant.

VOORHIES, J. On the 29th March, 1855, the plaintiff became the purchaser of a certain plantation, with the slaves, implements of husbandry, &c., attached to the same, which was sold at auction as the property of the defendant. He

alleges in his petition, that two of the slaves, one named *Celestine*, aged 18 years, and the other *Isidore*, aged 6 years, and certain other articles, embraced in the sale, were never delivered. He therefore prays, that the defendant may be condemned to pay him, as the value thereof, the sum of \$3842, besides interest and costs.

The court below having given a judgment adverse to his pretensions, he appealed.

The record contains several bills of exceptions, taken by him to the opinion of the Judge on the trial, below, to which he has called our attention.

1st. The defendant introduced in evidence two written statements, attached to the following document, in connection with the testimony of *B. L. Millaudon*, then on the witness' stand, one dated the 6th and the other the 12th April, 1855, and both signed by said *Millaudon* and *W. J. Darden*, agents of the defendants, viz:

"Inventory of articles on the Poydras plantation, taken on the 6th of April, 1855, and delivered to *Mr. Davidson* by *Messrs. B. L. Millaudon* and *W. J. Darden*.

The hands are the same as those mentioned in the inventory taken on the 8th February, 1855, with the exception of two children marked on the advertisement by error after the name of negro woman *Arthemis*. The number is 123, instead of 125. 61 mules and one horse, 20 oxen, 5 cows, 3 yearlings, 3 calves, 15 carts and wagons, 1 water cart, 8 three-horse ploughs, 27 two-horse ploughs, 4 harrows, 100 empty sugar hogsheads, 16 barrels of pork and beef, 7 barrels of fish, 125 cords of wood. I acknowledge to have received all the abovementioned articles and plantation from *Messrs. B. L. Millaudon* and *W. J. Darden*.

PARISH OF ST. BERNARD, 6th April, 1855."

[Signed]

JOHN DAVIDSON.

In the first of these statements it is asserted, among other things, that the slave *Mathilde* never had any other children than those described in the advertisement by the names of *Celestine*, *Isidore* and *Rose*, whereas the words "two children" were erroneously superadded, and that the articles therein specified were delivered to the plaintiff. In the other, that the large number of articles therein specified, "not included in the above inventory," were also delivered to the plaintiff.

The admission of these statements was opposed on two grounds: 1st, because they were *res inter alios acta*. 2d, Because, *ex parte*, they were inadmissible, the witness himself being competent to prove the facts therein stated, nor could they even be furnished to the witness for inspection without first showing that his memory was not clear and retentive in regard to some of the particulars.

We do not think the Judge erred in overruling these objections. The evidence was clearly pertinent to the issue, and could not, therefore, be considered as *res inter alios acta*. In cases requiring proof of the delivery of a great variety of articles, dates, &c., it would be extremely difficult, nay, frequently impossible, to make such proof with certainty and precision unaided by memoranda taken at the time, as in the present case. It is true, a memorandum thus taken does not, *per se*, make proof of the facts therein set forth. But the rule on this subject may be considered, we think, as correctly laid down in 1 Greenleaf, § 466.

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2d. We do not think the Judge erred in excluding testimony to prove the plaintiff's claim to two old boilers, old iron, &c., on the ground, that the same were not embraced either in the printed advertisement or inventory read at the sale. The plantation appears to have been sold *à la folle enchère*, the two previous purchasers having failed to comply with the terms of the sale. The plaintiff now seeks, and we think without any legal grounds, to recover the value of those articles, alleged to have been included in the former sales. The previous purchasers, if sued by the defendant for damages resulting from the inexecution of their contract, might, it is true, avail themselves of this as a ground of defence, but surely the plaintiff cannot be permitted to claim anything more than what he has purchased.

3d. The plaintiff objected to the examination of *L. Millaudon*, when cross-examined by the defendant's counsel, touching matters totally unconnected with those on which he was examined in chief; that the defendant should have made *Millaudon* his own witness for that purpose. The Judge in our opinion did not err in overruling this objection, which appears to us to be clearly indefeasible under our rule of practice.

On the merits, we conclude from the evidence, that the tradition or delivery of the property thus conveyed to the plaintiff has taken place in accordance with the terms of the contract between the parties. The slaves *Celestine* and *Isidore*, embraced in the deed of sale, are clearly shown to have been delivered with the others, amounting to 123, as evidenced, not only by the deed of sale, but by the above document signed by the plaintiff, in which the error in relation to the two children of the slave *Mathilde* is acknowledged to have been made in the advertisement.

Judgment affirmed.

SPOFFORD, J., concurring. Upon the authority of *Durnford v. Clark*, 1 Martin, 202, I conclude that the refusal of a District Judge to confine the cross-examination of a witness to matters connected with his examination in chief is not assignable as error in this court.

#### J. LEVOIS v. F. GERKE.—ON A RE-HEARING.

The 6th section of the Act of the 29th of March, 1826, (session Acts, p 140) which provides for a sequestration of the property and a meeting of the creditors of any merchant or trader who shall abscond or conceal himself in order to avoid the payment of his debts, is still in force.

That law provides for a mode of proceeding different from the one had in view in cases of voluntary and forced surrender, and is not affected by the Acts of 1855 upon those subjects.

**A**PPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*G. & C. E. Schmidt*, for plaintiffs and appellants. *A. & A. Pitot*, for appellees.

COLE, J. *Levois and others*, creditors of *F. Gerke*, acting under the provisions of the 6th Section of the Act of 29th March, 1826, obtaining a sequestration of all his property, and an order calling all the creditors to a meeting in order to appoint a syndic and liquidate his affairs.

*Durand, Dortie and Lacapere*, creditors of *Gerke*, who had obtained an attachment against his property, intervened in the proceedings, and in their

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capacity of attaching creditors, whose interests were injured by said proceedings, demanded that the same be set aside and quashed, on the ground, that the 6th section of the law of 1826 had been repealed by the statutes of 1855, relative to insolvency.

The demand of the intervenors was sustained by judgment of the court below, and the plaintiffs now seek to have the said judgment reversed, on the ground, that the said 6th section is still in force, and this is the principal question for our present consideration.

The 6th section of the Act of 29th March, 1826, entitled "An Act supplementary to an Act entitled 'An Act relative to the voluntary surrender of property, and to the mode of proceeding, as well for the direction, as for the disposal of debtors' estates, and for other purposes,'" reads as follows:

"That if any merchant or trader abscond or conceal himself, in order to avoid the payment of his debts, it shall be lawful for three of his creditors or more to apply to any competent Judge, and after having made an affidavit, that the said merchant or trader has actually absconded or concealed himself, in order to avoid the payment of his debts or to be sued therefor, as well as of the specific amount of their respective claims, to obtain from the said Judge an order authorizing the sequestration of the property of the said merchant or trader, and that his creditors may be called to appoint syndics, who shall be put by the Judge in possession of the property of said merchant or trader, as by way of forced surrender; and, in such case, all the other formalities and rules prescribed by law, in matter of voluntary surrender of property, shall be complied with."

At the time this statute was enacted, no law existed in Louisiana which empowered the creditors of a debtor who had fled from the State to seize his property and distribute it ratably among the mass of his creditors, and to carry into force, as to him, the provisions of the 3510 Art. of the Civil Code, which is as follows: "The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exists among the creditors some lawful causes of preference."

Anterior to the enactment of this statute, a debtor could secretly leave the State, and some favored creditors could attach his property and obtain a privilege by the attachment before the other creditors were even cognizant of his departure.

This statute was then indispensable for the safety of the commercial community, and supplied a void in the legislation of the State.

It provided for the disposal of the estates of debtors who had absconded, a mode different from, and independent of, the laws then in force for forced and voluntary surrenders.

The laws then in vigor for forced surrenders required, as an indispensable requisite for a forced surrender, that the debtor shall be in actual custody.

The laws then in force for a voluntary surrender required, among other formalities, that the debtor should present a petition to a competent court, praying for a call of his creditors."

Section 6 provides a new mode of proceeding against a different class of debtors from the laws then in vigor for a forced or voluntary surrender.

It is true, that this section authorizes proceedings as *by way of forced surrender and voluntary surrender*; but, as it authorizes to proceed partly by

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forced and partly by voluntary surrender, this shows that the Legislature contemplated a mode for disposing of the property of debtors who had absconded or concealed themselves, entirely distinct from the remedies then in being.

It should also be remembered, that under the Constitution of 1812, laws were not enacted distinctly with a title for each, but laws upon many distinct subjects were embraced under the same general title.

By reference to the Act approved March 29th, 1826, it will be found, that sections 7 and 8 apply to successions; these sections are not, however, repealed by the repealing clause in the Acts of 1855, relative to insolvent laws, because they are not upon the same subject-matter, and there is nothing therein inconsistent with them.

Inasmuch as the insolvent laws of 1855 do not embrace the class of debtors referred to in section 6th of the Act of 1826, and as the subject-matter of the Acts in question of 1855 are voluntary and forced surrenders, and as said section 6th provides a mode different from either species of surrenders, and constitutes a distinct remedy, and as there is nothing in the laws of 1855 relative to insolvency which clashes with the provisions of this section, we are of opinion that it is not repealed by the repealing clause in those laws.

It is not now the time to decide on the rank of the attaching creditors or of those who have sued out the writ of sequestration; the rank and priority of the different creditors will be fixed during the proceedings under the 6th section of the Act of 1826.

It is, therefore, ordered, adjudged and decreed, that the former judgment of this court in this case be set aside, and that the judgment of the lower court on the rule be avoided and reversed, and the rule be dismissed, and intervenors pay the costs of both courts.

MERRICK, C. J., dissenting. The putting of the creditors in the possession of the goods of the debtor who absconded or secreted himself to avoid the pursuits of his creditors, is nothing peculiar to modern times. It was recognized by Justinian as to those who, having given surety, concealed themselves, and in a certain manner by the former laws of the country when the debtor fled. Dig. Lib. 42; F. 4 Legis 2 and 7; Partidas 5, Tit. 14, Law 10; See also Mac-kelvey Parte Speciale, § 767, No. 3, C.

The Code of 1808 as well as the Code of 1825 recognized two kinds of surrender, forced and voluntary. They are defined as follows:

"The voluntary surrender of property is that which is made at the desire of the creditor himself."

"And the forced surrender is that which is ordered at the instance of the debtor's creditors or some of them, in cases provided by law."

Both of these kinds of surrender are "subject to formalities which are prescribed by special laws." Code 1808, p. 294, Arts. 168 and 169; Civil Code, 2168, 2169.

These two kinds of surrender have been treated as the two divisions of the subject by the lawgiver ever since the promulgation of the Codes.

The sixth section of the Act of 1826 in question, putting the creditors in possession of the property of the merchant or trader who absconds or conceals himself, has been treated by the lawgiver as properly coming under the one or the other of these heads ever since the passage of that Act.

It is so treated in the Digests of Moreau, Bullard and Curry and the Digest of 1852, which were published under the legislative sanction.

It is so classed, as I think, in the Act itself, for the title of the Act is "An Act supplementary to an Act entitled 'An Act relative to the voluntary surrender of property and to the mode of proceeding, as well for the direction as for the disposal of debtors' estates, and for other purposes.'" The first six sections of the Act, including the one in question, treat of the surrender of property to the creditors where the debtor is living. The seventh section relates to insolvent successions where no one will accept the administration, and whether this section is or is not repealed, it does not appear to me materially to affect the argument. It is evident, that the Legislature, by the sixth section, intended for the causes mentioned to authorize three of the creditors to obtain *an order* for the surrender of the property of the debtor. The surrender was not, therefore, voluntary, and must fall under the other division indicated by the Code, viz: the "surrender which is *ordered* at the instance of the debtor's creditors" Judge Porter said, in a case arising under the old law, in the case of *Ward v. Brandt*, that:

"The failing circumstances already alluded to" (in cases where courts were authorized to decree a forced surrender) "are those cases where the debtor who is a *trader or merchant conceals his person* or his property from his creditors with an intention to defraud them, or *who absconds*, taking with him his effects and books of account; or is unable to pay all his debts; or who applies for a respite; or to have the benefit of these laws made for the relief of insolvent debtors; or against whom execution has issued; or who fails to discharge his debts as they become due."

"In all these cases that proceeding which our law contemplated by the expression 'forced surrender' *may be ordered*: the creditors may apply that a concurso be formed; that syndics be appointed; that the property be sequestered and applied to the common benefit, and that the debtor, if he conceal his effects, be imprisoned until he makes a full and fair disclosure respecting them." 9 M. R., 636.

It seems to me, therefore, that a fair construction of the sixth section of the Act of 1826, both by reference to the Act itself, the former legislation, the decisions of this court, and the legislative action since the statute was passed, requires that it should be classed under the head of forced surrender. But all laws on the subject-matter of both voluntary and forced surrenders, except what is contained in the Civil Code, the Code of Practice, and the two statutes of 1855, are repealed. Acts 1855, 319, sec. 4; 438, sec. 36.

And on the subject of the legislation of 1855 we have held, that the object was to furnish in one body all the law on the subject-matter treated of in each Act, so that, in order to know what the law is on that subject one would not be compelled to look beyond the Act itself. I see, therefore, no good reason to change the judgment heretofore pronounced by this court.

VOORHIES, J., concurs in this opinion.

#### OVERULED OPINIONS.

VOORHIES, J. This is an action brought by the plaintiffs against the defendant, an absconding debtor, for a forced surrender of his property, in accordance with the 6th section of the Act of the 29th of March, 1826, entitled "An Act supplementary to an Act entitled an Act relative to the voluntary surrender of property, and to the mode of proceeding, as well for the direction as for the disposal of debtors' estates, and for other purposes." A writ of sequestration was issued as prayed for. The Sheriff's return thereon shows, that all the property belonging to the defendant had already been seized by him under a writ of attachment sued out by *Durand, Dorte and Lacapere*.

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On the execution of the sequestration, *Durand, Dorte* and *Lacapere*, the attaching creditors, took a rule upon the plaintiffs to show cause why the proceedings in the present case should not be dismissed, on the ground of being illegal and unauthorized by law.

In support of the rule it is urged, that the section above quoted, on which the plaintiffs' action is based, was virtually repealed by the statutes of 1855.

The Acts of 1817 and 1826, relative to the voluntary surrender of property, exclusive of that section were consolidated in the Act entitled "An Act relative to the voluntary surrender of property and mode of proceeding," approved the 15th of March, 1835. The 36th section of this Act expressly declares all laws contrary to its provisions, and all laws upon the same subject-matter, except what is contained in the Civil Code and the Code of Practice, to be repealed. That section, it is evident, was properly excluded from this Act, even if still in force, as inapplicable to the voluntary surrender. All the Acts in relation to forced surrenders were consolidated in the Act entitled "An Act relative to forced surrenders and the mode of making the same," approved March 14th, 1855. The last section of this Act also contains the repealing clause of all laws contrary to its provisions, *all laws upon the same subject-matter*, except what is contained in the Civil Code and the Code of Practice. The 6th section of the Act of 1836, which clearly applied only to forced surrenders, was not embraced in this Act. As it was upon the same subject-matter, namely: forced surrenders, it was thereupon expressly repealed. That such was the clear intention of the lawmaker, we think also results from the fact that all the statutes considered in force at the time were re-enacted in 1855, as the Revised Statutes of the State. Session Acts of 1855, 318 & 492; 11 A. 499. As the repeal of that section leaves the plaintiffs' action without any legal foundation, it is clear, therefore, that the other grounds of defence which they have urged cannot avail them. The law authorizes persons whose interests may be affected by a suit pending between other parties to intervene in such suit and join one of the parties or oppose both. Code of Practice, Art. 389 & 392, as amended by the Act of 1836. We are therefore of opinion, that the rule was properly taken to set aside the proceedings in this case. The claim of *Durand, Dorte* and *Lacapere* against the defendant *Gerke*, appears to us to be fully sustained by the evidence. Moreover, it could not be contested by defendants in the rule. 1 L. 481; 8 L. 54.

It is, therefore, ordered, that the judgment of the court below be affirmed, with costs.

SPOFFORD, J., dissenting. The 6th section of the Act of 29th March, 1836, (p. 140) supplied a *casus omissus* in the previous laws.

Provision had been made for voluntary surrenders by insolvents; provision had also been made for obliging contumacious debtors, *within reach of process*, to pay their debts or make a surrender.

But the case of a debtor who absconded or concealed himself had not been thought of; he could not be reached by any existing remedies. Such a debtor would not, of course, make a voluntary surrender; and he could not be forced to make a surrender, because he could not be cited. The evil to be remedied was found to spring chiefly from transient merchants and traders. A new law upon a new subject was therefore enacted; it was declared that "if any merchant or trader abscond or conceal himself, in order to avoid the payment of his debts, it shall be lawful for three of his creditors or more, to apply to any competent Judge, and, after having made an affidavit that the said merchant or trader has actually absconded or concealed himself, in order to avoid the payment of his debts, or to be sued therefor, as well as of the specific amount of their respective claims, to obtain from the said Judge an order authorizing the sequestration of the property of the said merchant or trader, and that his creditors may be called to appoint syndics, who shall be put by the Judge in possession of the property of the said merchant or trader, *as by way of forced surrender*, and that in such case, all the other formalities and rules prescribed by law in voluntary surrender of property, shall be complied with."

This is simply a provision for the judicial sequestration and distribution of the property of absconding or concealed merchants and traders, who have not paid their debts, who will not make a voluntary surrender, and who cannot be forced to make a surrender.

Plainly, therefore, such proceedings cannot be called voluntary surrenders, nor forced surrenders. There is no surrender at all. There is a sequestration of property and a distribution of it among those whose common pledge it is, without the assent or dissent of the owner, who is not to be notified at all. Nor did the Legislature speak so loosely as to call it either a voluntary or a forced surrender. One step was to be taken "*as by way of a forced surrender*," and others as in voluntary surrenders."

Now, in revising the statutes in 1855, two Acts were passed, one entitled "An Act relative to forced surrenders and the mode of making the same" (Sess. Acts, p. 318); the other entitled "An Act relative to the voluntary surrender of property and mode of proceeding, (Sess. Acts, p. 431). The case before us does not fall within the meaning of either of these titles. This however is a minor consideration; what is of far deeper significance, it is not provided for, or in any way alluded to, in any section of either Act. So far as these two Acts go, the case of an absconding or concealed merchant or trader, or an insolvent who cannot be reached by process and will not appear, is a *casus omissus*, as it was before the adoption of the 6th section of the Act of 1836. The provisions of that section are in no wise inconsistent with the two Acts of 1855; therefore, there is no implied repeal; as we have seen, they are not upon the same subject-matter, therefore, they are not expressly repealed. In the case of *Holmes v. Wills*, 11 An., 439, we held that the repealing clause only swept away such anterior legislation upon the matter *specifically treated of* in the new legislation as was not retained in the latter. In *Stafford v. His Creditors* the new law treated specifically of the penalty for a fraudulent bankruptcy, and we held that so much of the old law *concerning this penalty* as was not retained in the new, was repealed. It seems to me that the present case does not fall within the doctrine of either decision. On the contrary, I think the doctrine of both, carried to its legitimate consequences, must lead to the conclusion that the 6th section of the Act of 29th March, 1836, is still in force; and such is my opinion.

BUCHANAN, J. I concur with Mr. Justice Spofford, as to the effect of the repealing clause in the Acts of 1855. His opinion on that point seems to me to conform to the interpretation which we adopted in the case of *Holmes v. Wills*.

The sequestration of an absconding merchant or trader's effects at the instance of three of his creditors, under the sixth section of the Act of 1826, is not, in the terms of the statute, a forced surrender; and it is clearly not a voluntary surrender. There is nothing in the statute, that I can perceive, which gives a greater right to the plaintiffs in such a proceeding than the plaintiffs in any other sequestration would have. I am, therefore, of opinion, that the attachment previously levied upon the defendant's property at the instance of the appellees, could not be affected by the subsequent sequestration of the plaintiffs; and that the judgment should be affirmed so far as to dissolve plaintiffs' sequestration of the property previously attached by appellees.

## L. A. FINLEY, Syndic, v. P. MALLARD.

The interest on a claim is not suspended by the debtor placing it upon his schedule, where the creditor takes no part in the proceeding although the debtor may obtain a respite.

**A**PPEAL from the Fifth District Court of New Orleans, *Augustin, J.*  
*Walker & Pierce*, for plaintiff. *G. LeGardeur*, for defendant and appellant.

COLE, J. The sole question in this case is, whether the debtor, who, being in embarrassed circumstances, applies to his creditors for a respite to pay the various sums due by him, as put down in his bilan, is bound to pay interest to a creditor whose claim was placed on the schedule, but who did not vote or take any part in the proceedings.

The lower court decided the question in the affirmative, and defendant has appealed.

The law makes the debt at bar bear five per centum interest from its maturity; the interest was then a part of the contract at the time the note sued on was made; defendant knew at the time he signed it, that if it was not paid at maturity, it would afterwards bear five per centum interest.

The other creditors cannot, by granting a respite, deprive plaintiff of his right to get the whole amount due him after the expiration of the time accorded by the respite.

This would be a violation of the contract.

Defendant did not in his petition ask to be relieved from the payment of interest, but only a certain extension of time for the payment of his debts.

The debt at bar was a certain sum bearing interest; the interest was accessory to the principal debt, and when time was given to pay the principal debt, the interest was therein included, and the respite was really time granted to pay the original debt and the interest that might accrue thereon.

The respite cannot be considered as creating a novation of the debt, or as a new contract by which plaintiff agreed to take at a future time less than the amount actually due, but only a postponement of the payment of the amount due to a period beyond the maturity of the debt. *Vide* 2 Kent, 461; C. C. 1932; Session Acts 1852, 95.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

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C A S E S  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF LOUISIANA,  
AT  
OPELOUSAS.

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AUGUST, 1857.

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PRESENT:

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|---------------------------------------------------------------------------------------|---|----------------------------|
| HON. A. M. BUCHANAN,<br>HON. H. M. SPOFFORD,<br>HON. C. VOORHIES,<br>HON. J. L. COLE. | } | <i>Associate Justices.</i> |
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H. E. LAWRENCE v. J. S. GROUT.

A plat of survey purporting to be an extract from an approved map of a particular township, certified by the Register of the Land Office is inadmissible as evidence, it being only the copy of a copy and therefore not the best evidence.

The Surveyer General of the United States for the State is the proper person to certify the township maps.

The reservation in the Act of Congress of March 2d, 1849, which devotes a part of the swamp lands to the State, of lands which are "*claimed or held by individuals*," does not apply to persons who claim or hold lands without a sufficient basis for perfecting a title thereto.

No claim can be enforced for improvements made on land while the title is in the sovereign.

**A** PPEAL from the District Court of St. Mary, *A. Voorhies, J.*  
*J. G. & A. Olivier*, for plaintiff and appellant. *J. W. Walker*, for defendant.

COLE, J. The plaintiff and appellant claims to be the owner of lots 1 and 3 of section No. 3 in T. 16, S. of Range 12 E. in the S. W. land district of the State of Louisiana, containing fifty-one 44-100 acres; and complains, that defendant has committed divers acts of trespass and waste upon lot No. 3 aforesaid, to his damage five hundred dollars.

He prays to be quieted in his title to said land, and that writs of possession issue.

The defendant avers, that he is the legal owner and possessor of lots No. 4 and 6 in section No. 3 of T. No. 16 S. R. No. 12 E., which he acquired by purchase for a valuable consideration, the title to which originally came from the United States.

Plaintiff offered in evidence a patent for the lots claimed by him from the State of Louisiana.

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The only question in the case is as to the identity of Lot No. 3; for plaintiff has evidently a title to it. There is a confiction in the number of the lot which defendant supposes he bought, between the map of said township 16, as certified by the Register and that certified by the Surveyor General of the State, the former represents the lot claimed by defendant as No. 4, and the latter represents said lot as No. 3.

Defendant insists, that lot No. 4, of which he is probably the owner, is the lot No. 3 claimed by plaintiff; and, to prove this, offered a plat of survey purporting to be an extract from an approved map of township 16, certified by R. Benguerel, Register of the Land Office at Opelousas.

Plaintiff objected to the introduction of this plat, upon the general principle, that it was not the best evidence, and that it was the copy of a copy.

We are of opinion that this plat was inadmissible.

The certificate is in these words :

LAND OFFICE, OPELOUSAS, LA., April 14th, 1856.

"I hereby certify, that the foregoing diagram is a true copy of sections Nos. one, two, three, four, five, nine, ten, eleven and sixteen of township No. 16, south of range No. 12 east, taken from the map of said township, on file in this office."

R. BENGUEREL, Register.

The Register does not certify, that it is a copy from the original plat filed in his office, and the Surveyor General in the copy offered by plaintiff of the township map No. 16, S. R. 12 E. certifies, that it is a "copy of the original, now on the files of this office," which shows, that the map offered by defendant was a copy of a copy.

The surveyor General of the United States for this State is the officer who has charge of the public surveys, and he is the proper person to certify the township maps. Land Laws, vol. 2, 294, sect. 6.

It has been held by this court, that the copies of public surveys, deposited in the office of the Register of the Land Office, are placed there for his government, and to enable him to perform the duties imposed by law; but he has not legal authority to certify copies so as to make them legal evidence. The law intrusts that power to another person. *Millaudon et al. v. McDonogh*, 18 L., 115.

It is contended, that this decision has been overruled by two decisions, one in 1st R. and the other in 3d R.; an examination of these decisions will show, that they do not militate against the one quoted from 18th L.

In *Boatner v. Scott*, 1 R., 552, it appears, that the copy of the plat of survey was "certified by the Register of the Land Office to be a correct transcript of the original survey in his office," and the court considered it good evidence, because it was certified by the officer who declared that he had the custody of the original survey.

In *Désiré Judue v. François Chrétien*, 3 R., 15, the court merely declared, that the Registers of the Land Offices of the United States may, like all other keepers of public records, give copies or extracts of any books or documents in their custody, and such copies duly certified are admissible in evidence; but they cannot attest or certify the contents of such books or documents in any other manner.

This decision was given on a bill of exceptions to the opinion of the District

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Court refusing to admit in evidence a certificate of the Register of the Land Office at Opelousas, attesting that the plaintiff's claim to the premises had been allowed by the then Register and Receiver of the office, as appeared from the books in the possession and keeping of the Register.

It is evident that the court did not in this case decide the point now under consideration, and that these two decisions are not antagonistical to that in 18 L., 115.

Defendant has then shown no title to the land claimed by plaintiff, but defendant urges, that the Act of Congress of March 2d, 1849, entitled "An Act to aid the State of Louisiana in draining the swamp lands therein," and which devotes a part of the swamp and overflowed lands in Louisiana to the State, provides that the grant shall not embrace swamp lands which are "claimed or held by individuals," and that the land sued for by plaintiff is swamp land, and was claimed five years before plaintiff purchased his warrant.

As defendant has produced no title for the lot in dispute, he cannot fairly come within this provision, for the meaning of the proviso must be, that the lands of those shall not be embraced who claim or hold their lands by a title or some right that can be enforced at law; it cannot signify, that persons who claim or hold lands without any title or any right which would serve as a basis for perfecting or obtaining hereafter a title, could prevent such lands from being sold as swamp lands, for such an interpretation would defeat the donation.

Besides the 2d section of said Act of Congress declares: "That as soon as the Secretary of the Treasury shall be advised by the Governor of Louisiana, that that State has made the necessary preparation to defray the expense thereof, he shall cause a personal examination to be made, under the direction of the Surveyor General thereof, by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation; and a list of the same to be made out and certified by the deputies and Surveyor General to the Secretary of the Treasury, who shall approve the same, so far as they are not claimed or held by individuals," &c.

In the absence of adverse proof we must presume, that the Secretary of the Treasury performed his duty, and that the lot now sued for by plaintiff was not claimed or held by defendant in the sense of the said statute of Congress.

It is true, that defendant has offered in evidence the receipt of the Receiver and the certificate of the Register of the purchase by *William Smith*, under whom he holds, of lots four and six, but he has adduced no title for lot 3, and the judgment in his favor is erroneous.

Defendant asks, that in the event of eviction he may be paid for his improvements. Without deciding whether, under the circumstances of this case, he is entitled to be paid for the same, we would observe, that the evidence as to them is rather indefinite.

*Copper* testifies that *Smith* made improvements, but does not state their nature or value. *L. B. Reeds* testifies that ten acres are probably cleared. But the benefit of this clearing to the land and augmentation of its value are not so clearly shown; besides, it is not proved, that this clearing was made after plaintiff acquired his title from the State—for if it was made when the title of the lot was in the sovereign, defendant could not recover anything therefor.

We think that he is not entitled to any compensation for his improvements.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and that plaintiff be quieted in his title to lot No. three in township No. sixteen south of range No. twelve east in the south-western land district of the State of Louisiana, as designated and numbered on the approved township map, marked No. 4, certified by the Surveyor General of the State of Louisiana, and contained at the end of the record of this suit, and that a writ of possession issue according to law, and that the demand of defendant in compensation be rejected, and that defendant pay the costs of both courts.

CHARLES MULLEN v. GIRARD FOLLAIN et al.

Where a party, whose property was sold under an order of seizure and sale, was present at the sale and bid himself for the property, he is estopped from contesting the validity of the sale on merely formal grounds which were obvious to him at the date of the sale.

If the advertisement of the sale was defective in not describing particularly the buildings, he should have objected to the sale and not enticed other persons into bidding.

**A** PPEAL from the District Court of the Parish of St. Landry, *Martin J. B. F. Linton*, for plaintiff. *J. F. Morrogh, Swayze & Moore* and *J. E. King*, for defendants and appellants.

**SPOFFORD, J.** This suit was brought by the former owner of certain real estate in the town of Washington, to set aside a Sheriff's sale thereof to the defendant *Follain*, made under an order of seizure and sale, on the ground of informalities.

The informalities alleged in the petition are four :

- 1st. Want of notice of seizure and notice to appoint appraisers.
- 2d. Want of appraisement.
- 3d. Want of a sufficient description of the property seized and sold.
- 4th. That the seizure was excessive.

The District Judge set aside the sale, and the defendants, *Follain*, and his warrantor *Dupré*, the seizing creditor, have appealed.

The judgment was erroneous, because all the alleged defects, so far, at least, as they are as proven, were cured by the conduct of the plaintiff himself.

He appeared at the sale, made no opposition thereto, bid himself for the property, thereby encouraging others to bid, and gave up possession of the whole premises as sold by the Sheriff to the purchaser *Follain*. If, under such circumstances, he could now attack the sale on merely formal grounds which were obvious to him at the date of the sale, there would be little security for bidders who might be misled by the acts of parties whose property is exposed to public sale. See *Walker v. Allen*, 19 La. 311; *MacMasters v. Commissioners, &c.*, 1 Ann. 11; *Muir v. Henry*, 2 Ann. 593.

It is true, that, in forced alienations of real estate, there must be a reasonably certain description, as one which will enable the property to be identified. *Wilson v. Marshall*, 10 Ann. 329; *Dodeman v. Barrow*, 11 Ann. 87. But here the advertisement and Sheriff's returns both of the seizure and adjudication, so described the lot of ground in the town of Washington as to en-

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able the parties to identify it and the Sheriff to put the purchaser in possession, which he has done. The proceedings in obtaining the order of seizure and sale, which are of record, embrace the authentic act of mortgage where the lot was also, and, perhaps, more minutely described. Because the plaintiff who, in purchasing, mortgaged to his vendor the land with the house that then stood on it, afterwards erected other small buildings upon the lot, it does not follow that the sale could be annulled on the ground that the new buildings which thus became subject to the mortgage affecting the lot (C. C. 3278) were not particularly described in the order of sale, advertisement, &c. They passed with the lot of which they became a part. (C. C. 497). The plaintiff was bound to know this, and, if he wished a more minute advertisement, should have applied in time to have it made. At least, being present, he should have objected to the sale and not have enticed other persons into a snare by bidding himself. The remarks of the Court in *Seavell v. Payne*, 5 Ann. 259, are directly applicable to this state of facts: "It is obvious that the plaintiff acquiesced in this description. He had his chance of buying under it, and if those who were competing with him, bought under that description, it seems to us that, on the principles of law on which courts always act in cases of this kind, it is not competent for the plaintiff to avail himself of the defective description of the property which had passed under his eye, and which he had an opportunity of correcting. We think we are authorized to infer, as a question of fact, that the plaintiff, so far as to those with whom he treated about the purchase of the property, assented to the sale in this form, and is estopped from contesting its validity on that account." Cases cited in Story's Equity Jurisprudence, secs. 384, 385, 386.

As to the alleged defects, we may remark that the record shows that there was an appraisal, and that the plaintiff appointed one of the appraisers; this was also a waiver of notice of seizure, if such notice was not given, and the party had a remedy for an excessive seizure given by the Code of Practice, Articles 652, 653. It is too late to object on this score, after a judicial sale, and it would not even have been a sufficient ground for an injunction. See *Dobbs v. Hawken*, 3 Rob. 127; *Temple v. Marshall & James*, 11 An. 618.

The appellee complains, in the brief filed by his counsel, that the order of seizure and sale was issued in favor of the seizing creditor, without authentic evidence of the transfer of the note and mortgage to himself. This, though shown by the evidence, has nothing to do with the issues presented by the pleadings. In cases of this kind, the evidence is presumed to be offered to establish only the informalities alleged. No appeal was taken from the order of seizure and sale, and no opposition was made to it; and this action was not brought to annul it for any such defect as that here insisted upon.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed, and that there be judgment against the plaintiff on his demand, he paying costs in both courts.

## S. LEONARD v. BENJAMIN HUDSON, Tutor.

Evidence may be received to show that a note which was given by the former tutor of a minor, in his own name, was in fact signed by him in his capacity of tutor, and that the consideration was a debt due by the minor. Such testimony does not contradict any part of the note, and will authorize a judgment on the note against another tutor to the minor subsequently appointed.

**A** PPEAL from the District Court of St. Mary, *A. Voorhies, J.*  
*H. C. Wilson*, for plaintiff. *T. H. Lewis*, for defendant and appellant.

**COLE, J.** This suit is instituted on a note for \$1384 26 with 8 per cent interest from the 1st of March, 1851, payable on the 1st of March, 1852, to plaintiff or his order.

It is alleged, that this note was made by *William Smith Gordy*, now deceased, as natural tutor of his minor children, for services rendered on the plantation, the right and title of which were vested in the said children.

This suit is instituted against *Benjamin Hudson*, the present tutor of said minors.

It is urged that evidence was inadmissible to prove, that this note was given by *W. S. Gordy*, as tutor to his minor children.

This evidence was admissible; plaintiff had the right to establish in what capacity the note was signed; such testimony does not contradict any part of the note. Vide *Pascal v. Union Bank*, 9 A., 484.

The testimony shows, that the consideration of this note inured to the benefit of the minors; they are then responsible therefor. *Succession of Johnson*, 4 A., 253.

It is also urged, that the note sued on novated the debt due by the minors, and if the debt be not novated it is prescribed by three years. This is incorrect; the Civil Code, Art. 3503, provides, that the action for the salary of overseers is "prescribed by three years, unless there be an account acknowledged, a note or bond given, or an action commenced before that time."

As a note was given in the case at bar, the three years' prescription becomes inapplicable, and the case falls under the operation of Article 3505 of the Civil Code.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

## POLICE JURY v. LANDRY.

None are legal voters at an election held by order of the Police Jury to decide whether an ordinance imposing a tax for works of internal improvement shall be approved, but the proprietors of landed estate in the parish or municipal corporation where the election is held.

**A** PPEAL from the District Court of St. Martin, *A. Voorhies, J.*  
*Deblanc & Fuselier*, for plaintiff and appellants. *Simon & Gary*, for defendant.

COLE, J. On the 13th of October, 1852, the Police Jury of the parish of St. Martin levied a tax of \$103,750 00 on the landed property of the parish, payable in five equal installments, according to the assessment roll of the preceding year.

The object of this tax was to subscribe for 4150 shares of the New Orleans, Opelousas and Great Western Railroad Company.

An election was ordered to take place on the 16th of November, 1852, in compliance with the Act of 1852 of the Legislature No. 175, p. 128, Acts of 1852; to ascertain the sense of the voters on whose property the tax was proposed to be levied.

Two hundred and sixty-four votes were polled, giving a majority of thirty-six votes in favor of the tax.

The defendant being sued for the first installment of his tax, contests the validity of the election on several grounds; as we are of opinion that one of the alleged informalities is sufficient to render the election null, we will only allude to it.

Said Act, approved March 12th, 1852, is "An Act providing for the subscription, by the parishes and municipal corporations of this State, to the stock of corporations undertaking works of internal improvement, and for the payment and disposal of the stock so subscribed."

The 3d section of this Act declares:

"That no ordinance passed under the provisions of this Act shall be valid or take effect until it shall have been approved and ratified by a majority of the voters on whose property the tax is proposed to be levied, at an election to be held specially for that purpose, by order of the Police Jury or municipal corporation passing the ordinance," &c.

The second section declares, that the property on which the tax is to be levied is the landed estate situated in the parish or municipal corporation.

It is clear from these sections, that none are legal voters for a tax of the kind under consideration, but the proprietors of landed estate in the parish or municipal corporation where the election is held.

The meaning of the word "voters," in the latter part of the third section, must be interpreted by the definition thereof in the first part of the same section.

Now it is established, that a sufficient number of illegal votes were taken to determine the result of the election in favor of the tax, and that the tax was carried by means of said illegal votes.

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But it is said, that defendant has ratified the election so far as he is individually concerned, but no legal ratification has been shown, even if it was possible for an individual to ratify an election which is null.

Even if defendant signed the list, which contained the names of those who wished to avail themselves of the 13th section of the charter on account of the said tax, still it is not proved, that he was aware of the illegality of the election at the time he signed the same, and his consequent freedom from liability on account of said railroad tax.

The Police Jury could not, as argued by plaintiff, ratify the election; if illegal, they had no power to ratify it, for none but the legal voters under the statute could declare if the tax should be imposed.

We are of opinion then, that defendant is not liable.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

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SETTER, HYDE & MACKIE v. ALEXANDER LANDRY.

By the "action of workmen, laborers and servants for the payment of their wages," which is prescribed by one year under Act 3499, C. C., is meant only the action of such workmen, laborers and servants against their immediate employers who hire them by the day or by the month, and not the action of a contractor who undertakes a specific job.

The action on the contract is not barred by one year, although the charge is made up partly of the items for which they had to pay workmen and material men.

**A** PPEAL from the District Court of St. Martin, *A. Voorhies, J.*  
*J. G. Olivier*, for plaintiffs. *Simon & Gary*, for defendant and appellant.

**SPOFFORD, J.** The plaintiffs, keepers of a dock at Algiers, sued the defendant, owner of the steamboat Pitser Miller, upon an account for \$1972 19 for docking, overhauling and repairing the said steamer, and furnishing materials for said work. The defendant sets up a claim for \$3000 in reconvention. The District Judge rendered a judgment in favor of the plaintiffs for \$1472, rejecting the reconventional demand altogether. The defendant has appealed, and the plaintiff in answer thereto prays that the judgment be increased to the amount claimed in the petition.

The defendant insists, that the prescription of one year is applicable to the whole account sued upon, and if not to the whole, at least to such portions of it as embrace materials furnished for the repair of the vessel. He cites the Article 3499 of the Code to support this plea. The construction of this Art. has been judicially settled. By "the action of workmen, laborers and servants for the payment of their wages," is meant only the action of such workmen, laborers and servants against their immediate employers who hire them by the day or by the month, and not the action of a contractor who undertakes a specific job, and it is immaterial whether the price of the job be fixed by contract or left for adjustment upon a *quantum meruit*. *Gallaspy v. Livingston*, 5 An., 671. And by the action "for the supply of wood and other things necessary for the construction, equipment and provisioning of ships and other

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vessels," is meant the action of the sellers of the raw materials only, against the parties who buy directly from them whether they be the owners of the vessel or undertakers for repairs. This was directly decided in the case of *Harrod v. Woodruff*, 3 Rob., 336, where it was held, that shipwrights who undertake to build or repair a vessel are neither workmen or laborers claiming their wages, nor are they furnishers of wood or other materials claiming the price thereof. They themselves hire workmen and buy materials. Their own contract is to do a job. Their remuneration for this is an entire charge, although made up partly of the items for which they have had to pay workmen and material men; but the action of the contract is not barred by one year—that of the workmen against their immediate employer for daily or monthly wages and that of material men against their immediate builders for the price, is barred by that term.

The demand for damages pleaded in reconvention grows out of an alleged delay on the part of the plaintiffs in performing their contract to repair the *Pitser Miller*. But there was no contract that the work should be finished within a limited time. It appears, that a day was fixed for putting the boat in the dock, and that although she was ready, four or five days elapsed before she was docked. The expenses for keeping the boat there for that time would be all the damages that could be allowed. It does not appear that the subsequent grounding of the boat in the *Atchafalaya* was the proximate result of this delay in docking her. Such damages are too remote and conjectural to be considered even had there been a contract to repair the boat by a certain time. The expenses for the delay actually proven do not exceed \$150. As the District Judge allowed a deduction of \$500 for overcharges in the plaintiffs' bill, a deduction which, under the evidence, seems to us extremely liberal, we are not disposed to interfere with the judgment.

The appellant certainly has not sufficient reason to complain; and the appellees' prayer for an amendment in his favor must also be refused, there not being a manifest error to his prejudice.

Judgment affirmed.

#### FRANCES E. LAWRENCE AND HUSBAND v J. BURRIS.

The husband is a necessary party to an appeal taken from a judgment in favor of his wife, and if his name is omitted in the appeal bond, when the appeal is granted, as if on motion in open court, the appeal will be dismissed.

**A** PPEAL from the District Court of the parish of St. Mary, *A. Voorhies, J. J. G. Olivier*, for plaintiffs. *T. H. Lewis, J. A. McClarty*, for defendant and appellant.

**SPOFFORD, J.** *Frances E. Brashear*, wife of *Henry E. Lawrence*, "authorized, assisted and joined by her said husband," alleging herself to be the owner of a certain tract of land upon the Bayou Bœuf, in the parish of St. Mary, brought suit against the defendant, as the possessor of an adjoining tract, to fix the boundary line between the two co-terminous estates, and to recover damages for alleged trespasses.

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The defendant answered, denying the trespasses, avering that the land upon which the plaintiff says he had encroached, was his, and in case of eviction by her, claiming a large sum against her for the value of his improvements.

A survey was had, and there was a judgment in favor of the plaintiff, fixing the limits in accordance with her prayer, and adversely to the pretensions of the defendant.

The defendant appealed. He gave an appeal bond only in favor of *Mrs. Lawrence*, and not in favor of her husband.

*Mrs. Lawrence*, authorized by her husband for this special purpose, now moves to dismiss the appeal, because the defendant has not made her said husband a party to the appeal.

He is a necessary party. No valid judgment could be rendered against her, even in a matter pertaining to her separate interest, without his presence to assist her.

In this case, the appeal bond is the only test of the question, whether the defendant has made him a party to the appeal. For the order of appeal was granted in chambers, pursuant to the following consent authorizing the Judge to decide the case in chambers: "Either party shall have the right to appeal from said judgment, as if moved for in open court, on furnishing the bond and security for the amount which shall be fixed to the order to be granted by the Judge presiding. Waiving the necessity of petition and citation of appeal."

In a case of this kind, it has been held that the parties mentioned in the appeal bond are alone parties to the appeal. *Robert v. Ride*, 11 An. 410; see also *Hewson v. Creswell*, 10 An. 232.

In *Lanoue v. Reed*, 7 La. 113, the appeal was dismissed for the following reasons, assigned by Mathews, J. "The suit is brought against an executor and a testamentary heir; the latter being a married woman, was sued together with her husband. He is not cited in the appeal, which ought to have been done, he being a party to the suit necessarily made so, to protect the interest of his wife."

In *Wells v. Scott's Executrix*, 10 La. 401, a similar ruling was made. It was objected then that the wife was before the court merely as executrix and might well appear without the assistance of her husband. The court remarked that "the 118th Article of the Code of Practice provides, that in all suits for a cause of action relative to the wife's separate interest, both husband and wife must be parties. In this case, the husband was a party below, and the judgment is in favor of the executrix for a balance on her account of administration. The balance thus decreed to her evidently does not belong to the estate, and consequently not to the executrix in that capacity, but personally. The judgment became her property, and when the appellants seek to avoid it, her husband must be joined with her."

The appeal being granted, as if on motion in open court, the only mode in which the appellant could manifest an intention to bring *Mr. Lawrence* before the appellate court, was by giving an appeal bond in his favor as well as in favor of his wife.

Appeal dismissed.

## B. C. CROW v. SARAH WATKINS' HEIRS.

A judgment cannot be enjoined by a plea in compensation founded on notes of the plaintiff held by defendant before the judgment enjoined was rendered.

In the absence of proof it will be presumed that the notes were acquired before their maturity.

**A** PPEAL from the District Court of Lafayette, *Dupré J.*  
*M. E. Gomet*, for plaintiff and appellant. *D. O. Bryan, J. M. Porter*  
 and *J. W. Walker*, for defendants.

SPORFORD, J. Both parties complain of the judgment in this case, but we think both should be satisfied.

It is clear, that the credit for \$195, claimed by the plaintiff in injunction without a certain date, was embraced in the schedule of credits marked A, as having been paid,—\$95 on the 15th May, 1846, and \$100 on the 26th May, 1846. As that schedule includes the \$700 paid by the draft on *John Hall*, dated March 10th, 1849, it must have been executed after the receipt of March 14th, 1849, at the bottom of which the memoranda relative to the \$195 appears. That memorandum is presumed to bear the date of the receipt above it, and there was as much reason to include the \$195 in schedule A as the \$700.

There was no error in rejecting the plaintiff's pleas in compensation, founded upon the notes of *A. J. Porter* and *A. Campbell*, and upon the account for professional services rendered in 1843. The claims were prescribed, and prescription was pleaded by those of the defendants in injunction who were interested.

The case of *Riddell v. Gormley*, 4 An., 140, does not apply to this, for here compensation is pleaded by way of exception, and it cannot be pretended that it took place by operation of law. If the plaintiff held the notes before the judgment enjoined was rendered he should have pleaded them there and then, and cannot enjoin now to compensate them. In the absence of proof he is presumed to have acquired them before maturity.

The District Judge did not err in placing his estimate of the value of the services rendered in the suit of *Rice v. Campbell* at \$75, the mean between the two extremes mentioned in the statement of facts.

As to the answer of the defendants to the appeal it suffices to observe, that they were correctly condemned to pay the costs below, and that the prayer of *Martha O. Porter*, for damages, was rightfully refused, since the defendants brought about the necessity for the injunction, by issuing an execution for the whole of a judgment, about half of which, by their own admissions, had been discharged. No credits appear to have been allowed the plaintiff which are not justified by the evidence.

Judgment affirmed.

## EDMUND P. DWIGHT v. DRURY MASON et al.

Where the garnishee in an attachment suit has in his answers acknowledged to be in possession of property belonging to the defendant, it is not necessary there should be a seizure by the Sheriff to support the attachment.

**A**PPEAL from the District Court of St. Mary, *A. Voorhies, J.*  
*J. W. Walker*, for plaintiff and appellant. *H. Gibbon*, for defendants.  
*BUCHANAN, J.* This suit was commenced by attachment against two absent defendants, *Drury Mason* and *Delila Mason*.

One of the defendants, *Delila Mason*, having died since the commencement of this suit, her estate was administered upon in the parish of St. Mary (where this suit was pending,) and her administrator, *Charles R. Muggah*, who had already been cited, as garnishee, under the attachment herein, was cited anew in his administrative capacity, and filed an answer in said capacity upon the merits, to wit: the general issue. The curator *ad hoc* appointed by the court to represent the other defendant, *Drury Mason*, also filed in his name a general denial.

Upon these issues the parties went to trial, and judgment was rendered in favor of plaintiff. But upon the motion of the administrator of the one defendant, and of the curator *ad hoc* of the other, a new trial was granted and the court below gave judgment of nonsuit, as to both defendants, on the ground that the Sheriff had not made a seizure of the property of defendant, which the answers of the garnishee, *Charles R. Muggah*, acknowledged to be in his hands.

We think the court erred. The garnishee's answers to interrogatories were filed on the 11th July, 1853, and acknowledged the possession of slaves which had been adjudged to belong to *Drury* and *Delila Mason*. The record of the suit in which those slaves had been so adjudged the property of defendants, is in evidence, and identifies the slaves referred to in the answers of the garnishee. The estate of *Delila Mason* is in court, independently of the attachment, by the answer of the administrator, filed on the 10th July, 1855. The fact of an administration, sufficiently demonstrates the existence of assets within the jurisdiction of the court; and the curator *ad hoc* of the other absent defendant *Drury Mason*, was fully authorized by this state of facts to join issue as he did upon the 9th April, 1857.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; that the cause be remanded to be proceeded in according to law, and that the appellees pay the costs of appeal.

## WILLIAM ROCHEL, Tutor, v. DAVID BERWICK.

The redhibitory action cannot be maintained by the purchaser of a slave at auction where it appears that he was told by the auctioneer in answer to his own question, that the sale was made without any guarantee except of title, and that for a considerable time before he gave his notes in compliance with the adjudication he was aware of the extent, if any, to which the value of the slave was impaired by the alleged malady.

From this a waiver of any objection to the purchase on the ground of unsoundness will be inferred.

**A** PPEAL from the District Court of St. Mary, *A. Voorhies, J.*  
*J. G. & A. Olivier*, for plaintiff. *J. A. McClarty*, for defendant and appellant

BUCHANAN, J. The slave *William* was sold on the 19th March, 1855, at a probate sale of the estates of *Mary Bell* and *Matthew Rogers*, and was adjudicated to defendant for the price of eight hundred dollars, payable in his notes at 1, 2, 3 and 4 years. The auctioneer proclaimed on the stand, in answer to a question put to him by defendant himself, as one of the witnesses thinks, that the sale was made without any guarantee, except of title. It is argued for defendant, that this announcement was not binding upon the bidders at the sale. In support of this position the case of *Nott v. Oakey*, 19th La. Rep., 18, is quoted. But in that case there was an alteration of the terms of sale, by the announcement from the auctioneer's stand of a condition different from and contrary to those which were contained in the advertisement of sale. Whereas, in the present case there was no such alteration.

It is admitted, that in the advertisement of this sale nothing was said about guarantee.

Upon the merits, it is not proved to our satisfaction that the redhibitory malady complained of existed before the sale. A witness who had charge of the slave as overseer of the plantation, for many years before and up to the time of the sale, swears that he always considered him a good, sound able-bodied negro.

We have the further circumstance in favor of plaintiff's claim, that the defendant was fully aware of the extent, if any, to which the value of the slave was impaired by the alleged malady, shortly after the sale, and a considerable time (say three weeks) before he gave his notes in compliance with the terms of adjudication. We infer from this a waiver of any objection to the purchase on the ground of unsoundness.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

## SUCCESSION OF H. VALANSART—Opposition of P. J. PARY.

On the removal to this State of French subjects, who were married and resided long after their marriage in France, a tacit mortgage in favor of the wife for preëxisting claims against her husband, originating during their residence in France, does not attach to the immovables acquired by her husband after his arrival here.

**A**PPEAL from the District Court of St. Landry, *Martel, J.*

*J. G. Olivier and E. H. Martin*, for appellant. *Swayze & Moore*, for appellee.

**SPOFFORD, J.** *Lucile Lemoine*, widow of *Henri Valansart*, and one of the appellees in this case, has moved to dismiss the appeal.

Her motion came too late. The day before it was made, she had filed an answer to the merits praying an amendment of the judgment in her favor. This was a waiver of all informalities in bringing up the appeal. *Shall v. Banks*, 8 Rob. 170; *Dunbar v. Owens*, 10 Rob. 140; *Carmichael v. Armor*, 1 Rob. 197; *Gayoso v. Garcia*, 1 N. S. 327; *Duncan's Executors v. Poydras Executors*, 4 N. S. 360; *Barkham v. Livingston*, 11 An. 604.

It is true, this court will notice *ex officio* the absence of essential parties which would render it impossible to interfere with the judgment appealed from without affecting prejudicially the rights of such parties. But in this case, we observe that the only controversy is, whether the claim of *Lucile Lemoine*, widow of *Henri Valansart*, for the sum of fifty-two thousand nine hundred (52,900) francs, with a legal or tacit mortgage on all the property of said *Valansart*, deceased, in preference to all other persons, with five per cent interest from the month of October, 1853, shall be displaced by the acknowledged mortgage claims of *P. J. Pary*, for some \$27,566, besides interest, which have been placed upon the tableau and allowed by the judgment as next in rank to the widow's claim. The opposition to the small claim of *Urbain* is abandoned; and *Louis Chaudet*, the administrator of the succession, whose tableau is opposed by *Pary*, is a party before us. We can, therefore, settle the controversy between the widow of *Valansart* and the opponent of *Pary*, without disturbing, in any degree, the rights of other parties.

*Henri Valansart* and *Lucile Lemoine* were married in France, their domicile of origin, in 1835. Just before the marriage was solemnized, they entered into a marriage contract, by which it appears that the wife brought to her husband a dowry of thirty-five thousand francs. Both spouses continued to live in France, where *Valansart* appears to have been extensively engaged in business as a miller and flour merchant, until the year 1848, when he came to this country. In February, 1849, he entered into a planting partnership with the appellant, *P. J. Pary*. *Valansart* contributed \$6,900 to the enterprise, and the titles to the lands were taken in his name. The act of partnership being *sous-seing privé*, *Pary* contributed an equal amount. The plantation was situated in the parish of St. Landry. The partnership became largely indebted to their commission merchants, *P. J. Pary & Co.* and *Pary, Lobit & Co.*; the balance due in May, 1852, being \$60,352 34. Half of this debt was

due by each partner, to wit, \$30,176 17. At the same time *Pavy, Lobit & Co.* owed *Valansart*, on his individual account with them, \$5,823 17. Deducting that from his half of the partnership debt, left him indebted to *Pavy, Lobit & Co.* in the sum of \$24,353 10.

It seems that *Pavy* paid this sum for *Valansart*, and thereby became his creditor for the amount. He also paid for him a further sum of \$3,213, all of which was acknowledged, in writing, by *Valansart*, who gave his notes to *Pavy*, dated in June, 1852, one for \$12,000, and the other for the sum of \$12,353, and a third note, dated in January, 1853, for \$3,213; all bearing interest from specified dates. On the 14th of March, 1853, *Valansart* and *Pavy* executed a recognitive act in authentic form, acknowledging each other's title to an undivided half of the property belonging to the "*Valansart* plantation;" in this act the indebtedness of *Valansart* to *Pavy* for the three above described notes, was acknowledged, and to secure the same, the former specially mortgaged to the latter his undivided half of the plantation and its dependencies, together with the thirty-five slaves thereon. The notes were paraphed and identified with the notarial act aforesaid, which was duly recorded in the alienation and mortgage books of the Recorder's office for the parish of St. Landry, on the 24th March, 1853.

Late in 1849, *Mrs. Valansart*, left her home in France, and came to the United States. She joined her husband at the plantation in St. Landry, in the latter part of 1850, or the early part of 1851. Both spouses continued to reside here until the death of *Henri Valansart*, in October, 1853.

Upon the opening of his succession, *Mrs. Valansart* advanced her claim for \$55,900 francs, with a tacit mortgage upon all the property of her husband. No evidence of this indebtedness ever existed upon the public records of this State previously.

The only controversy to be settled is, whether she has this tacit mortgage overriding the acknowledged conventional mortgage of *P. J. Pavy*.

The view we take of the case renders it unnecessary to discuss the questions which have been mooted by counsel concerning subrogation and novation.

For we find that of the sum claimed by *Mrs. Valansart* (widow), thirty-five thousand francs are claimed for the restitution of her dowry. This is proven to have been paid into the hands of her husband in France, within a few weeks after their marriage. Ten thousand five hundred francs are claimed for money loaned to *Henri Valansart* in France, by her father, to whose succession she has accounted for it since the death of her husband here; and ten thousand four hundred francs are claimed as having been paid by her father and mother in France for *Valansart* upon certain contracts made by him there, before he departed for the United States, and for which she has accounted in the same manner.

She also avers that on the 8th January, 1852, she obtained a judgment against her husband for all these sums, at Paris, in France.

One of her witnesses testifies, that all the sums received by *Valansart* for the dowry of his wife, and in the way of loans from his father-in-law, were employed in his business as a flour merchant in France.

The case, therefore, resolves itself into the inquiry, whether, on the removal to this State of French subjects who were married and resided long after their marriage in France, a tacit mortgage in favor of the wife for preëxisting

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claims against her husband, originating during their residence in France, attaches to the immovables acquired by her husband after his arrival here.

The question has twice been brought before this tribunal and twice answered in the negative. We, therefore, consider the jurisprudence of Louisiana upon this point as settled.

In *Prats v. His Creditors*, 2 Rob. 508, our predecessors declared, that "after an attentive examination of the provisions of our Code, which establish mortgages in favor of minors and married women, we have come to the conclusion that such mortgages, at least so far as they are tacit and exist without being recorded, were intended to be confined to persons who marry in this State, or receive their appointments as tutors from our courts, or who, after marrying or receiving such appointments abroad, come to reside here; and that, in the latter case, such tacit mortgages exist only for sums received since their removal into this State."

In *Stewart v. His Creditors*, decided at New Orleans in February last, the case of *Prats v. His Creditors* was affirmed. On that occasion we remarked, that "from a review of the various Articles of the Code on the subject of legal mortgages, it appears to us that they point conclusively not only to the supposed residence in the State of the party whose property is sought to be subjected to their operation, but to the security of a debt originating in the State."

Both of the cases above cited were analogous to this, in that the law of the country where the wife's claim originated, was similar to our own, with respect to the tacit mortgage reserved to her for the restitution of her dotal affects, and the reimbursement of her paraphernal property alienated by her husband.

It is true, these laws are to be classed among real statutes, and as such they have no extra-territorial operation. The law of France can confer no mortgage or privilege upon property situate in Louisiana. The fact that the appellee has a mortgage for restitution on the property of her husband there, in no wise betters her condition here. To our own law alone, must she look for a mortgage claim upon property here; and if our Code, by its provisions, gives her such a mortgage as she claims, then it must give a similar retroactive relief to all wives who may immigrate to Louisiana, with dotal or paraphernal claims against their husbands originating abroad, whether the law of the domicil where the debts were contracted, secured them by a mortgage upon the property of the husband or not.

We cannot give such a sweeping extension to the doctrine of latent mortgages, to the detriment of our own citizens.

It is, therefore, ordered and decreed, that the judgment of the District Court, so far as it overrules the opposition of *P. J. Pavy*, to the allowance of the claim of *Lucile Lamoine*, widow of *Henri Valansart*, against the succession of her said husband, as a claim with a legal or tacit mortgage on all the property of the said deceased, in preference to all other persons, be avoided and reversed. It is further ordered, adjudged and decreed, that the said claim of *Lucile Lemoine*, for the sum of (52,900) fifty-two thousand nine hundred francs, be reduced to the rank of an ordinary claim against the succession of her said husband, and that no mortgage or privilege be allowed therefor, and that the tableau of distribution be reformed in this respect. It is further

ordered, that the judgment, in other respects, be affirmed; the costs of the opposition of *P. J. Pavy*, in both courts, to be paid by the succession.

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ON A RE-HEARING.

SPOFFORD, J. The point made in the application for a re-hearing, although not presented in the original argument, was not overlooked by the court.

But we thought, and still think, that the moneys paid by *Mrs. Valansart's* father for the debts of *Henri Valansart* in France, after he came to Louisiana, did not constitute valid claims in her favor against her husband, if at all, at any rate, until she had collated for them to her father's succession, and thus assumed the payment of them out of her own funds. But this settlement did not take place until after the rights of the opponent, *Pavy*, as a mortgage creditor of *Henri Valansart* were irrevocably fixed.

Re-hearing refused.

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CHARLES H. BEAUCHAMP v. CHACHERÉ, Sheriff, et al.

The principles settled in the case of *Smith v. McMicken*, 3 An. 321, reaffirmed. A judgment belonging to a partnership in a steamboat, is not liable to seizure under executions issued on a judgment against the individual members of the partnership.

APPEAL from the District Court of St. Landry, *Martel, J.*

*J. E. King*, for plaintiff and appellant. *T. H. Lewis* and *Porter*, for defendant.

BECHANAN, J. Plaintiff appears in this cause, as the transferee of a judgment obtained jointly by three persons, named *Thomas C. Anderson*, *Cyrus Thompson*, and *Thomas M. Anderson*, and enjoins the seizure of said judgment made in execution of two judgments against *Thomas C. Anderson* and *Thomas M. Anderson in solido*, and of three judgments against *Thomas C. Anderson* solely.

The evidence shows that the two *Andersons* and *Thompson* had all of them an interest in the judgment seized, at the time of the transfer made by them to plaintiff; said judgment being an asset of a partnership in a steamboat, which partnership is in course of liquidation.

The record furnishes no proof of notice to the judgment debtor, of the transfer of the judgment, as required by Article 2613 of the Civil Code. But, as it was observed by Mr. Justice Slidell in delivering the opinion of the court in the analogous case of *Smith v. McMicken*, 3 An. 321, there is a question which stands before the question of notice, and overshadows it. That question is, whether the seizures made by the defendants were lawful? Whether upon execution against two, and against one, of the members of a partnership composed of three persons, the defendants herein could seize a judgment belonging to the partnership. For the reasons given in the case cited, these seizures must be held to be bad.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that the injunction herein be perpetuated; defendants and appellees paying costs in both courts.

## THERIET &amp; BARON v. EDGAR E. VOORHIES.

When the husband mortgaged the separate property of his wife to secure a debt due by himself, and the wife appeared in the act and made a formal renunciation of all her rights, it was held that the act was not binding on the wife.

**A**PPEAL from the District Court of the parish of Lafayette, *Dupré, J.*  
*E. Simon, sen. & L. J. Gary*, for plaintiffs and appellants. *Deblanc & Fusilier* and *C. H. Mouton*, for appellee.

**SPOFFORD, J.** *Euzeïde Martin*, wife of *Edgar E. Voorhies*, received from her mother and natural tutrix the slaves *Portalis* and *Bruno* as a part of her paraphernal estate.

Afterwards, her husband, *Voorhies*, being indebted personally to the plaintiffs, *Theriet & Baron*, in the sum of \$800 76, gave his notes for the amount, to secure which he executed an authentic act of mortgage in their favor upon the slaves aforesaid. His wife, *Euzeïde Martin*, appeared in the act and declared "*qu'elle veut et entend consentir à cette hypothèque, et renoncer à tous droits d'hypothèque légale et autre, qu'elle a ou peut avoir sur les esclaves Portalis et Bruno, objet du dit contrat.*" The notary detailed in the act the several mortgage rights which she renounced, and explained the same to her out of the presence of her husband, pursuant to the Act of March 27th, 1835, (p. 153), the second section of which has been reenacted in 1855 and may be found in the Revised Statutes, p. 561, sec. 5.

After the maturity of the notes given by *Voorhies*, the plaintiffs procured an order of seizure and sale against the slaves thus mortgaged. *Mrs. Voorhies* enjoined the seizure and sale upon the ground, that the slaves being her paraphernal property, had not been legally mortgaged and could not be sold for the separate debt of her husband. The District Judge maintained the injunction, and the plaintiffs in the order of seizure and sale have appealed.

It is conceded that the slaves were the separate property of the wife; but the appellants contend that, under the Act of 1835, she could validly renounce her title to them, and that she did so; they further contend that, by suffering them to be mortgaged for her husband's debt, she did not contravene the provision of Article 2412 of the Code, because she did not bind *herself* for her husband's debt, but only *her property*.

The Act of March 27th, 1835, refers not to transfers or mortgages of the wife's own property, but provides for a renunciation of the hypothecary rights of the wife upon the property of the husband. These she is empowered to renounce by pursuing the formalities prescribed in that statute. But that law gave her no greater or other powers than she had before with respect to the alienation or encumbrance of her own lands and slaves.

It does not clearly appear in this case that the wife renounced or intended to renounce her own absolute title to her paraphernal slaves; but if the act may be thus construed, still the question recurs, was it a lawful act? Can a wife legally hypothecate her separate property to secure an individual debt of her husband? When properly authorized, and for proper purposes, she may sell her paraphernal estate, and that is all that appears to be implied in the

opinion of the court in *Delaeroix v. Nolan*, 7 An., 682, cited on behalf of the appellant.

But it was expressly held in *Curry v. Brown*, 12 Rob., 82, that a contract by which the wife binds her property as a security for her husband's debt is as much within the prohibition of Art. 2412, as a contract by which she binds herself personally. Indeed, all useful protection for married women would be gone if the refined distinction contended for by the appellants' counsel were to be adopted by the court, and it were to be held that the wife may devote all her property without restraint to the use of her husband, so long as she does not sign a personal obligation for his debts. It is the uniform practice of this court to look through all the disguises in which men may shroud their business dealings, and to prevent, so far as possible, the property of the wife from being sacrificed for the debts of her husband, from which she derives no benefit. *Pascal v. Sauvinet*, 1 An. 428; *Erwin v. McCalop*, 5 An., 173; *Provost v. Provost*, 5 An., 572. It was held in *McIntosh v. Smith*, 2 An., 756, that a wife who had stood by and seen her property sold to pay her husband's debts, was not estopped from bringing an action to reclaim it. The legal presumption of marital influence relieves a married woman, in some cases, from what might otherwise be a just imputation of fraud.

Judgment affirmed.

VOOSHIES, J., recused himself in this case, on account of relationship to one of the parties.

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## H. DEJOL et als. v. E. JOHNSON, Administrator.

The legal presumption, that the husband of the mother is the father of all children conceived during the marriage, can only be rebutted in the mode and within the time prescribed by law.

The right to disavow or repudiate a child born under the protection of the legal presumption, is peculiar to the father and can be exercised only by him or his heirs within a given time and in certain cases; and if the father renounces the right expressly or tacitly, it is extinguished and can never more be exercised by any one.

The disavowal by the father must be made in a judicial proceeding, an action to which the child is a necessary party. If the father has never legally contested the legitimacy of a child born in lawful wedlock, mere oral and ex parte declarations of the father, or his wife, or of the child whose claim is contested, touching the legitimacy, cannot be received as evidence.

The penalty of ten per cent. interest upon the funds in hand, for a failure by an administrator to render an annual account, can only be enforced when accompanied by a proceeding to remove the administrator.

**A** PPEAL from the District Court of St. Landry, *Martel, J.*

*T. H. Lewis & Porter*, for plaintiffs and appellants. *J. T. Morrogh*, for defendant.

SPOFFORD, J. *Tapley Déjol* and his wife, *Sarah Johnson*, were free people of color, residing in Louisiana. *Tapley Déjol* died, leaving a small estate, of which one *Neyland* was appointed administrator in the year 1852. *Neyland* having died, the present defendant, *Edmond Johnson*, was appointed administrator of the succession of *Déjol*, which was still unsettled, in the parish of St. Landry.

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The present plaintiffs, alleging themselves to be the only legitimate children and heirs of *Tapley Déjol*, on the 8th of August, 1856, filed a petition calling upon the administrator, *Johnson*, to file an account and to pay over the funds of the succession to them, with ten per cent. interest from the date when he was bound to render his annual accounts.

In response to this call, the administrator filed an account and with it a proposed tableau of distribution among the heirs of *Tapley Déjol*, whom he mentions by name as six in number.

The plaintiffs opposed two items only of the account, to wit: the sum of \$120, alleged to have been paid *Edward Johnson* for horse-feed, and the item of \$612 55 paid *Dr. A. G. Thornton* for a medical bill of the deceased. They specially opposed the distribution suggested by the administrator, upon the ground that three of the alleged heirs, to wit, *Patrick Déjol* (alias *Johnson*), *Murvin Déjol* (alias *Gay*), and *Mathilda Déjol* (alias *Gay*) were not children and heirs of *Tapley Déjol* deceased, but were adulterous bastards born of their mother at a time when she was the lawful wife of *Tapley Déjol*, of an illicit connection with other persons.

Both oppositions were overruled and the account and tableau homologated. The opponents have appealed.

The item for horse-feed seems to be established by adequate proof.

The large medical bill is not justified by the evidence. There is no detailed account of items. Two or three visits to the parish of Calcasieu, about forty miles from *Dr. Thornton's* residence in Flat Town, and constant attention to the deceased for a fortnight in his own house, whither *Déjol* was removed before his death, together with the furnishing of medicines, are all the services specifically proved. It is true a witness states that the doctor attended the deceased for six or eight months before his death. The disease was also a loathsome one. But the opinion of this witness, that the bill was a just and correct one, cannot supply the lack of data to support such an opinion. Upon a survey of the evidence we are satisfied that \$300 would be a liberal allowance for the services as proven, and the item charged as paid to *Dr. Thornton* must be reduced to that sum.

The appellant's counsel states, in his written argument of the cause, that he pleads the prescription of one and three years to these two items. But as we find no such plea filed in the Record, we cannot consider it. A brief of counsel forms no part of the pleadings in a cause.

On the opposition to the proposed distribution, the judgment was clearly correct. The appellants offered witnesses to traduce the character of their own mother by showing that she abandoned her husband, their father, and lived so remote from him when she conceived the children whose claims they oppose, that cohabitation with him was physically impossible; they also offered to show that these children were adulterous bastards alleged to be such by their father and openly acknowledged to be such by their mother; all of which evidence was rejected by the court, on the ground that the father had never legally contested the legitimacy of these children, as required by the Article 210 of the Civil Code, and that the delay for doing so had expired before his death, so that his heirs were by the Article 211 debarred from raising the controversy now.

The appellant excepted to the ruling of the court, and now contends that the cause should be remanded for the reception of this parol evidence. The Article

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203 of the Code embodies the maxim *pater est quem nuptiæ demonstrant*; "the law considers the husband of the mother as the father of all children conceived during the marriage." The legal presumption can only be rebutted in the mode and within the time prescribed by law. "The right to disavow and repudiate a child born under the protection of the legal presumption is peculiar to the father and can be exercised only by him, or his heirs, within a given time, and in certain cases. If the father renounces the right expressly or tacitly, it is extinguished and can never more be exercised by any one.\*\*\* The right to disavow (*action en désaveu*) is entirely distinct and different from that which all parties, whose interest may be affected, have to contest the legitimacy of one in whose favor the legal presumption does not exist (*contestation de légitimité*)." *Eloi v. Mader*, 1 Rob., 584.

"In all the cases above enumerated, where the presumption of paternity ceases, the father, if he intends to dispute the legitimacy of the child (*s'il veut réclamer contre la légitimité*) must do it within one month, if he be in the place where the child is born, or within two months after his return, if he be absent at that time, or within two months after the discovery of the fraud, if the birth of the child was concealed from him, or he shall be barred from making any objection to the legitimacy of such child (*et à défaut de faire la réclamation dans ces délais, le père y sera déclaré non recevable*). C. C., 210.

"If the husband die without having made such objection (*avant d'avoir fait sa réclamation*), but before the expiration of the time directed by law, two months shall be granted to his heirs to contest the legitimacy of the child, to be counted from the time when the said child has taken possession of the estate of the husband, or when the heirs shall have been disturbed by the child in their possession thereof." C. C., 211.

It was held in *Tate v. Penne*, 7 N. S., 553, to be a perfectly well established principle, that "a child born during marriage cannot have its condition affected by the declaration of one or both of the spouses."

And in the case of *Vernon v. Vernon's Heirs*, 6 An., 245, where the Banbury Peerage case was held to be the rule as to the condition of the plaintiff, which was fixed by the law in force in South Carolina, it was remarked by the court that, under our laws (Code, 209, 210, 211), the defendants would not be permitted to question the legitimacy of the plaintiff, although he was never acknowledged by the husband of his mother to be a legitimate son. See also 2 Toullier, Nos. 831 et seq. 858 et seq. The reason was that he had not contested the legitimacy of this son in the manner and time pointed out by the Code. Our Article 210 is taken substantially, and Article 211 literally, from the Napoleon Code—Articles 316 and 317. It has uniformly been considered that the mode of disavowal prescribed by the latter Articles of the French Code, was, by a judicial proceeding or action to which the child was a necessary party either in person or by the intervention of a tutor *ad hoc* appointed by a family meeting. *Le désaveu doit être formé devant les tribunaux civils, dans les formes ordinaires*," 2 Toullier, No. 842. "*Le désaveu est une action qui tend à dépouiller un enfant de la qualité de fils ou fille légitime, que lui donnait injustement la présomption légale. Cette action appartient au mari; elle appartient aussi à ses héritiers, mais seulement dans deux cas déterminés*," 317, 425. *Rogron C. N.* 312. "*Le désaveu est l'ACTION par laquelle on prétend qu'un enfant, conçu ou tout au moins né dans le mariage, n'est pas le fils du mari de sa mère; c'est tout simplement la dénégation JUDICIAIRE de la pater-*

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*nité du mari. La contestation de légitimité est l'action par laquelle on prétend qu'un enfant n'est pas légitime, pour une cause quelconque.*" 2 Marcadé, No. 16.

There is no reason to suppose that the framers of our Code intended that the disavowal should be made in any mode less solemn, public and imperishable than a judicial proceeding. The terms of the Articles 210 and 211 quoted above indicate a legal contestation; "if he intends to dispute the legitimacy (*s'il veut réclamer contre la légitimité*), or "to contest the legitimacy," are phrases which mean something more than a mere oral and *ex parte* declaration. The Article 318 of the Napoleon Code is omitted in our Code. "Tout acte extra-judiciaire contenant le désaveu de la part du mari ou de ses héritiers, sans comme non-avenu s'il n'est pas suivi, dans le délai d'un mois, d'une action en justice, dirigée contre un tuteur *ad hoc* donné à l'enfant, et en présence de sa mère."

But the last clause of Article 210, "or he shall be barred from making any objection to the legitimacy of such child" (*et à défaut de faire la réclamation dans ces délais, le père y sera déclaré non recevable*), has been added to the corresponding Article of the Napoleon Code (Art. 316) by which it is apparent that the extension of one month for bringing the action, which might be gained under the latter Code by an extra-judicial disavowal of the child, was not intended to be retained in Louisiana.

There was therefore no error in refusing to hear parol evidence of the declarations of *Déjol* or his wife, or of the children whose claims are contested, touching their legitimacy.

As to the prayer for ten per cent. interest upon the funds in hand for a failure to render an annual account, it suffices to remark that this is not a proceeding to remove the administrator, and that the former penalty has been held to be an accompaniment of the latter under the statute of 1837 reenacted in 1855. Rev. Stat., p. 3, sec. 4; *Thomas v. Bougeat*, 1 Rob., 406; *Succession of Desorme*, 10 Rob., 480.

It is, therefore, ordered, that the judgment appealed from, so far as it overrules the opposition to the item of \$612 55, charged as having been paid by the administrator to *Dr. A. G. Thornton* for medical services, be avoided and reversed; and it is further ordered, that the sum allowed for said item be reduced to \$300; it is also ordered and decreed, that as thus reduced and amended, the judgment homologating the said account be affirmed; and it is further ordered, that the judgment homologating the tableau of distribution be so amended as to fix the sum to be equally distributed among the heirs named in the tableau at five thousand two hundred and sixty-six dollars and 42 cents (\$5,266 42), or eight hundred and seventy-seven dollars and seventy-three cents and two-thirds each; and it is further ordered, that the judgment homologating the administrator's tableau of distribution, as thus amended, be affirmed; the costs of the opposition in both courts to be borne by the appellee.

## E. H. ANGOMAR v. J. G. WILSON.

Where the contract in relation to the movables embraced in a sale was in writing—*Held*: That the vendee could not be permitted to prove by parol, that it was the intention of the parties certain articles not designated should be included in the sale, unless he has alleged mistakes or fraudulent omissions to his prejudice.

**A** PPEAL from the District Court of St. Landry, *Dupré, J.*  
*T. H. Lewis and Porter*, for plaintiff. *J. E. King*, for defendant and appellant.

BUCHANAN, J. Plaintiff and appellee sues defendant for the value of certain movables enumerated in a schedule annexed to and made part of the petition. Plaintiff alleges that he sold and delivered to defendant a sugar plantation, slaves, &c., situated in the parish of St. Landry; that soon after said sale, the defendant, without any right or authority, took into his possession the articles enumerated in the schedule, which belonged to plaintiff; part of which articles were on the plantation, and part at other places.

Defendant pleads, in his answer, that the property claimed by plaintiff, and for the recovery of which he is sued, belongs to respondent, which he is ready to verify on the trial of the cause.

Upon this issue, the only question remaining was the interpretation of the acts of sale between the parties. The identity, and perhaps the value, of the objects in dispute, are not controverted.

There are two sales, both by authentic act.

By the first, plaintiff sells to defendant a sugar plantation, "with all the buildings and improvements thereon, and all the rights, ways, customs and advantages thereto belonging or in anywise appertaining; also, all the horses, mules, cattle, and instruments of husbandry thereto properly appertaining."

By the second sale, plaintiff conveyed to defendant "all the house furniture contained in the house and residence of said vendor, and all the furniture appertaining to the said dwelling and residence, except the following described property, the linen furniture appertaining to the said dwelling house," &c.

On the trial of the cause, after defendant had offered in evidence the second of these sales, he offered the notary who drew the act and one of the witnesses who signed it, to prove that the intention of the parties was to include in that sale the articles sued for by plaintiff.

This parol evidence was properly rejected by the District Court. The case of *Akin v. Drummond*, 2 An. 94, relied on by defendant's counsel, only goes to the extent of recognizing the right of parties to prove mistakes or fraudulent omissions in written contracts relating to movables. The defendant's answer does not allege any mistake or fraudulent omission to the prejudice of defendant, in the written contract in question.

This case certainly resembles that of *Larne v. Hampton*, 4 An. 53, as to the generality of the expressions of the sale, "house furniture," and "furniture appertaining to the dwelling and residence," but there is no ambiguity in those expressions. The only item of the schedule annexed to plaintiff's petition that can possibly come under these general terms is the silver plate, estimated at one hundred dollars.

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In like manner, the only items of the said schedule that can be classed under the general expression "instruments of husbandry" in the other sale, are the sugar house mill, and the four sugar kettles, estimated in the aggregate, nine hundred and forty-eight dollars.

But if we deduct these three items from the bill of particulars, there is still left an amount exceeding that allowed to plaintiff, by the judgment appealed from.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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MARY KING v. POLICE JURY OF ST. LANDRY.

No remedy is given by statute against a parish, for a private injury caused by the absence of bridges or a neglect to keep them in repair.

Where it was not shown that the Police Jury of the parish were under a legal obligation to keep the bridge over a certain water course always in repair—*Held*: They were not liable for damages occasioned by the ruinous condition of the bridge.

**A** PPEAL from the District Court of St. Landry, *Dupré, J.*  
*H. L. Garland*, for plaintiff and appellant. *A. Depré*, for defendant.

SPOFFORD, J. This case presents the following question: Is the parish of St. Landry liable in damages for an injury to the property of one of its citizens, occasioned by the ruinous condition of one of the parish bridges connecting a highway across the Bayou Têche?

There was no law which compelled the parish of St. Landry to build the bridge in question. Having built it, there was no law which required the parish to keep it in perpetual repair. The whole subject seems to have been confided to the uncontrolled discretion of the Police Jury of the parish.

"The Police Juries shall have power to make all such regulations as they may deem expedient, as to the proportion and direction, the making and repairing of the roads, bridges, causeways, dikes, levees and other highways." Acts 1813, p. 158; Revised Statutes, p. 408, sec. 18; see also Revised Statutes, p. 480, sec. 1.

The repair of the public roads, causeways, bridges, &c., so far as regulated by the general law, is entrusted to the management of overseers of roads, with certain directions and under certain penalties. Revised Statutes, p. 505, secs. 132, 133, 134, 135, 136, 137, 138, 139. These overseers are subject to a presentment and prosecution for neglect of duty. And they are empowered, whenever it shall be necessary for the public convenience, that any road, bridge or causeway be immediately made or repaired, or any obstruction removed, to call out a sufficient number of hands to perform the work on one day's notice. Act 1839, p. 4; Rev. Stat. p. 507, sec. 141.

As no remedy is given by statute against a parish for a private injury caused by the absence of bridges or a neglect to keep them in repair, and as it is not shown in this case that the Police Jury of St. Landry were under a legal obligation to keep the bridge over the Têche always in repair, we think there was no error in the judgment rejecting the plaintiff's demand. Upon

this subject, see also *Moore v. Mayor of Shreveport*, 3 An. 645. The question of the liability of municipal corporations for the injurious acts of their agents done in the proper scope of their employment, is quite different. See *Houston v. Police Jury of St. Martin*, 3 An. 566; *Walling v. Mayor, &c.*, 5 An. 660.

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Judgment affirmed.

### GEORGE W. JOHNSTON v. JANE M. COCKE.

The jurisdiction of the Supreme Court is limited by the Constitution and the statutes which have organized the court, and although the parties are willing to waive the objection, the court itself will refuse to entertain an appeal in a case which by law is unappealable.

APPEAL from the District Court of St. Martin, *A. Voorhies, J.*  
*DeBlanc & Fusilier*, for plaintiff and appellant. *E. Simon, sr.*, and *E. Simon, jr.*, for defendant.

BUCHANAN, J. The District Court for the 14th Judicial District, sitting in St. Martin, rendered an interlocutory judgment in this cause on the 19th February last, decreeing the provisional keeping of the children of the parties to the defendant. Plaintiff presented a petition for an appeal from this judgment. At the bottom of the petition of appeal was written the following consent of counsel: "These are to certify that it was agreed between us, the undersigned, that there should be an appeal in the case of *George W. Johnston v. Jane M. Cocke*, in relation to the provisional keeping of the children born of the marriage; said appeal to be decided in New Orleans by the Supreme Court.

March 2d, 1857.

[Signed]

DEBLANC & FUSILIER, of Counsel.

"

EDWARD SIMON, JR., of Counsel."

The following order of court was written below this consent of counsel:

"Let an appeal be granted as prayed for, on appellant giving bond and security in the sum of fifty dollars, said appeal returnable at the Supreme Court sitting at New Orleans, as agreed upon between the parties.

St. MARTINSVILLE, March 3d, 1857.

[Signed]

ALBERT VOORHIES,

Judge of 14th District."

The appeal bond also refers on its face to New Orleans as the place of return of the appeal; which was accordingly passed upon in that city by this court; and judgment rendered on the 8th June, 1857, dismissing the appeal, at the cost of appellant.

Immediately upon the decree of the Supreme Court being certified to the District Court of St. Martin, a petition was presented by plaintiff to the District Court for another appeal returnable to Opelousas at the present term. It is this second appeal which is now before us.

The appellee moves the court to reject the appeal, and we do not hesitate in sustaining that motion. We are satisfied that the plaintiff had no right to the present appeal.

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If we have rightly understood the argument of the learned counsel of plaintiff, the consent given by him for the return of his first appeal to New Orleans being, by its terms, a consent to have the cause *decided* in New Orleans, did not authorize the appellate court to dispose of the cause in any other manner than by a decision upon its merits; and the counsel argues that the foundation of the jurisdiction of the Supreme Court in New Orleans in this matter not being the law, but the consent of parties, the court was bound to follow the letter of the consent as plaintiff's counsel understood it in the decision to be rendered; or otherwise the decision might be treated by the appellant, as it manifestly has been, as a nullity.

We do not thus understand the relations of this tribunal to the parties litigant before it.

Our jurisdiction is an appellate one, limited by the Constitution and the statutes which have organized the court. We cannot recognize any authority in suitors to require us to give judgment upon the merits of a cause which is not within our appellate jurisdiction. And if we indulge the parties to a suit by consenting, upon their joint application, to hear and determine an appeal at a place of session of the court, where it would not be legally triable and determinable without the consent of parties, this will certainly not place the cause upon different and higher ground than those causes which are regularly returnable in the place where such decision is rendered.

Our decision in New Orleans proceeded upon the ground, that the judgment appealed from did not work an irreparable injury; and was, therefore, unappealable.

It is not correct to style this a decision upon mere matter of form and procedure. It concerned, on the contrary, the jurisdiction, the most vital and essential attribute of the court; without which we are usurpers and our judgments blank paper: a matter which it is our duty to settle whenever any doubt presents itself, even though both the parties may have overlooked it, or have been willing to waive it.

This appeal is, therefore, rejected, at appellant's costs.

#### HENRY C. DWIGHT v. WALTER BRASHEAR et al.

A party may abandon his appeal from the portion of the judgment which passed upon the title to the property, and retain the appeal as to the part of the judgment which condemned him to pay the fruits and revenues or their value.

On a judgment of the Supreme Court which condemned such party to pay the fruits at a certain rate per annum, until the restoration of the property, execution could only be issued for the fruits up to the time at which the possession of the property was abandoned to the owner.

**A** PPEAL from the District Court of St. Mary, *A. Voorhies, J.*  
*J. G. Olivier*, for plaintiffs. *J. W. Walker*, for defendants and appellants.

VOORHIES, J. This is an injunction sued out in the case which was decided between the parties litigant by this court in September, 1855. See 10th An., 645.

The appeal in that case was taken on the 5th of February, 1852. During its pendency, it appears the defendant offered to restore to the plaintiff, *Brashear*, the property in litigation, acquiescing in the judgment so far as it passed upon the title, but reserving his right of appeal on the other branch of the case, namely: the rents or fruits of the property. *Brashear* declined to accept the offer, alleging as a reason, that he had agreed to convey the property to his attorney, *William C. Dwight*, on the final decision.

"A mixed action, is one which, in its nature, partakes both of the real and of the personal action, such as a claim for the ownership of real property, and also for the fruits it has produced, or their value." C. P., 7. The question as to the title or the fruits may be decided in a separate action. See *Winter v. Zacharie*, 6 R. 466. We are unable to perceive any good reason why the defendant *Dwight* could not abandon his appeal from that portion of the judgment which passed upon the title to the property. Article 567 of the Code of Practice declares: "The party against whom judgment has been rendered, cannot appeal, if such judgment have been confessed by him, or if he have acquiesced in the same, by executing it voluntarily." The tender of the property to *Brashear* was in writing. It was, therefore, competent for him to avail himself of it, under this provision, as a ground to dismiss the appeal on that branch of the case.

The property in question appears to have been in *William C. Dwight's* possession until his death, when it went into the possession of the administrator of his estate, who continued to hold it from the date of the tender until the final decision of the case. *E. P. Dwight*, the administrator, testifies "that *William C. Dwight* in his lifetime occupied rooms in the building which was in controversy between *Walter Brashear* and *H. C. Dwight*, and for the rent of which property the execution enjoined was issued. There existed a written agreement between *Walter Brashear* and *H. C. Dwight*, by which the former was to transfer the property to the latter, after the title to the same was decided. On the 22d of December, 1854, he requested *L. R. Curtis* to take charge of the property and rent it for him. Had a conversation with *Curtis* a short time after the above date, in which *Curtis* stated that he had rented the property to *Ibert*," &c. Cross-examined says, that "he was not directly authorized by *Walter Brashear* to take possession of that property and rent it; but considers that under the agreement he was authorized," &c.

The testimony of this witness forms the subject of a bill of exceptions taken by the counsel of the defendant and appellant on the trial below. His testimony was objected to "on the ground, that the defendant should not be prejudiced by the acts of other parties, who, without his authority, assumed to control his property, and that all such testimony went to prove *res inter alios acta*." We do not think the Judge erred in overruling the objection, which could only go to the effect, and not to the admissibility of the testimony. Had the witness no authority to control the property, it is perfectly clear that his acts could in no manner affect or prejudice the appellant's right. But we think the evidence discloses that he had such authority under the written agreement of the appellant. That agreement, it is true, has not been produced, but we are bound to presume from the testimony of the witness that such authority existed as he understood it under the agreement. Had it not been so, the appellant should have shown it by the production of the instrument itself, which

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is not pretended to have been destroyed, although the contract between the parties was voluntarily revoked by them in 1856. That such authority existed, we think, is fully confirmed by the admission of the appellant himself. The appellee having thus parted with the possession of the property, it appears to us to flow as a matter of natural consequence, that he cannot be held liable either in equity or law, for its fruits.

The judgment affirmed by this court decrees the appellee to pay the appellant the fruits at the rate of \$418 per annum until the restoration of the property. The fruits which have accrued since the tender, constitute the only claim for which the appellee is sought to be made liable; and, as we have seen, without any legal foundation. We are, therefore, of opinion there is no error in the judgment of the court below, which is affirmed, with costs.

#### STATE v. WILLIAM BASS.

The Act of the Legislature empowering the Judge to appoint an Attorney to prosecute in behalf of the State (*pro. tempore*), when the District Attorney shall not attend, is not unconstitutional. In all criminal cases as well as civil cases, a written assignment of errors must be filed, in conformity to Art. 897 of the Code of Practice.

If the assignment is not filed before the cause is submitted the right to file it is waived.

**A**PPEAL from the District Court of St. Landry, *Dupré, J.*  
*P. D. Hardy*, for the State. *J. E. King, B. F. Linton and C. H. Mouton*, for the accused and appellant.

**SPOFFORD, J.** *William Bass* was indicted in the Parish of Calcasieu for the murder of one *Anthony Corkran*. The venue was changed to the Parish of St. Landry, where the prisoner was tried and found guilty of manslaughter. His motions for a new trial and an arrest of judgment being overruled, he was sentenced to the penitentiary for twenty years. From this sentence he has appealed.

The only point presented by the record itself concerns the legality and constitutionality of the appointment by the Judge of a member of the bar to act as District Attorney *pro. tempore*, in the absence of that officer during the term of court at which the indictment was found. The authority to make this appointment is found in an Act of 1817, reenacted in 1855, (p. 369, sec. 11) in these words: "Whenever the District Attorney shall not attend, the Judge shall have power to appoint an Attorney to prosecute on behalf of the State, (*pro. tempore*), who shall be paid such amount as may be allowed by the court, to be paid by the Auditor out of the salary of the District Attorney, on the warrant of the Judge." Rec. Stat., p. 183, sec. 11.

In this case it is not denied that the District Attorney was absent, or that the Attorney who framed and signed the bill, as acting in the place of the District Attorney in his absence, was regularly appointed in pursuance of the statute.

The only question made is whether the statute be constitutional. It is said to conflict with that disposition of the organic law, which requires District At-

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torneys to be elected by the people. Const. Art. 83. We do not perceive that there is any real conflict. The District Attorney was chosen by the People. He was not superseded in his office. The appointee of the court did not become a District Attorney. He became authorized by the appointment, under the law, to discharge a specific duty which usually falls upon the District Attorney, but which the Constitution has not confided exclusively to that officer. If there is nothing in the Constitution to prohibit it, the Legislature may dispense with the signing of indictments by the regular District Attorney, and authorize them to be signed by a substitute appointed by the court. It is the finding of the grand jury endorsed upon a bill by its foreman, that gives an indictment authenticity. The signature of the framers may not be essential to its validity, if the Legislature does not make it so. The duties of District Attorneys shall be determined by law. Const. Art. 74. And there is nothing in the *Constitution* which requires bills of indictment to be signed, or all prosecutions to be conducted by the regular District Attorneys. *The law* makes it incumbent upon them to perform the duties of prosecutors in behalf of the State when they are present and not recused; if absent or recused, the State law confides their duties temporarily to other persons, and no clause of the Constitution forbids it.

The case of the *State v. the Judge of the Sixth District*, 9 An. 62, furnishes no parallel to this; for the Constitution vests all the judiciary power in a Supreme Court, in such inferior courts as the Legislature may from time to time order and establish, and in Justices of the Peace, but limits the power of the Legislature as to the mode of ordering and establishing the inferior courts by declaring that their judges must be elected by the qualified voters of the respective districts or parishes. Const. Arts. 61, 81. The Legislature cannot therefore confer judiciary powers upon any inferior court whose judge shall not be elected by the people. It cannot transfer judicial duties to any other than judicial officers.

The propriety of the appointment of an attorney to prosecute in such a case as this, in lieu of the absent District Attorney, has been recognised by previous decisions. *The State v. Jerry*, 4 An. 190; *The State v. Viaux*, 8 An. 517, 523.

In what is styled a supplement to the printed argument of the appellant's counsel we find several points discussed as errors assigned upon the record. But we find no written assignment of errors, as is required by the Code of Practice, Article 897. That rule applies to the course of practice to be pursued in this court in all cases brought by appeal before it, whether civil or criminal, and the assignment should be filed before the cause is submitted or the right to file it is waived. If we were permitted, however, to examine the points presented in this portion of the argument, we do not think the appellant could profit by them. He did not move to arrest the judgment in the court below on any such technical grounds, although, if there was a foundation for these objections, they were then obvious to the accused and should have been brought to the notice of the District Judge. *The State v. Arthur*, 10 An. 265.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with costs.

CORNELIUS VOORHIES v. J. A. DeBLANC, Sheriff, et als.—PIERRE J. PAVY et al. v. THE SAME. \*

The word "immovables," as employed in Article 3256 of the Civil Code, which specifies the objects which *alone* are susceptible of mortgage was intended to embrace only such things as are immovable by their *nature*, as lands, buildings, &c.

"An action for the recovery of an immovable estate or an entire succession," although, by legal intendment considered an incorporeal immovable, is not susceptible of mortgage.

An entire succession, disregarding the elements which enter into its composition, is not an object susceptible of mortgage.

A judicial mortgage will not attach to an immovable action as distinguished from the property which is the object of the action, nor to the entire interest of the debtor in the movables, slaves and immovables which composed the active mass of a succession falling to him as heir.

**A**PPEAL from the District Court of the Parish of St. Martin, Dupré, J. *M. Voorhies*, for plaintiff and appellant. *A. DeBlanc & Fuselier and R. Simon*, for appellees.

SPOFFORD, J. *Alexander Declouet* being a judgment creditor of *Jean Adolphe Dumartrait* levied an execution upon "all the hereditary rights, actions and pretensions of said *J. A. Dumartrait* in and to the property, real and personal, by him inherited, for one undivided fourth, from his father *Adrien Dumartrait*, deceased, whose succession is opened in the Parish of St. Martin."

The property thus seized being sold, produced a fund of four thousand dollars, which *Declouet* sought to apply to the satisfaction of his judgment, by virtue of his seizure.

*Cornelius Voorhies* filed an opposition in which he claimed a preference on all the proceeds of this sale by virtue of a judicial mortgage upon the seized property, resulting from the registry of a judgment against *Jean A. Dumartrait* in the Parish of St. Martin, which took rank of all other claims by priority of inscription, and was sufficient in amount to absorb the fund in court.

*P. J. Pavy & Co.* also filed an opposition. They had the eldest judicial mortgage against *Jean A. Dumartrait* recorded in the Parish of St. Mary, the parish of his domicile.

The succession of *Adrien Dumartrait* was composed of movables, slaves and immovables, in the Parish of St. Martin. Some time after the sale of *Jean A. Dumartrait's* one fourth interest in the succession, under *Declouet's* judgment, the property of the whole succession was sold, and the relative value of the movables, slaves and immovables was thereby determined. The value having been thus ascertained, and shown on the trial of these oppositions in the court below, the District Judge divided the fund in court into three parts having the same ratio to each other as the respective products of the movables, the slaves, and the immovables of the entire succession of *Adrien Dumartrait*.

Of these three parts, he awarded to the seizing creditor, *Declouet*, the portion corresponding to the proceeds of the movables; to *Voorhies*, the portion corresponding to the proceeds of the St. Martin immovables; and to *Pavy & Co.*, the portion corresponding to the proceeds of the slaves, as ascertained by the sale of the entire property of *Adrien Dumartrait's* succession.

\* This case was decided at New Orleans, March 24, 1857.

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The theory upon which this judgment was based seems to have been this: that the common debtor, *Jean A. Dumartrait*, was seized at the death of his father, *Adrien Dumartrait*, of one undivided fourth of all the movables, immovables, and slaves belonging to *Adrien's Succession*, (C. C. 1214, 934, 938); that thereupon *Voorhies'* judicial mortgage attached at once to the undivided one-fourth interest of his debtor in the succession lands with their accessories, situated in the Parish of St. Martin, where his judgment was the first of record; that, at the same instant, the judicial mortgage of *Pavy & Co.* attached to the undivided one-fourth interest of the same debtor in all the slaves belonging to the succession, because they had the first recorded judgment in the Parish of St. Mary, the debtor's domicil; and, lastly, that *Declouet*, by virtue of his seizure, under Article 722 of the Code of Practice, was invested with a privilege on the undivided one-fourth interest of the common debtor in all the property of the succession, which privilege, however, was overridden, *quoad* the lands and their accessories, by the prior judicial mortgage of *Voorhies*, and, *quoad* the slaves, by the prior judicial mortgage of *Pavy & Co.*; that the fund in court represented one-fourth interest of *Jean A. Dumartrait* in all these kinds of property, composing the active mass of the succession of his father, as if the succession had been partitioned and he had taken one-fourth of each of these three classes of property in kind; that the mortgages and privileges which attached to the property itself were transferred to the fund; and that the only practicable mode of ascertaining the relative proportion of each class was to take as a basis the subsequent sale of the whole property of the succession.

From this judgment *Voorhies* alone has appealed; *Pavy & Co.* only have joined in the appeal, and they merely pray for an amendment allowing them, in addition to what they got below, one-third of the portion allotted to *Declouet* as representing the value of the debtor's interest in the movables of his father's succession.

The sole ground of the appeal by *Voorhies*, as presented by the brief of his counsel, is that *Jean A. Dumartrait's* interest in the succession was an entirety, and an immovable situated in the Parish of St. Martin, where *Voorhies* held the first recorded judgment against the heir; that his judicial mortgage, therefore, bound the whole interest of the debtor in this succession, regardless of the nature of the property belonging thereto, and entitles him to be paid by preference out of all the proceeds of the sale.

If the entire interest of an heir in a succession which has fallen to him is susceptible of mortgage, irrespective of the nature of the property which comprises the active mass of the succession, it follows, we think, that the appellant would be entitled to relief.

The question must, therefore, be solved at the threshold of the case.

Our lawgivers have thought it wise to restrain the power of hypothecating property, which is one of the rights of dominion, by the following general and sweeping rule:

"The mortgage only takes place in such instances as are authorized by law." C. C. 3250.

The mortgage right then is to be measured, in every case, by the express grant of power in our Codes and other statute books.

The following objects *alone* are susceptible of mortgage:

"1. Immovables subject to alienation, and their accessories considered likewise as immovables.

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"2. The usufruct of the same description of property with its accessories during the time of its duration.

"3. Slaves.

"4. Ships and other vessels." C. C. 3256.

Now it is contended that, because, in Article 463, it is declared that "an action for the recovery of an immovable estate or an entire succession" is "considered as immovable from the object to which it applies," such an "action" is embraced under the designation of "immovables subject to alienation" in the first class of the objects which, according to Article 3256, are alone susceptible of mortgage.

Closer investigation will, we think, show this interpretation to be inadmissible.

The word "immovables" is used in various senses in the Code.

"There are things immovable by their nature, others by their destination, and others by the object to which they are applied." C. C. 454.

Slaves are considered as immovables, "*by the operation of law.*" C. C. 461. It appears to us that the word "immovables," as employed in Article 3256, was intended by the lawgiver to be limited to its first and literal sense, embracing only such things as are immovable by their nature, as lands, buildings, &c. We are led to this conclusion, first, because to the expression "immovables subject to alienation," is added the phrase "and their accessories considered likewise as immovables," an addition quite unnecessary if the word "immovables" had been used in its broadest signification, and as embracing things immovable by their destination as well as by the object to which they are applied; secondly, because the lawgiver has added, as another and distinct class of things susceptible of mortgage, "the usufruct of the same description of property with its accessories during the time of its duration;" there can be no usufruct of an "immovable action" or of "an action for the recovery of an entire succession," so these rights do not fall within the "same description of property" intended to be specified in the first class of things susceptible of mortgage; thirdly, because "the usufruct of immovable things" is declared, by Article 463, to be considered as immovable from the object to which it applies, and, therefore, it was idle to specify such usufruct as a distinct thing susceptible of mortgage, if the words "immovables subject to alienation and their accessories" were intended to include all sorts of immovables, whether by nature, destination, or from the object to which they apply; fourthly, because "slaves" are enumerated as the third class of things susceptible of mortgage, another superfluous specification, if the word "immovables" was used in its widest sense, in the first class, for Article 461 had already declared that "slaves, though movables by their nature, are considered as immovables, by the operation of law; and, finally, because the enumeration of the "usufruct" of immovables as subject to mortgage, in Article 3256, and the omission to enumerate the "action for the recovery of an immovable estate or an entire succession" demonstrate the intention of the Legislature to exclude the latter from the power of hypothecation granted as to certain specified objects alone; *expressio unius est exclusio alterius*; and the argument acquires additional force when we observe that, in Article 463, "the usufruct and use of immovable things," "a servitude established on real estate," and "an action for the recovery of an immovable estate or an entire succession," had been

specified as three distinct things "considered as immovables, from the object to which they apply." For we cannot suppose that the lawgiver enumerated one of these things, in Article 3256, as being liable to mortgage and omitted the other two without a design.

Article 3296, which declares that: "The judicial mortgage may be enforced against all the immovables (*biens-immeubles*) and slaves which the debtor owns or may subsequently acquire" does not, in our opinion, enlarge the catalogue of things susceptible of mortgage, enumerated in Article 3256, if, indeed, it can be considered as embracing all of that catalogue, except ships and other vessels, upon which it is unnecessary now to express an opinion.

We therefore conclude that "an action for the recovery of an immovable estate or an entire succession," although by legal intendment considered an incorporeal immovable, is not susceptible of mortgage.

Still less do we think that an entire succession, disregarding the elements which enter into its composition, can be mortgaged. If it were so, we should be forced to the conclusion that when a succession was composed wholly of personal effects not one of which could be mortgaged, the heir could yet mortgage the totality or the ideal being which represented those effects.

If it be true that the property which enters into a succession can be mortgaged by the heir, whenever it is by its nature susceptible of mortgage, we are then led to the conclusion which the District Judge adopted, and which seems to be supported by the views of Persil, *Rég. Hyp.* I, pp. 276, 279.

But it would be going beyond what is called for by the case in the position of the parties before us, to decide whether these alleged judicial mortgages really attached to anything. For, as remarked already, *Voorhies* alone has appealed, and the other parties have not complained of the judgment in his favor for a portion of the fund. The only question he presents is whether he has a privilege upon the entire proceeds of the sale under *Declouet's* judgment by reason of his supposed judicial mortgage; and we find that he has not, for his mortgage could not attach to an immovable action, as distinguished from the property which is the object of the action, nor upon the entire interest of his debtor in the movable, slaves and immovables which composed the active mass of the succession falling to the heir. If it attached to anything, it could only attach to the undivided interest of his debtor in the immovables situated in the parish where the judgment was recorded.

*Pavy & Co.* had recorded their judgment in the parish of the debtor's domicile, which, they say, affected his interest in the slaves by Article 3318 of the Code. As no amendment has been asked by *Declouet*, as against *Pavy & Co.* or *Voorhies*, we cannot enquire whether he was entitled to more than he obtained.

*Pavy & Co.* only complain of the allowance to *Declouet* of the entire portion the fund which represents the relative nature of the debtor's interest in the movables of the succession, and they assert that they are entitled to one-third of it. As their demand is a third opposition, founded wholly on an alleged privilege, it is difficult to see how, under the principles by which they support the correctness of the judgment in all other particulars, they can assert a privilege upon the fund representing the movables. They made no seizure, and if they have no privilege they cannot dispute the seizing creditor's right.

Nor can we, in the peculiar attitude these parties occupy towards each other, inquire into the correctness of the action of the District Judge, in tak-

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ing as a basis of his estimate of what *J. A. Dumartrait* would have received of each sort of property by a partition in kind, the result of a sale posterior to the Sheriff's sale, which, as all parties agree, divested his interest in his father's succession.

And we express no opinion concerning the validity of the seizure, advertisement and sale under *Declouet's* judgment, inasmuch as all parties are claiming the proceeds in affirmance of the sales.

Under the view we have taken of this remarkable case, we do not think the judgment between these parties can be disturbed. It is therefore affirmed with costs.

LEA, J., concurred in this opinion.

VOORHIES, J., being a party to this cause, recused himself.

MERRICK, C. J. I concur in the conclusions of Justices Spofford and Lea, although I do not think it necessary to decide the question whether an action to recover an entire succession is susceptible of mortgage or not.

In my opinion, where the heir is present and recognized, or where the creditors have accepted the succession for him by the seizure of his interest in it, the succession, even if it be under administration, must be considered as in the possession of the heir. C. C., 1985.

If the heirs reside upon the property of the succession, and enjoy the same in a state of indivision, their possession is apparent. If the property be under administration the administrator is their agent, and his possession is that of the heirs. Hence the mortgage attaches upon the undivided interest of one of several heirs in each and every immovable and slave of that succession. This mortgage, where there are several heirs, is not absolutely fixed and certain but movable, and by the mere act of partition, is transferred to the portion falling to the heir who has given the mortgage, leaving the portions of his co-heirs unincumbered. Act 1843, p. 44, sec. 2.

Now if the property, the movable, immovable and slaves of a succession are sold to effect a partition or for other cause, the mortgage attaches to the proceeds of the mortgaged property. 2 N. S. 231; 8 Rob. 97; 9 L. R. 200.

Where debts of the succession are to be paid before the rights of the heir can be ascertained, the relative rights of the mortgage and other seizing creditors of the heir will be adjusted according to equity and such principles of law as are laid down in the code.

If the right of the heir to a succession under administration were to be considered as in action only, and not in possession, and the property were to be sold by the administrator, it would follow (the mortgage not attaching to the real action) that the proceeds were free from all incumbrances in the hands of the administrator.

Again, if the real action, as for instance the right of the heir to a partition were subject to the judicial or other mortgage, the mortgage creditor would have a mortgage upon the interest of the heir in all the movables of the succession, which would be instantly defeated by the partition or the reduction of the right of action, according to Art. 463, into possession.

I think, therefore, that the mortgage attached to the interest of the heir in each of the movables of the succession, precisely as it would have done if he had bought the like interest by a single or a succession of purchases, save only the liability of the creditor to be defeated in part by the shifting of his mort-

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gage by the act of partition to immovables of less value. C. C. 1434, Act 1843; 12 Rob. 450, *Succession of Pigneguy*.

I, therefore, concur in the decree affirming the judgment of the lower court. BUCHANAN, J., dissenting. The object of this litigation is the proceeds of a Sheriff's sale.

What was sold? *Jean A. Dumartrait's* share in the succession of his father, stated in the advertisement and seizure to be one-fourth.

What did the purchaser acquire? The right to recover, by action of partition or otherwise, all of *Jean A. Dumartrait's* interest in the succession of his father. This was an entire thing—an entire estate—not to be confounded with any particular objects or articles contained in the inventory of *Adrien Dumartrait*. See *Ternant v. Boudreau*, 6 Rob. 488, in which Simon, J., as the organ of the court, took great pains to elaborate the legal distinction. See his reasoning on pages 493 and 494.

The legality of the seizure of defendant's interest in the estate of his father is scarcely an open question, since the decisions in *Noble v. Nettles*, 3 Rob. 152, and *Mayo v. Stroud*, 12 Rob. 105. Besides, all the parties acquiesce in its legality.

The next step in our inquiry is to ascertain what is the technical classification of the thing or object seized and sold? It is an incorporeal immovable. C. C. 451 and 463. It is an action for the recovery of an entire succession. This action is indivisible, according to the authorities quoted above. The purchaser was put in the shoes of *Jean A. Dumartrait*, as heir of his father—entitled to the advantages of such a position in the distribution of *Adrien Dumartrait's* estate—and liable to its burdens, in contribution to debts and charges. The price of adjudication represents the estate or right which he purchased.

The Article 462 C. C. relied upon by the counsel of appellees, does not contradict the Article 463, which declares the right seized and sold to be an immovable. On the contrary, the Article 462 refers to Article 463, as explanatory of his meaning.

Was that right affected by the inscription of *Voorhies'* mortgage? In answering this question, I premise that the right seized and sold had its existence in the parish of St. Martin, because *Adrien Dumartrait's* succession was opened in that parish, and because the seizure and sale was made in that parish. And this being premised, it follows, as I conceive, that the right of action for the recovery of *Jean A. Dumartrait's* inheritance, was affected by the inscription of *Voorhies'* judgment in the parish of St. Martin.

It comes within the first class of objects susceptible of mortgage, conventional, legal or judicial, in Article 3256 of the Code, which class is as follows:

"Immovables subject to alienation, and their accessories considered likewise as immovables."

It is an immovable *subject to alienation*. See Article 463 already quoted, and Article 2424 of the Civil Code.

Again, Article 3296 of the Code subjects to the *judicial* mortgage especially, all immovables and slaves which the debtor actually owns, (at the date of inscription,) or which he may afterwards acquire. *Jean A. Dumartrait* acquired the immovable right of inheritance in this parish, after the inscription of *Voorhies'* judgment. I therefore say, the right of inheritance in question,

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or the action for the recovery of the inheritance (which is synonymous) was subject to the judicial mortgage of *Voorhies*.

But here we are met by the argument, that the estate inherited might consist solely of movables, in which case there would be an injustice or an undue advantage in favor of the holder of the judicial mortgage. This argument is nothing more than an ingenious attempt to withdraw from view the distinction between the entire estate or inheritance, and the particular objects which compose it.

For the purposes of this litigation, it seems to me entirely superfluous to consider what were the kinds of effects which composed the inventory of *Adrien Dumartrait*. It is very clear that *Mr. Declouet*, acting under the advice of his distinguished and able counsel, did not venture to seize *Jean A. Dumartrait's* undivided interest in any of the lands, slaves, furniture, cash, stocks, movable effects, or active debts comprised in the inventory. He seized the entire inheritance, which the law says, in terms unambiguous, in various texts, is an *immovable*. For instance, the Code treats it as an immovable in relation to prescription. By Article 1023, the faculty of accepting or renouncing an inheritance is barred by the lapse of time required for the longest prescription of the right to real estate.

It seems to me inconsistent and inadmissible that the seizing creditor should now shift his ground and say: "I stand upon my privilege, so far as the estate of my debtor, which I have acquired under my execution, consists of movables; conceding to you an hypothecary right, so far as it consists of immovables."

The judgment of the District Court, which is affirmed by the majority of this court, I cannot help regarding as a total change of the jurisprudence on this subject; yet I do not understand my brethren as declaring their dissatisfaction with the decisions in *Ternant v. Boudreau*, *Noble v. Nettles* and *Mayo v. Stroud*, and their intention to overrule those cases.

The decision of the District Judge is to the following effect: *Adrien Dumartrait's* succession realized, at an auction sale made by the heirs, without authority of justice, after the Sheriff's sale, the total sum of. . . . . \$20,146 45

Add active debts or claims in the inventory, not sold at the public sale. . . . . 9,006 70

Total of *Adrien's* estate. . . . . \$29,153 15

Of which one-fourth belonged to *Jean A. Dumartrait* and was acquired by *Declouet* at Sheriff's sale, amounting to. . . . . \$ 7,288 28

The price of adjudication of the fourth interest of *Jean A. Dumartrait* in his father's succession, at Sheriff's sale, was \$4,000.

Now, as the aggregate of sales of houses and lands at the auction sale was \$7,720, and as the aggregate of sales of slaves at the said sale was \$8,901, and as these two sums bear respectively to \$29,153, total of *Adrien Dumartrait's* estate, the proportions of twenty-six and a half per cent., and thirty and a half per cent. or thereabouts, the District Judge gives about twenty-six and a half per cent. of the net proceeds of Sheriff's sale to *Voorhies*; about thirty and a half per cent. of those net proceeds to *Pavy & Co.*; and the remainder, say about forty-three per cent. of the net proceeds of Sheriff's

sale, to *Declouet*, the seizing creditor. This would be entirely correct, if the specific lands, slaves and movables had been seized and sold, and if *Jean Dumartrait's* interest in these specific objects had been adjudicated for four thousand dollars. But this has not been done; and the injustice of the distribution to *Voorhies* is apparent, when we find from the record that the fourth interest of *Dumartrait* has realized to the purchaser, *Declouet*, a profit over and above his bid, of three thousand two hundred and eighty-eight dollars; in addition to which, the judgment returns to him sixteen hundred and fifty-five dollars; making an aggregate of four thousand nine hundred dollars; while the total amount of his judgment against *Dumartrait*, with interest to the day of sale, was less than twenty-seven hundred dollars.

Thus it is seen that in the particular case, the seizing creditor who purchased the inheritance of the common debtor, loses nothing, by adjudging to the opponent the whole proceeds of the Sheriff's sale.

Were it otherwise, indeed, it would make no difference in principle. The question is, does the inscription of *Voorhies'* judgment carry a mortgage upon the property which has been sold to a larger amount than awarded by the court below. Being impressed with the conviction that it does, I am of opinion the judgment should be reversed.

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#### T. M. TUCKER v. J. BURRIS.

The certificate of a Commissioner for Louisiana of the official capacity of the Clerk of a county court in another State, affords *prima facie* presumption of the legal authority of the Clerk to do what he is shown to have done, to wit, to receive the acknowledgement of a deed.

APPEAL from the District Court of the parish of St. Mary, *A. Voorhies*, J. *T. H. Lewis*, *J. W. Walker*, and *J. E. King*, for *Tucker*, appellant. *J. A. McClarty*, for appellee.

BUCHANAN, J. In September, 1848, *Thomas M. Tucker* brought a possessory action against *John Burris*, claiming damages for trespass committed by said *Burris*, upon the N. W. quarter of section 35, township 16 S., range 13 E., containing one hundred and sixty acres, more or less, of which *Tucker* alleges himself to have been in the actual and uninterrupted possession as owner, for more than one, five, ten and twenty years, previous to the institution of the suit.

In December, 1848, *John Burris* instituted a possessory action against *Thomas M. Tucker*, alleging actual and quiet possession, as owner for many years, of a tract of land situated on the south side of Bayou Boeuf, having thirty arpents front on said bayou, by the depth of forty arpents, bounded, &c. The petition alleges that *Thomas M. Tucker* had committed trespass and waste upon said land, on or about the 1st of September, 1848; and prays for judgment quieting petitioner in his possession, and for damages against *Tucker*.

Finally, in March, 1850, *John Burris* brings another possessory action against *Thomas M. Tucker*, upon allegations identical with those contained in his previous suit, but with a prayer for the conservatory process of injunction, to prevent further trespass and waste.

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In June, 1851, *Burris*, by his answer filed in the suit of *Tucker*, and by an amended petition filed in the first of his own suits against *Tucker*, converted those actions into the petitory, by alleging title in himself to the *locus in quo*, as derived from *William C. C. Martin*, by public act dated 12th January, 1848, by making *Martin* a party to the suits, and by praying for judgment for the title and possession against *Tucker*.

*Tucker* makes no objection to the change of action from possessory to petitory: but to both the suits of *Burris*, pleads title and the prescription of ten, twenty and thirty years.

The three suits were consolidated by order of court, and were tried by a jury in October, 1856.

In the consolidated issue, *John Burris* was properly regarded as the plaintiff, the burden of proof being upon him, under the pleadings, to make out his title.

The jury found a verdict in his favor for the land and damages, but they allowed *Tucker* the value of his improvements. He appeals.

The first thing which arrests our attention in the record, is a bill of exceptions to the introduction of a deed of sale executed in the State of Texas, by *John Garrett* and others, to the defendant, before *George R. Billups*, Clerk of the county court of Jackson county, in said State, dated 21st of July, 1854, with a certificate of a Commissioner of Deeds of the State of Louisiana, in and for the State of Texas, annexed. The objections made to the introduction of these instruments as evidence were:

1st. That Commissioners of Deeds, acting in other States under the authority of the State of Louisiana, are not empowered to certify as to the official attributes of officers before whom a deed or other instrument may be acknowledged in such States.

2d. That it does not appear that Clerks of the county courts in said State of Texas are authorized by the laws of the said State to take the acknowledgment of acts of sale.

It would seem from the remarks of the Judge *a quo* at the foot of the bill of exception, that a portion only of the certificate of the Louisiana Commissioner was intended to be rejected by the court, to wit, that portion which referred to the taking of deeds by the Clerks of courts. But in point of fact, the whole deed, with the certificate of the Clerk of the county court in Texas, and the certificate of the Louisiana Commissioner, have been excluded from the jury; and we may well suppose, that the want of this evidence has been prejudicial to the cause of appellant. For his plea of the prescription of ten and twenty years required proof of a title translatif of property; and accordingly *Tucker* exhibits a claim of title, of which one of the links is, a conveyance from *Thomas Davis* to *Joshua Garrett*, of date the eighth day of August, 1808; and another, a conveyance from certain heirs of *Joshua Garrett* to *Tucker*, of date the 7th July, 1854.

The Act of 1855, sec. 3, p. 44 of the Session Acts, copied from the Act of—, (Bullard & Curry, p. 165, sec. 7.) provides as follows: "The Commissioners are authorized and empowered to authenticate and attest the signature, official capacity and official acts of any Judge, Justice of the Peace, or other public officer, holding a commission or acting under the authority of the State or territory in which he shall reside, and for which he shall have been appointed.

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We are of opinion that the certificate of the commissioner for Louisiana being good evidence, under the Statute, of the official capacity of the Clerk of the county court in Texas, there is a *prima facie* presumption of the legal authority of the county Clerk to do that which he is shown to have done, to wit, to receive the acknowledgment of the deed, and that the document should have gone to the jury.

It is, therefore, adjudged and decreed, that the judgment of the District Court upon the verdict of the jury, be reversed; that this cause be remanded for a new trial, with instructions to the District Court to receive in evidence the deed from *John Garrett* and others to *Thomas M. Tucker*, of date the 21st of July, 1854, with the certificates of *George R. Billups*, Clerk of the county court of Jackson county, Texas, and of *J. R. M. Dowden*, Commissioner of Deeds for Louisiana in Texas, annexed to said deed. It is lastly ordered, that the appellee pay the costs of appeal.

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J. WILLIAMS et als. v. J. CLOSE et als.

A party may institute a petitory action for one tract of land, and in the same petition may sue the same defendant for slander of title of another and distinct tract, but could not in the same suit sue for a tract of land and for damages for slander of title to such tract.

The confirmation of a land claim enures to the benefit of the original grantor or those holding under him, as held in 3d L. R., 107, *Sackett v. Hooper*.

APPEAL from the District Court of the parish of St. Landry, *Martel, J.*  
*Swayze & Moore*, for plaintiff. *B. F. Linton*, for defendant and appellant. *T. H. Lewis*, for intervenors.

COLE, J. This action is instituted in the petitory form for one tract of land, and in the form of an action of jactitation or slander of title for three other and distinct tracts of land.

The plaintiffs allege that they are the nearest collateral heirs of *Isaac Baldwin, jr.*, deceased, and transferrees of *Laura* and *William Taylor*, universal legatees of said *Baldwin*, of all their rights under the last will and testament of said *Baldwin*; and as such, they claim to be the owners, each, of an undivided portion of the following tracts of land situated in the parish of St. Landry, to wit:

1. Of one piece of land situated at the junction of the bayous Courtableau and Têche, having the former for its north, and the latter for its eastern boundary, being all that part of the claim confirmed in the name of *Charles Barré*, as No. 5 of the report of the Commissioners of the United States, for adjusting land titles in the Western District of Louisiana, lying to the west of the Bayou Têche and on the right bank of the Bayou Courtableau, as represented on an extract annexed to the petition from the United States Township Map of T. 5 and 6 S. of Range 5 east, being a part of section 4 in township 6 and of section 42 in T. 5.

2. Another piece of the same confirmed claim, having a front on the eastern side of the Bayou Têche, and bounded on the south by the southern line of

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said confirmed claim, and on the north by the lines of a tract of land forming part of said confirmed claim No. 5, and known lately as belonging to John Close and Euphrosine Barré, his wife.

3. Another tract or piece of said confirmed claim No. 5, lying on the right bank of Bayou Courtableau, bounded on the east by the eastern side line of said claim, on the south by the southern line thereof, and of such width as to give said tract a superficies of between 1100 and 1200 acres.

4. And another piece of land lying on the left bank of the Courtableau, measuring six arpents front on the left bank of said bayou, by forty arpents in depth, forming the upper six arpents of that part of said claim No. 5, which lies on the left bank of said Bayou Courtableau.

They further aver, that these tracts of land came down to them from Jacques Courtableau, who held a much larger tract by virtue of a grant from the French government, by a regular chain of titles, as follows :

At Courtableau's sale, Lamorandière purchased the whole tract for Madame Marcantell, and at the sale of the latter, Egan Mills became the purchaser of the same ; after the death of the latter, his widow married one Reed, who sold at private sale, by an informal act, the said land to Barré, between whom and the heirs of Egan Mills arose a suit as to the title thereto, which was decided in 1814 ; the judgment of the court giving the heirs of Mills not quite one half of the said whole tract, of which two of said heirs conveyed to Judge Isaac Baldwin their interest by regular deeds of sale. That said Judge Baldwin died in 1833, leaving his wife, his widow in community, and one child, Isaac Baldwin, his sole heir ; and the said Mrs. Baldwin died in 1836, leaving the said Isaac Baldwin, her son and sole heir ; that in 1845, the said Isaac Baldwin died, leaving Laura Taylor and William Taylor as instituted heirs and universal legatees, who afterwards conveyed all their rights in the estate of said Isaac Baldwin, jr., to Louis Janin and all the petitioners, except Johnson, who were heirs at law of said Baldwin ; and afterwards the said Janin sold to said Sidney L. Johnson all his interest in said estate.

They further allege that their title and possession and that of those under whom they claim, had always been acknowledged by said Charles Barré and by his heirs, until lately, when certain persons styling themselves the heirs, or agents or assignees of heirs of Barré, John Close, Zepherine Close and her husband Honoré Déjean, have taken possession of the tract of land lying on the east or left bank of the Bayou Courtableau, forming the upper six arpents of section 42, T. 5, S. R. 5 east, fronting on said bayou and measuring back forty arpents, being the portion colored green on the plat filed in the former suit by the Commissioners ; that they have also slandered the title of petitioners to the other tracts of land above described, saying that they have no title thereto.

Plaintiffs pray that they be decreed owners of eight undivided ninths of the tract of land on the east or left bank of Bayou Courtableau, consisting of the upper six arpents front on said bayou, with forty arpents in depth between parallel lines, being the upper six arpents of section 42, and recover possession of the same, and that defendants be condemned to pay petitioners one thousand dollars for slandering their title to the other three tracts of land before described, as belonging to them, or else to set up and prove their title to the same, if any they have.

Plaintiffs filed an amendment to their original petition, setting up, that the question of title to said land had been finally decided in the suit of O'Connor

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and heirs of *Mills v. Barré*, 8 M., p. 446, and formed *res judicata* between the parties to the present suit, which they specially pleaded.

Afterwards, *Evan O'Connor*, *Sarah O. O'Connor*, wife of *J. McClusky*, *David Coe*, natural tutor of *David Green*, and *Mary Coe*, issue of his marriage with *Charlotte O'Connor*, deceased, and *Pierre Sylvestre* intervened and averred that they were the sole surviving heirs and legal representatives of *Helen Mills*, deceased, and as such, are the owners and proprietors by good and valid titles, of the third part of the fourth of the half of eight thousand eight hundred acres of the land in controversy, or the third of the fourth of four thousand four hundred acres, and pray to be adjudged owners of the same.

The interests of the plaintiffs in this case are in common with that of the intervenors, being owners in common of the land in controversy.

The defendants answered and set up in defence: 1, a general denial; 2, special denial of the heirship of plaintiffs; 3, they denied that plaintiffs had any title of any description; 4, that the Territorial Court had no jurisdiction and could settle no title to lands claimed by virtue of a complete grant emanating either from the Spanish or French governments; 5, that the United States Land Commissioners had reported favorably to the claim of *Barré* to the land; 6, that the judgment of the Supreme Court of Louisiana in the suit of *The Heirs of O'Connor et als. v. Barré*, had never been executed or carried out and is now barred by prescription, in consequence of its never having been notified to *Barré* or his heirs; 7, that the act of confirmation by Congress to *John Closs* is a complete title to him; 8, prescription of five, ten, twenty and thirty years, by virtue of a good title and possession.

On these issues, the parties went to trial; judgment was rendered by the Judge *a quo* in favor of plaintiffs and intervenors, sustaining and quieting them in the possession of and title to the lands described in their petitions, but rejected the prayer for damages.

The defendants have appealed.

There is a bill of exceptions to the refusal of the court to rule the plaintiff to elect to proceed in one form of action or the other, either for a slander of title or in a petitory form; defendants alleging therein, that both forms of action could not be tried at the same time.

We are of opinion that a party may institute a petitory action for one tract of land, and in the same petition may sue the same defendant for slander of title of another and distinct tract; for he would be only enforcing his several rights against the same parties; but he could not in the same suit sue for a tract of land in the petitory form, and also sue for slander of title of the same tract. In the suit at bar, plaintiffs distinctly allege that defendants are in possession of one of their alleged tracts of land, that plaintiffs have the best title thereto, and ask to be decreed owners thereof and to recover possession of the same; they also allege that defendants have slandered their title to three other tracts of land, and ask for damages for the same, or else that they set up and prove their title to the same, if any they have: this action then for the one tract is of the petitory character, and for the other three tracts it is an action for the slander of title, and the plaintiff had the right so to frame his petition.

In the same bill of exceptions defendants excepted to the ruling of the lower court on a motion of plaintiffs, which alleged that the former in their answer

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having set up a denial of the slander, and also a better title to the land than plaintiffs, must either waive their title and permit the court to investigate the question of damages for slander of title, or make out their title by the introduction of proof. The court seemed to consider the whole case as an action of slander, and ruled accordingly. This was incorrect. So far as the part of the action which is in a petitory form is concerned, the court ought to have ruled that plaintiffs should exhibit and make out their title for the one tract sued for, and not that defendants should first produce their title for the same; but as we have all the evidences of title before us of both parties, it is not necessary to remand the case; but the ruling was proper, so far as it relates to the part of the action which was an action of slander as to the three other tracts of land.

The object of the action of jactitation is to afford a shield to the possessor, and to place him in the same advantageous position when his possession is troubled by slander, as by trespass; to coerce the defamer to institute suit, and to impose on him the burden of proving his assertions.

In this species of action, if defendant denies the slander, he then admits he has no title; he cannot deny the slander and also set up title, for these would be inconsistent pleas. 9 M., 714, *Livingston v. Heerman*. The court having ruled them to elect, defendants proceeded to attempt to make out their title, which, in our opinion, they have entirely failed to establish.

The points of defendants will be considered in their order:

1. "Special denial of the heirship of plaintiffs."

The heirship is sufficiently established in the Record.

2. "They denied that plaintiffs had any title of any description."

The title of plaintiffs is proved by the evidence.

3. "That the Territorial or Supreme Court had no jurisdiction and could settle no title to lands claimed by virtue of a complete grant emanating either from the Spanish or French governments, and therefore had no jurisdiction of the matters at issue in the suit of *The Heirs of O'Connor et al. v. Barré*, 3 M., 446."

This objection is without force; for the contest in the said suit in 3 M., was not between persons claiming lands under distinct titles from either the French, Spanish or American governments; the question to be settled was not, whether one of two or more distinct titles, under either of those governments, should prevail, but, on the contrary, it was a suit between parties claiming under the same original title, in which the plaintiffs, heirs of *Evan Mille*, who was the last purchaser before *Barré* of the land, sought to set aside the sale thereof to *Barré* by the second husband of their mother, on the ground that it was void *in toto*, for want of certain forms under the laws of Louisiana.

The questions raised in that case related to the laws of Louisiana, and not to those of the French, Spanish or American governments, and the courts of Louisiana were the only tribunals proper to investigate and decide them.

4. But it is urged, "that said judgment was never carried out or executed; that *Barré* was never notified, either of the judgment or of the report or action of the commissioners or referees appointed to execute the same."

The testimony of their own witness, *C. Hollier*, settles this objection; he testifies that "*Barré* told him that there was a judgment against him, that he was notified with it, and that if *Baldwin* and *O'Connor* would not be satisfied with the portion of the land on this side of the bayou, he would give them a portion of his land on the little bayou."

Besides, the commissioners, whilst executing the judgment of the court, were at *Barré's* house; they proceeded from there to run the lines of division that were to mark out to him his land and distinguish it from that of the heirs of *Mills*, in accordance with said judgment.

Besides, *Barré* was fully represented in court when the final judgment was rendered and throughout the proceedings.

5. "That the United States Land Commissioners had reported favorably to the claim of *Barré* to the land."

On the trial, they introduced an extract from the American State papers, vol. 3, p. 89, in support of their claim. This is a report of the United States Land Commissioners on the claim of *Charles Barré* to the whole tract granted to *Courtableau*; it is favorable to the claim and recommended its confirmation by Congress.

This recommendation must have been based upon the supposition that the title of *Courtableau* had been transferred to *Barré*; and even if the claim of *Barré* had been actually confirmed, the confirmation would inure to the benefit of the original grantee, or those holding under him. 3 L., p. 107, *Sackett v. Hooper*.

Now, *Barré*, the ancestor of the defendants, never had a title under *Courtableau*, the original grantee of the French government, and those who held under him, to more than one-half of the whole tract granted. It is true, that he acquired by prescription the portion of an heir in the other half of said tract which was decreed to belong to the heirs of *Mills*; therefore, the act of confirmation aforesaid could inure to his benefit only as to the half which he acquired by deed from *Mrs. Reed*, widow of *Evan Mills*; for the other half of the tract never passed to him by said deed of sale; it belonged to the heirs of *Evan Mills*, who was the last purchaser of the land before *Barré*, and never passed out of their ownership or possession. This was the decision of the Supreme Court of this State in 3 M., p. 446.

6. "That the act of confirmation by Congress to *John Close* is a complete title to him."

The patent issued to *John Close* on the 23d of March, 1846, cannot affect the claim of plaintiffs, for it was decided to be good and valid long before this patent was issued by the supreme tribunal of the State; besides, this patent is a mere quit claim from the United States and conveys to *Close* only such title as the government itself had at the time. The patent itself declares that it is "in no manner to affect the rights of third persons nor preclude a judicial decision between private claimants to the same land."

It is clear then that this patent or confirmation to *Close* cannot by its own purport affect injuriously the claim and title of plaintiffs.

7. The plea of prescription cannot prevail, because no such possession has been established as would serve as a basis for prescription.

8. One of the defendants, *John Close*, in support of his claim to the land, produced an act of sale from *Barré* to his daughter, the wife of *Close*. This act is dated May 21, 1813, and was passed after the litigation between the vendor and the heirs of *Mills*, respecting the land in controversy, had commenced; for the suit of *O'Connor et als. v. Barré* was filed in 1811, and it was passed one year and a few months before the final judgment of the Supreme Court was rendered in the case, decreeing the heirs of *Mills* to be the owners of the land which plaintiffs now claim. This transfer could in no manner affect

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the title of plaintiffs; for when property actually in litigation is sold, the purchaser is bound by the judgment in the suit. 3 An., p. 252, *Gillespie v. Com-mack*.

Besides, it does not appear that the land transferred by said act is part of the lands which were allotted to the heirs of *Mills* by the commissioners appointed, under the decree of the court, in the suit of *O'Connor et als. v. Barré*, to divide the lands in controversy in that suit according to the decree therein.

The plaintiffs have established their title to the tract of land sued for in the petitory form, and defendants have not made out their plea of prescription: plaintiffs have shown, that the title of the said tract of land was decreed to be in those under whom they and their assignors hold by the judgment of the Supreme Court in the case of *O'Connor et als. v. Barré* in 3 M., p. 446; and as all the parties to this hold under the parties to that action, and derive their rights now claimed from those accorded to the parties thereto, and as the land in controversy in this suit was also in litigation in that of *O'Connor et als. v. Barré*, the judgment in the said suit in 3 Martin, is then *res judicata* between the parties to this action, and they are bound by the decree therein. 3 An., p. 236, *Delabigarre v. Second Municipality*. Now, by the decree in said suit in 3 M., the said tract of land sued for in the petitory form was adjudged to those under whom the present plaintiffs hold, and the latter are entitled to a judgment in their favor.

As to the three other tracts of land, to which the action of slander refers, defendants have entirely failed to make out a title, or to establish their plea of prescription, plaintiffs and those under whom they hold appearing always to have maintained their possession of the same.

We cannot, however, accord the damages prayed for in this court, for no malice has been shown in defendants. 2 Rob., p. 336, *Walden v. Peters and others*. The intervenors have also established their title to the land claimed by them.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

#### B. F. LINTON v. S. W. WIKOFF.\*

Article 2255 of the Civil Code which declares "Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before or at the time of making them, or since, applies, as a rule governing real estate, to adjudications made at sheriff sales.

The prescription applicable to a demand by the holder upon a note is not applicable to the demand of the surety for re-imbursement against his principal. The latter is a personal action which is barred only by ten years.

**A**PPEAL from the District Court of St. Landry, A. VOORHIES, J.  
B. F. Linton, for plaintiff and appellant. Lewis & Porter, for defendant.  
MERRICK, C. J. The defendant having advanced certain sums of money to pay some debts for which he had become security for the plaintiff, in order to secure himself, bought in at Sheriff sale (as plaintiff alleges, below its value.)

\* This case was decided in 1856, rehearing granted and finally decided in 1857.

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the plantation and certain negroes of the plaintiff. The plaintiff was suffered to remain upon the property sold for some time, but finally the defendant assumed possession of the property so purchased. Plaintiff alleges that in the month of December, 1849, he "delivered the same up with the express stipulation that he, defendant, was to take it at a fair valuation to pay any amount with all the interest and cost which might then be due to him, and to pay the balance over to petitioner."

He avers that, on the 23d day of February, 1850, the valuation of the property was \$13,600; that his, *Linton's*, indebtedness to *Wikoff* was \$4,497 76; that he had fully complied with his contract, but that the defendant on the 23d of February, 1850, made a pretended sale of the property for cash "to sacrifice the property and buy it himself for nothing."

The petition concluded with a prayer that the defendant be condemned to pay him \$9,163 34 and five per cent. interest from the 23d of February, 1850, and any other sum the court may deem legal, equitable and just.

The answer denies generally the plaintiff's petition, and the defendant therein sets up in reconvention two promissory notes of plaintiff, which he, the defendant, alleges he had as the surety of plaintiff paid and taken up.

Judgment was rendered in favor of the defendant for \$3,346 66 and interest, subject to a credit of \$461 12 for professional services.

The plaintiff appealed.

He urges, that the Judge of the District Court erred in refusing to hear parol proof, viz, the testimony of *John H. Taylor*, the agent of the defendant, who was asked "if he had any written authority from the defendant, his principal, to make a sale of the property, consisting of lands and slaves, on the 23d of February, 1850, it being the second sale of the same property." He was further asked "if it was not to his knowledge that there was an agreement in relation to the second sale of said property between the plaintiff and defendant after the adjudication of it in 1845 to defendant, and what were the terms of it." The plaintiff further stated that he intended to prove by *Dr. Taylor* and other witnesses, that at the first sale, in 1845, the defendant had purchased the land and slaves greatly below their value, but that in the present action it was not intended to attack the validity of the Sheriff's adjudication to defendant. The District Court was of the opinion that the testimony was inadmissible under Art. 2256 C. C., and the plaintiff excepted.

The plaintiff contends that the Article of the Code cited applies to notarial acts, and not to adjudications made at Sheriff sales, and that parol proof is admissible to explain these last mentioned sales.

But in his bill of exceptions as well as petition, the plaintiff concedes, in this suit, that the sale of 1845, was legal. It must follow that the legal title rested in the defendant, and that the property in his hands became subject to all the rules governing real estate. Hence the title could not be affected by parol; and the plaintiff not having protected himself with a counter title, nor interrogated his adversary on facts and articles, the Sheriff's adjudication became invincible. If the plaintiff relies upon defendant's letter of March 1st, 1847, it amounts to but little more than a pollicitation, for there is nothing in the Record to show an acceptance or a payment made under it. The defendant says in this letter: "I am not desirous of the possession of this property with the train of trouble and vexation necessarily attending its management. If you can by your industry, economy and skillful husbandry make out to pay

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punctually the interest of the aggregate debt and a portion of the principal, I am most cordially disposed to allow you a reasonable time to do it."

It is clear that this letter does not support the allegation in the plaintiff's petition, that at the time he delivered possession to the defendant in 1849 there was an express stipulation between the parties, that *Wikoff* was to take the property at a different valuation from the price at which he purchased.

But under the allegations of plaintiff's petition, and in view to the single objection made to the testimony, he should have been permitted to prove, by parol, that the property was bought by *Wikoff* in 1845 greatly below its value.

This would not have been proving *title* to real estate by parol. If the plaintiff had produced written proof of his other allegations this testimony might have been important. But as it is not pretended that the plaintiff has other than parol proof of his contract, it would be idle to remand this case for the purpose of receiving proof on that point alone.

We have been requested, in the event this case is not remanded, to reserve to the plaintiff the amounts paid by him since the sale. We do not discover any payments made by him which he was not obliged to make.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed, and that the plaintiff pay the costs of the appeal.

#### SAME CASE ON A RE-HEARING.

SPOFFORD, J. A re-hearing is asked upon the question of prescription, as to the reconventional demand.

That demand is not founded upon the promissory notes directly. It is a demand for reimbursement for moneys paid by the plaintiff as surety for the defendant. The suretyship is on negotiable paper, it is true; but it has been held, that the prescription applicable to a demand by the holder upon the notes themselves is not applicable to the demand of the surety for reimbursement against his principal. This is a personal action which is barred only by ten years. C. C., 3508; *Toledano v. Gardiner*, 2 An. 779; *Succession of Guil-laume*, ib., 636.

Re-hearing refused.

#### ORELINE v. HEIRS OF HAGGERTY.

A will is null and void which is contained in one and the same act with the will of another person. C. C., 1565.

APPEAL from the District Court of Lafayette, *Dupré, J.*  
*DeBlanc & Fusilier*, for plaintiff and appellant. *C. H. Mouton*, for defendant.

BUCHANAN, J. A motion is made to dismiss this appeal, because the appeal bond is not signed by the appellant.

It is settled that the signature of the appellant to the appeal bond is un-

necessary. It suffices that it be signed by a proper surety. 5 Rob., *Jones v. Sidle*, and cases quoted in Hennen's Digest, verbo appeal.

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The present action was commenced by petition filed 9th January, 1857. The petition sets forth, that one *John Haggerty*, since deceased, made his last will by nuncupative act, on the 10th March, 1851, a copy of which is annexed, and thereby bequeathed to his slaves, the petitioner and her children, their freedom and liberty, to take effect from the day of the testator's death. It concludes by a prayer that a day be fixed for proving the will—that the heirs of *Haggerty*, who are named, be cited—and that after due proceedings, the will of *Haggerty* be proved, homologated, and carried into effect, according to its form and tenor.

The heirs of *Haggerty* pleaded the exception of *res judicata*: and in case said exception was overruled, they opposed the probate and execution of the will of *Haggerty*, on the grounds:

1. That the will was contrary in form to the 1565th Article of the Civil Code, inasmuch as it is contained in one and the same act with the will of another person, namely: *Haggerty's* wife.
2. That by the Act of March, 1857, the emancipation of slaves in this State is prohibited.
3. That the will is contrary to law and good morals, the petitioner and her children named in the will, being the concubine and the adulterous bastards of the testator.

The District Court decided the cause exclusively upon the 1st of the above enumerated pleas; to which also we will confine our attention.

The will commences as follows:

"Aujourd'hui, ce dix de mars de l'année mil huit cent cinquante et une—à la requête de Monsieur *Jean Haggerty* (dit *Clark*) et à celle aussi de sa femme légitime, *Marie Esclard*, dite *Frederick*, tous deux résidant dans la paroisse susdite—moi, le soussigné, *George W. Seranton*, Recorder, dûment commissionné et assermenté en et pour la paroisse de Lafayette, dans l'Etat de la Louisiane, et y demeurant, je me suis transporté chez eux pour recevoir par acte authentique et public leurs derniers testaments, en présence de Messieurs *Napoléon St. Julien*, *Pierre Giroir*, fils, *Aurélien St. Julien*, *Joseph Ozème Milançon* et *Pierre Bélisaire Milançon*, cinq habitants, appelés par le testateur et la testatrice pour ce exprès, tous témoins," &c.

After this preface, the act continues:

"Et là et lors personnellement comparut et fut présent le dit *Jean Haggerty*, se déclarant habile à tester, étant sain de corps et d'esprit, &c., lequel a dicté son testament devant les susdits témoins, au Recorder, qu'il écrit tel qu'il a été dicté, et ainsi qu'il suit," &c.

Next follows (after the testamentary dispositions of *Jean Haggerty*) a formal conclusion and the signatures of the testator *Haggerty*, the witnesses named, and the Recorder immediately below, and in continuation we find written as follows:

"Etat de la Louisiane, paroisse de Lafayette, le dix mars, mil huit cent cinquante et un, au même jour et date comme ci-dessus, devant les mêmes Recorder et témoins, la dame nommée dans le susdit acte, *Marie Esclard*, épouse légitime de le testateur susdit, *Jean Haggerty*, a comparu et fut personnellement présente et laquelle dame, là et lors, se déclarant habile à tester,

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étant saine de corps et d'esprit, &c., a dicté son testament devant les audis témoins aussi soussignés, au dit Recorder, qui l'a écrit tel qu'il a été dicté, et ainsi qu'il suit." &c.

Then follows a formal conclusion and the signatures of *Mrs. Haggerty*, the testatrix, and those of the witnesses and notary.

We have been particular in transcribing so much of this double act of last will, because the argument of counsel has turned in great part, upon the fact of whether it be in reality one connected act, or two distinct and independent acts. We have no doubt that the former is the correct interpretation. The preamble of each will has blended both together in such a manner, that it seems entirely impossible to mistake the intentions of the two testators, and particularly of the testator *Jean Haggerty*. It is worthy of particular observation, that *Mr. Haggerty* makes no disposition in this testament of any portion of his property, (if he had any other property,) than his slave woman *Oreliné*, the plaintiff, and her children. It is obvious, that he must have deemed it important to secure the coöperation of his wife in the enfranchisement of those persons; and her will, as dictated, is but a repetition of his own, embracing the same object, and in words almost identical.

The judgment of the District Court is affirmed, with costs.

#### HENRIETTA TROWBRIDGE v. C. T. CARLIN.

In cross actions brought by husband and wife for a separation from bed and board it was held: That where the faults of the parties are nearly balanced, and are of a similar nature, neither party can be heard to complain in a court of justice.

Under the law of Louisiana, as hitherto interpreted, disappointments in the marriage relation, and mere incompatibility of temper, are not causes for a judicial separation between husband and wife—excesses, outrages and cruel treatment of a nature to render the conjugal life intolerable, are; but with the qualification, that the party complaining must be comparatively innocent. Mutual insults and outrages, the fruit of mutual provocations, unless there be a great and palpable disproportion of guilt, as between the parties, furnish no sufficient ground of action to either.

**A** PPEAL from the District Court of the Parish of St. Mary, *A. Voorhies, J. J. G. Olivier and H. Gibbon*, for plaintiff. *Tucker & Wilson*, for defendant, appellant.

**COLE, J.** The parties to these suits have applied in separate actions for a separation from bed and board.

The suits were consolidated by consent of counsel and tried together.

The wife has appealed from the decree of the District Court, which grants the judgment of separation in favor of the husband and entrusts him with the keeping of the children.

The principal causes adduced by the husband for his right to a separation are, that his wife desired to interfere with his prerogative of ruling on the plantation, and of administering its affairs; was dissatisfied when he left home to attend to his plantation, and also, that she used very improper language towards him in presence of the overseer.

It appears from the evidence, that jealousy must have been the cause of the whole of the improper conduct of the wife; the husband seems to have sup-

ported her ebullitions of temper for a long time, until becoming wearied, he endeavored to correct her temper by corporeal punishment.

This was antagonistical to that protection which is due to the wife, but *Mr. Carlin* appears to have been goaded on to it by the continued provocation of his spouse.

The evidence establishes, that the character of the husband is generally mild and amiable; the witnesses of the wife also declare that she is an amiable and refined lady.

As both parties have acted unkindly to one another, a separation ought not to be granted to either. 9 M., O. S., 421, *Fleytas v. Pigneguy*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and that the petitions in these consolidated cases be dismissed, and that appellee pay the costs of both courts.

*SPOFFORD, J.*, concurring. If all the evidence which soils this record is to be credited, it proves great misconduct on the part of both spouses, in the mutual relation which both are trying to dissolve. Crimination and recrimination, blows, and words harder than blows, have succeeded their marriage vows of reciprocal forbearance, fidelity and love.

A little more than ten years ago the appellee, then an elderly man with a fortune, married the appellant, a young girl without one.

The first that we hear of them is, that they arrived upon the husband's plantation in the parish of St. Mary, "looking cross" at each other. Bickerings soon arose about the management of the household; favorite servants of the master were found disrespectful to their mistress, and had to be chastised or sold. The lady had misunderstandings with the overseers, and they left. Abusive language, revolting to the ear of decency, is said by one of the overseers to have been uttered, in his presence, to the husband by the wife, apparently under the stings of jealousy. Two ladies testify that, in their presence, the husband upbraided his wife with being "of no account," saying "that she did not suit him, and that he was sorry he had ever married her." One of them deposes, that he also traduced her family; and both say that, to these reproaches, she answered meekly, and with tears. Notwithstanding occasional outbreaks and altercations of this sort, relieved, it would seem, by some placid intervals, time went on and three children were born of the marriage. Although each parent is proven to have been tenderly devoted to the children, these new ties do not appear to have drawn them closer to each other. Indeed, the displays of temper on both sides seem rather to have increased in intensity, and it is admitted that, on one occasion at least, the father resorted to violence to correct the mother of his children.

About a year before the present suits were brought, and nearly nine years after the marriage, the husband instituted an action for separation of bed and board against his wife; but one of his overseers testifies, that he was persuaded to abandon it by her tears and promises of amendment. It was abandoned shortly after its institution.

At length, the present cross-actions were brought on the same day, in which each spouse, after a glowing recital of grievances suffered, and a careful suppression of grievances inflicted, claimed a judgment of separation against the other with a right to the custody of the three children, which each party seems very solicitous to retain.

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The District Judge, expressing no doubt as to the truth of any of the testimony, concluded that the husband was the aggrieved party, and gave him a judgment of separation with the custody of the children.

The wife has appealed.

Although the conduct of both parties appears to have been highly censurable, it is impossible to say from the record before us, which was first or most in fault. Their errors were of a kindred character, ebullitions of temper springing from disappointment, a spirit of retaliation, and a lack of self-control.

In a case like this, where the faults of the parties are so nearly balanced, and are of so similar a nature, the serious question arises, can either be heard in a court of justice to complain of the other? Should not the conduct of each toward the other close the mouths of both?

An affirmative answer to this question was given by one of the sages of the Roman law, treating, however, of the pecuniary interests of the spouses only:

"Papinianus lib. XI. Quæstionum viro atque uxore mores invicem accusantibus, causam repudiî dedisse utrumque pronuntiatum est. Id ita accipi debet, ut eâ lege, quam ambo contempserunt, neuter vindicetur: paria enim delicta mutuâ pensatione dissolvuntur." Dig. Lib. XXIV, Tit. III, l. 39.

The common law adopted this principle of compensation in refusing divorce where the parties were guilty of similar faults towards each other. Const. 32, Q. VI. can. I. Coquille and Domat seems to have recognized something like this rule as a part of the ancient French law.

Under the Code Napoleon, two schools sprung up and divided upon this question. Duranton (T. II, No. 574), Valette and Massol hold that a demand for separation is barred on either side by mutual faults of the same description; in the words of M. Duranton, "la réciprocité des torts doit aussi, en général, produire une fin de non-recevoir, surtout lorsqu'ils sont de même nature." On the other side, among those holding that where both parties are guilty of mutual outrages, both should have a decree of separation, must be classed the great names of Toullier (II, 764), Marcadé (I, 769), M. Demolombe (IV, 415), and probably the weight both of doctrinal and judicial authority in the modern jurisprudence of France.

The District Judge cited only the opinion of Toullier. But, it must be remembered, that this is a question of Louisiana law. Our Code, our jurisprudence, and our manners differ in many respects from those of France, although to a considerable extent, derived from that source.

The doctrine of the common law and of Duranton, on the point under consideration, appears to have been adopted at a very early period, and frequently enforced by our predecessors. In *Durand v. Her Husband*, 4 Martin, O. S. 174, it was held: that "the law which provides for a separation from bed and board in certain cases is made for the relief of the oppressed party, not for interfering in quarrels where both parties commit reciprocal excesses and outrages."

In *Pigneguy's* case, 9 Lou., 420, the wife's claim for a separation was rejected, although it was proved that her husband had used personal violence towards her on one occasion, the court remarking that the evidence gave color to the assertion, that she provoked the ill treatment by her violent temper.

In *Rowley's* case, 19 Lou., 571, the court said, the argument, that after what had occurred between the parties it would be impossible for them to live together, was not a justification for a decree of separation.

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In *Lallande v. Jore*, 5 An., 33, judgment of separation obtained by a wife for defamation by her husband was reversed, because the conduct of the wife had been marked by exasperation and violence towards her husband. *Durand's* case was cited with approbation, and also *Waring's* case, 2 Phil., 132, where it was said by an English court, that if the conduct of the party complaining has been outrageous, the remedy must be first sought in a reformation of conduct by the complainant.

And in *Naulet v. Her Husband*, 6 An., 403, where, as in this case, both parties demanded a separation, and the District Court granted it in favor of the husband, the judgment was reversed and both parties were turned out of court, because they were both in the wrong, having been guilty of reciprocal outrages.

To ascertain what is a just limitation upon the right of divorce, is one of the most difficult of social problems.

To fix this limitation is an attribute of sovereignty.

Under the law of Louisiana, as hitherto interpreted, disappointment in the marriage relation, and mere incompatibility of temper, are not causes for a judicial separation between husband and wife—excesses, outrages and cruel treatment of a nature to render the conjugal life intolerable, are; but, with this qualification, that the party complaining must be comparatively innocent of conduct similar to that complained of, in order to obtain a decree; mutual insults and outrages, the fruit of mutual provocations, unless there be a great and palpable disproportion of guilt as between the parties, furnish no sufficient ground of action to either.

This being the doctrine of the cases heretofore adjudged in this State, we would not feel at liberty to disturb it, although it might conflict with our views of policy; but, notwithstanding the vigorous and able assaults that have recently been made upon this rule in France, and notwithstanding the inconveniences it may occasionally work, its manifest tendency is to induce greater circumspection in entering upon the most important of civil contracts, greater forbearance in undergoing the petty annoyances of domestic life, and a more general suppression of such scandalous scenes as it has been our painful duty to review in this cause.

I therefore concur in the above decree, dismissing both actions at the appellee's costs.

#### SUCCESSION OF ANTOINE NUMA TASSIN.\*

Under the second section of the Act of March 17th, 1837, "to provide a homestead for the widow and children of deceased persons," it was held: That the surviving widow was bound to give security as usufructuary, the usufruct being of money belonging to her deceased husband's children by a former marriage.

**A**PPEAL from the District Court of the Parish of St. John the Baptist, *Duffel, J. Berault & Legendre*, for administrator, appellant. *St. Paul & Bony*, for appellee.

\*This case was decided in 1855, and not heretofore reported.

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SPOFFORD, J. The only question in this case grows out of the construction of the Act of March 17th, 1852, entitled "an Act to provide a homestead for the widow and children of deceased persons." Sess. Acts, p. 171.

Section one enacts, "that whenever the widow or minor children of a deceased person, shall be left in necessitous circumstances, and not possess in their own right property to the amount of one thousand dollars, the widow or the legal representatives of the children shall be entitled to demand and receive from the succession of their deceased father or husband, a sum which added to the amount of property owned by them, or either of them, in their own right, will make up the sum of one thousand dollars, and which said amount shall be paid in preference to all other debts except those of the vendor's privilege and expenses incurred in selling the property."

It is further enacted by section two, "that the surviving widow shall have and enjoy the usufruct of the money so received from her deceased husband's succession during her widowhood, afterwards to vest in and belong to the children or other descendants of said deceased."

The administrator of *Tassin's succession*, who is the appellant in this case, concedes that the District Judge properly allowed the surviving widow the usufruct of one thousand dollars by preference out of the succession; but he complains that the money was improperly ordered to be paid over to her without requiring security for the return of the principal to the descendants of her deceased husband upon the termination of her widowhood by marriage or death.

His argument is, that the second section of the Act of 1852, constitutes her a usufructuary of money, and that she is, therefore, by legal implication, subjected to the obligations imposed upon such usufructuaries by sec. 3d, tit. 3d of the Civil Code; that is, that she must give security, or in default thereof, the money must be put out at interest on good security, under the authority of the Judge.

In this case, the usufruct is established by operation of law. C. C. 532. The general rule is that usufructuaries must give security. C. C. 551. The burden is on the opponent to show that she falls within some exception to the rule.

It is true, that neither the father nor mother having the legal usufruct of the estate of their children, is required to give the security. C. C. 553. But the opponent does not belong to this category of persons. Her usufruct is not of the estate of her children; but of a sum of money belonging to *Tassin's* children by a former marriage, who are now minors.

It is true that the security may be dispensed with in favor of the usufructuary by the act by which the usufruct is established. C. C. 552. But there is no such dispensation of security in the Statute of March 17th, 1852, under which this usufruct is established.

The usufruct created by that act must conform to the laws *in pari materia*. C. C. 17; *Succession of Bringier*, 4 An. 394; *Succession of Fitzwilliams*, 3 An. 489.

Construing the Act in connection with the general law upon the subject of usufruct, we conclude that in a case like the present, it was the intention of the lawgiver that security should be given by the widow.

The Article 556 of the Civil Code provides, that if the usufructuary does

not give security or a special mortgage, &c., sums of money, the usufruct of which has been given, shall be put out at interest on good security, with the consent of the owner, and if he refuses, by the authority of the Judge.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below be so amended, as to authorize the sum of one thousand dollars to be paid over to the opponent, *Emma Hymel*, widow of *Antoine Numa Tassin*, by preference out of his succession, only upon her giving security according to law; and in default of her giving such security, that the said sum of money be put out at interest on good security, according to Article 556 of the Civil Code; the interest thereof to be paid to the said opponent during her widowhood, and at the expiration thereof the capital to be paid over to the children or other descendants of the deceased *Antoine Numa Tassin*. It is further ordered and decreed, that in other respects, the judgment appealed from be affirmed, the costs of this appeal to be borne by the opponent and appellee.

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JOHN S. EDWARDS, Under-Tutor, v. JOHN MORROW, Tutor.

In a suit to remove the father from the tutorship of his minor, on the ground of notoriously bad conduct, the party should allege particular facts of which the defendant was guilty, in order to enable the court to determine whether such facts constituted "notoriously bad conduct."

No cause of exclusion or removal from the tutorship is applicable to the father, except that of unfaithfulness of his administration and of notoriously bad conduct. C. C., 826.

APPEAL from the District Court of the parish of St. Landry. *Martel, J. Lewis & Porter*, for plaintiff and appellant. *J. E. King & B. F. Linton*, for defendant.

VOORHIES, J. In this case the defendant is sought to be removed from the natural tutorship of his minor children, on the grounds: 1, That he has neglected to educate them; 2, That he has driven two of them from his domicile, and refused to clothe or feed them, in consequence of which they have become homeless vagrants, without the means of subsistence; 3, That he has repeatedly declared that the two last-mentioned children should never receive the property inherited from their deceased mother; 4, That he has repeatedly declared his intention to deprive his other children of a portion of their inheritance, by dividing it equally between them and his children by a second marriage; and 5, that the defendant is an habitual drunkard, and is unfaithful in the administration of the property of the minors, and in the care of their persons.

An exception to the plaintiff's right of action was pleaded by the defendant. Considering that the plaintiff had substantially complied with the requirements of the law, in obtaining the authorization of the judge to prosecute the suit, as we infer from the record, the exception was properly overruled.

The defendant then pleaded that the suit had been instituted from improper motives; that the allegations of the petition were untrue; that he had faithfully managed the property of his minor children. And claimed one thousand dollars damages in reconvention of the plaintiff.

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The plaintiff is appellant from a judgment of the court below rejecting his demand.

Before considering the merits of the case, it is necessary for us to notice several bills of exception to which our attention has been directed by the counsel for the appellant.

1. On the second day of the trial, after several witnesses had been examined, the judge refused to allow an amendment offered by the plaintiff, that "*John Morrow* is, and has been for several years, a man of notoriously bad conduct, and ought, therefore, to be removed from the natural tutorship of his children." Apart from the reasons which may have induced the judge to refuse the amendment, it appears to us that such an allegation would be immaterial. The party should allege particular facts of which the defendant was guilty, in order to enable the court to determine whether such particular facts constituted, within the terms of the law, "notoriously bad conduct."

2. We do not think the judge erred in refusing the declarations of the minors *Preston* and *Burton Morrow* to some of the witnesses, "that their father had driven them from home and refused to support them," to be given in evidence. If the minors were themselves incompetent as witnesses, of which there can be no doubt, it is clear that their declarations, which amounted to mere hearsay, were inadmissible.

3. We think the judge very properly refused to permit the plaintiff to prove by witnesses that from their knowledge of the defendant, and from his general character, they considered and believed him to be a dishonest man; and that if the property in his possession belonging to his minor children should be converted into cash, the money would not be safe in his hands, that he would swindle them out of their inheritance. The particular facts within the knowledge of the witnesses giving rise to such inferences, could alone be given in evidence, and of which, besides, the court, and not the witnesses, was the proper judge.

4. The testimony in relation to a difficulty between the defendant and his daughter, and the character of his wife, neither of whom being a party to this suit, was, in our opinion, very properly excluded. Whether the defendant's treatment to his daughter, who had ceased to be under his tutorship by her marriage, was unjustly harsh or not, or whether the defendant's present wife was profane, high-tempered and drank spirituous liquors or not, was, it seems to us, quite immaterial, and could afford no legal ground to remove the defendant from the tutorship.

5. The Judge *a quo*, we think, correctly sustained the defendant's objection to the following questions propounded by the plaintiff's counsel to the witnesses: "1st. Is not the defendant a man of notoriously bad conduct? 2d. Is not the defendant a dishonest man? 3d. If the property of the minors now in the possession of the defendant were sold and converted into money, do you believe the money would be safe in the defendant's hands?" As a general rule, the opinions of witnesses are inadmissible. The present case does not form an exception to that rule.

6. Conceding that the Judge *a quo* erred in sustaining the defendant's objection to the competency of the plaintiff as a witness, on which we express no opinion, we do not think it affords a sufficient reason to authorize us to remand the cause, convinced as we are that it would not vary the result of this unfor-

tanate controversy, which should end here. From the voluminous testimony in the record, which has been carefully examined by us, we must presume that "the neighbors have all testified, as the defendant's counsel remarks, and as against this testimony, that of the under-tutor could be of no avail."

Upon the merits we concur in the conclusion of the Judge *a quo* that the plaintiff has failed to make out his case. "No cause of exclusion or removal is applicable to the father, except that of unfaithfulness of his administration, and of notoriously bad conduct." C. C. 326. There is no evidence in the record showing that the defendant was unfaithful in his administration. It is true he was addicted to drinking, but this does not appear to have interfered with the management of his business or caused any injury to the property or to his pecuniary interest. His conduct may be censurable in this respect, presenting an evil example to his children, but it is surely not such as to constitute in itself, within the terms of the law, "notoriously bad conduct." The case of the tutorship of *Virginia Kershaw*, 5 R. 488, bears a strong analogy to the present. There it appeared the tutor was addicted to using ardent spirits to excess; when drunk he was inoffensive, and when sober a quiet good citizen. In the case at bar, the defendant does not appear to be addicted to any other vice, and is also inoffensive under the influence of intoxicating liquors. The doctrine as to what constitutes notorious bad conduct we consider to be fully settled by our predecessors. See the case of *Bosworth v. Butler*, 2 A. 298.

It is, therefore, ordered and decreed, that the judgment of the court below be affirmed, with costs.

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#### LUCIUS SUTHON v. MARIE T. CASTILLE.

The purchaser of property while in the peaceable and undisturbed possession of the property, cannot maintain the revocatory action against his vendor to set aside the sale of the property to his own vendor, on the ground of fraud and simulation.

**A**PPEAL from the District Court of St. Landry, *Martel, J.*  
*J. E. King, Swayze & Moore, T. H. Lewis and Porter*, for plaintiff and appellant. *J. H. Overton, J. F. Morrogh and Dupré & Garland*, for defendant.

COLE, J. On the 28th of March, 1845, *Pierre Labiche* being largely indebted to his wife, widow of *Jean Estorge*, and to her minor children, issue of her former marriage with said *Estorge*, by public act passed before *Adolphe Garrigue*, Judge of the parish of St. Landry, sold and transferred to his said wife, *Marie Therese Castille*, a large amount of property, in part satisfaction of her separate property and of the property of said minors, that had been received by him. By said act, it appears that he owed to the minors \$23,653 06, and to said *Mrs. Castille*, for her separate right, \$16,410 32, making a total due to the wife and her minor children, of \$40,063 38, which the said *Pierre Labiche* acknowledged to have received and disposed of as head of the community.

Defendant in said act having resumed the administration of her separate property and renounced the community established by the marriage contract, the said *Pierre Labiche* then declares, that "wishing to replace the amount

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of claims which his said wife may have against the community, either on her own account, or as tutrix of her minor children, amounting, as aforesaid, to the sum of \$40,063 38," he sells to her the property which is detailed in the act of sale, consisting of lands, slaves and movables, for the price and sum of \$21,230. For which sum, the wife acquits and discharges her husband *pro tanto*. The act continues: "This sale is besides made under the following conditions, to wit, that the said *Marie Therese Castille*, putting herself in the place and stead of the said *Pierre Labiche*, her husband, will pay, so as to discharge him, to *Jonathan Harris*, the sum of one hundred and twenty-nine dollars and thirty-eight cents, more or less," which added to the aforesaid \$40,063 38, makes a total of \$40,193 33, which deducted from \$21,230, the price of the sale aforesaid, leaves a balance of \$18,963 33, due the wife in her individual capacity and as tutrix, which *Pierre Labiche* in said act acknowledges to owe, and obliges himself to pay out of notes and accounts due him by different persons, the proceeds of which will be appropriated to the extinguishment of the debt.

Afterwards, to wit, in February, 1850, *Pierre Labiche* died, and on the 15th of March following, the defendant qualified and was appointed administratrix of his estate. An inventory was taken shortly afterwards, and on the 23d of October following, his succession being regarded as insolvent, a meeting of his creditors was called to decide upon the best disposition to be made of it.

The said inventory taken on the 8th of April, 1850, showed assets to the amount of \$1,509 75, and only five creditors appeared or were represented at the said meeting.

The present defendant, with her privilege claim of \$18,963 33, and ordinary creditors to the amount of \$144 22, voted a sale for cash.

The property was accordingly sold upon those terms on the 4th of January following, realizing the sum of one thousand and fifteen dollars and sixty cents, which went to the credit of the defendant's privilege.

Afterwards, to wit, on the 19th of June, 1854, defendant, by notarial act, sold to plaintiff a sugar plantation and several slaves, which, with the exception of a small fraction of land, constituted a part of the property sold by her husband to to her as aforesaid; the price of said property was \$45,000; five thousand dollars in cash, a like sum payable the 20th of April, 1855, and also on 1st of June, 1856; the remaining sum of \$30,000, payable in six equal annual installments from that date thereafter; the first three installments bearing eight per cent. yearly interest from the maturity of each, and the remaining ones to bear the same rate of interest from the 1st day of June, 1857.

The obligations of the plaintiff, payable accordingly, for those several installments of the purchase money, were duly executed and paraphed by the notary, to identify them with the act of sale, which embraced a special mortgage for the security of the said payments.

With the execution of this act, faithful delivery was made, by the defendant to plaintiff, of all the property described in the deed of conveyance of which he has since, and up to this time, been in the peaceable and undisturbed possession and enjoyment of the entire revenues.

The first installment of \$5,000 with interest accrued, had already matured on the 20th of April, 1855, and was yet unpaid. The second, for an equal amount, had but six months to run, when, on the 8th of December, 1856,

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plaintiff acquired by conventional purchase and transfer, with subrogation from *Ecariste Debaillon*, agent of his wife, *Alexandrine Ann Louallier*, four several judgments recovered by the Mechanics' and Traders' Bank of New Orleans against *Pierre Labiche*, the deceased husband of the defendant, for the consideration of seventy-five per cent. of the principal of the said judgments, exclusive of interest and costs, payable one-half on the 1st of March, 1856, and the remainder on the 1st of March, 1857, and on the 12th of March following, the date of the preceding assignment, he again acquired, by written transfer from the agent of *John Boyd*, for the sum of five hundred dollars in cash, a judgment recovered by him against the said *Pierre Labiche*.

These several judgments, including interest and costs, amounted at the trial of the present case to the sum of nine thousand nine hundred and thirty-four dollars and ninety-three cents, for which the plaintiff only paid, according to his own showing, two thousand five hundred and fifty-nine dollars and fifty cents, five hundred dollars in cash, and the balance on credits.

We would here observe, that two of the said judgments of the Mechanics' and Traders' Bank were rendered on the 13th June, 1843; another one was rendered on the 19th August, 1848, and the other on the 17th of May, 1848. The judgment of *Boyd* was rendered on the 14th of August, 1848.

Plaintiff in this suit represents, that by virtue of the transfer to him of said judgment that he is a mortgage creditor of the estate of *Pierre Labiche*, the late husband of the defendant, and institutes these proceedings against her both in her individual capacity and as administratrix of his succession, charging her (*mutatis mutandis*) with having never made a true and faithful inventory of the succession; of having badly administered it, and of having rendered no account of that administration. That the said sale of 28th May, 1845, by said *Pierre Labiche* to defendant was simulated and fraudulent and collusive between the parties, and in fraud of creditors; that neither the marital claims of the defendant, nor those of her minor children were just, or constituted as against *Pierre Labiche* any legal grounds for restitution on his part. That the property transferred was worth double the estimated price for which it was transferred; that the said transfer had not a legitimate cause and does not, therefore, fall within the exceptions of the legal interdiction of such contracts; that by one of the stipulations of the act, the defendant obliged herself for the payment of a debt contracted and due by her husband; that the defendant could not purchase for her minor children immovables without the advice and authorization of a family meeting, or invest their funds in movables, and that *Labiche* was largely indebted at the date of the act, and that the property so transferred, being the common pledge of his creditors, ought to have been appropriated to the payment of his debts.

Such are the various causes of nullity pleaded by the plaintiff against the validity of the act of the 28th of May, 1845, which he avers to have injured his rights as a creditor of the estate of said *Labiche*; and he further avers, said act being an absolute nullity, did not divest *Labiche* of his ownership and conferred no title on defendant, and that the property bought by plaintiff of defendant, belonging to another, the sale of said property to plaintiff was void, and vested no title whatever in the plaintiff, and he asks for judgment against the defendant, as *administratrix*, for the entire amount of his several judgments, though acquired at not one-third of their face, and also still further demands of her *individually*, the absolute rescission of the sale to himself of the

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19th June, 1854, the extinction of the entire existing indebtedness, amounting to forty thousand dollars exclusive of interest; the restitution of the cash payment of five thousand dollars; five thousand dollars damages for the loss of time and money, and the inconvenience to which he has been subjected, and ten thousand dollars, the value of the improvements made by him upon the premises.

Plaintiff prays that the defendant be cited in her individual capacity and as administratrix; that she be ruled to render a full account of her administration; that the acts of the 28th of May, 1845, and of the 19th of June, 1854, be severally annulled; that the several obligations executed by the plaintiff to the defendant, as the price of the latter purchase, be cancelled; that all the property described in those sales be decreed to belong to the succession of the deceased *Labiche*, as also that conveyed by *J. H. Labiche* to the defendant; that the plaintiff be recognized as a judicial mortgage creditor of said succession for the several amounts claimed by him for the judgment bought by him as aforesaid; and that he have judgment against the plaintiff individually for the sum of twenty thousand dollars, as detailed in the following specifications: the restitution of the cash payment of five thousand dollars, ten thousand dollars for the value of his improvements upon the premises, and five thousand dollars damages for the loss of time and annoyance to which he has been subjected by this litigation.

It seems to us that this statement of the case is sufficient to show that plaintiff has no cause of action, and that his demand must be rejected.

It is adverse to every principle of law and equity, that the plaintiff, while in the peaceable and undisturbed possession and enjoyment of the property purchased by him can, in defiance of his legal obligations as buyer, maintain against his vendor the action of nullity here instituted, when the sale of defendant to him is not absolutely null; but even upon the hypothesis that his action lies for the revocation of the sale to himself, and that he can legally attack the validity of the transfer from *Labiche* to the defendant, we think that the sale is valid, and, so far as the wife was concerned, coming within the exceptions to the general interdiction denounced by the Code, (C. C., Art. 2421; Troplong, vol. 1, No. 180,) and valid in fact as an act of honest restitution to his wife and step-children for their just dues in moneys received and appropriated by him to his own use; the evidence establishes that he was indebted in the amount alleged to his wife personally and to her as tutrix of her minor children.

It is also clear that, if the said judgments bought by him as aforesaid, in the hands of the original creditors, operated a judicial mortgage upon the property purchased by the plaintiff, his obvious and only remedy was to suspend payment of the price until security was given by the defendant against the existing dangers of disquietude in his possession. C. C., Art. 2535.

Besides, even if the said judgments could legally constitute such an outstanding hypothecary lien upon the property sold him, as to be regarded in the light of an adverse title necessary to the perfection of his own, his purchase would be interpreted as the act of a trustee of his vendor, the defendant, and he could only be entitled to reimbursement for the actual cost of the claim so acquired. *Pepper v. Dunlap*, 5 A. 260; *Galloway v. Finley et al.*, 12 Peters, 284.

We would also remark, that at the meeting of the creditors of the estate of said *Labiche*, before alluded to, not one of the judgment creditors here represented by plaintiff appeared to deliberate or vote, nor does any evidence in this record, parole or documentary, disclose that any notice was ever given to defendant, as administratrix, of the existence of such indebtedness, or of demand for payment, from the opening of the succession of *Pierre Labiche* to the institution of this suit by the present plaintiff.

Although all the mortuary proceedings in the estate of *Pierre Labiche* were, as the record shows, conducted according to the strictest formalities of law, matters also of public notoriety and of record, and must have been known to the judgment creditors aforesaid, yet no effort was made by them to obtain payment, and probably never would have been made if their claims had not been purchased by plaintiff.

We would also observe, that the sale of *Labiche* to his wife cannot now be attacked by plaintiff successfully, as defendant has pleaded the prescription of one year, which we consider as valid. C. C., 1989; 2 A., 669; *Merchants' Bank v. Bank of United States*, 3 A., 250; *Gillespie v. Cammack*, 3 L., 28; *Petit v. His Creditors*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and that the demands of plaintiff be rejected and his petition dismissed, and that he pay the costs of both courts.

#### SUCCESSION OF BOATWRIGHT.

It cannot be inferred that the testa'or intended to give a general *seizin* to the executor from the following expressions: "I leave the whole of this foregoing, as written, to the management of *Fergus Hathorn*, to have my request carried out fully and faithfully."

**A** PPEAL from the District Court of St. Landry, *Martel, J.*  
*H. W. Garland*, for executor. *J. E. King*, for opponents and appellants.  
 SPOFFORD, J. *Fergus Hathorn*, testamentary executor of the last will of *M. D. Boatwright*, having filed an account and tableau, the heirs opposed the same "on the ground that the commissions of said executor are overcharged; that the said executor never had the *seizin* of said estate, and that the amount of said commissions ought to be reduced."

The commissions opposed are estimated upon "\$55,944, amount of the half of the deceased in the partnership of *Boatwright & Swayze*, and his personal property," to wit, \$1398 66.

The only expression in the will from which it is possible to infer an intention to give a general *seizin* to the executor is the following: "I leave the whole of this foregoing, as written, to the management of *Fergus Hathorn*, to have my request carried out fully and faithfully." The fair construction of this clause would seem to be that the executor was only requested to see to the execution of the legacies. It cannot be held to confer a *seizin* of the entire succession under the Article 1653 of the Code. "The testator may express his intention to grant the *seizin* of his estate to the testamentary executor, either in express terms, by authorizing him to take possession of the whole or

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a part of the estate of his succession after his death, or by merely appointing him testamentary executor and detainer of his estate, the word *detainer* sufficiently announcing that the executor is to be seized of the property of the succession.

But if the executor testamentary be merely appointed testamentary executor without any power, his functions are confined to see to the execution of the legacies contained in the will, and to cause the inventory and other conservatory acts of the property of the succession to be made."

But by Article 1677, if the executor has not had a general seizin, his commission shall only be on the estimated value of the object which he has had in his possession, and on the sums he has had in his hands for the purpose of paying the legacies and other charges of the will." It has been held that parol evidence is admissible to show what property of the succession has passed through the hands of the executor, even when seizin has not been given by the will. *Anderson's Executors v. Anderson's Heirs*, 10 La. 29.

The account in this case shows that the executor received the sum of \$31,468 49 wherewith to pay the debts and the legacies. We are of opinion that his commission should be reduced to two and a half per cent. upon this sum.

No opposition was made to the separate allowance of \$850 to *Robert Burguerel* for special services rendered to the succession.

It is, therefore, ordered, that so much of the judgment of the District Court as dismisses the opposition of the heirs of *Michael D. Boatwright* to the account and tableau of *Fergus Hathorn*, testamentary executor, be avoided and reversed; it is further ordered, that the said opposition be sustained so far as to reduce the commission of the said executor from the sum of thirteen hundred and ninety-eight dollars and sixty-six cents (\$1398 66,) as charged, to the sum of seven hundred and eighty-six dollars and seventy-one cents (\$786 71), which sum is hereby allowed to the said testamentary executor in full for his commissions, the account and tableau to be amended accordingly; and it is further ordered, that in all other respects the judgment appealed from be affirmed; the costs of this appeal to be paid by the said *Fergus Hathorn*, appellee.

## FRANÇOIS FERAY v. JOHN M. FOOTE.

In the jurisprudence of Louisiana a distinction is not made between words actionable and words not actionable as the basis of damages in a suit for slander where no special damages are proved.

**A** PPEAL from the District Court of St. Mary, *A. Voorhies, J. E. Simon, jr.*, for plaintiff and appellant. *Gibbon and Olivier*, for defendant.

**BUCHANAN, J.** Plaintiff claims damages of defendant for slander. The words charged in the petition as slanderous are, "*François Feray* has sworn falsely in a certain business against me."

Plaintiff appeals, for the purpose of having the damages which were assigned by the jury increased—and the appellee, in his answer to the appeal, prays

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that the judgment be amended by dismissing the suit, on the ground that the words charged in the petition are not actionable.

The distinction between words actionable and words not actionable as the basis of damages, where no special damages are proved, has been overruled by the Supreme Court—Martin, Chief Justice, dissenting—in the very carefully argued and considered case of *Miller v. Holstein*, reported in 16th Louisiana.

While we view the jurisprudence of Louisiana as settled upon this point, and therefore allow the most extensive scope to the Articles 2294 and 1928 of the Civil Code, we are the less disposed to interfere (at least for the purpose of increasing it), with the verdict of a jury, in a case where no special damages have been shown to have been suffered.

Judgment affirmed, with costs.

### STATE v. HASH.\*

The accused had made certain statements as to his guilt to *B.* Held: that the District Judge did not err in permitting the statements of the accused to *B.* to go to the jury when the facts embraced therein had been corroborated by evidence *abundant*.

Although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts may be admitted, *if the court believes*, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. *In the absence of any such circumstances* the influence of the motives, proved to have been offered, will be presumed to continue and to have produced the confession, unless the contrary be shown, and the confession will therefore be rejected.

**A**PPPEAL from the District Court of Morehouse, *Richardson, J.*

*F. P. Stubbs*, District Attorney, for the State. *D. Newton* and *W. A. Caperton*, for defendant and appellant.

SPOFFORD, J. The prisoner *Hash* has appealed from a sentence of death pronounced against him by the District Court of the parish of Morehouse, upon the unqualified verdict of a jury finding him guilty of the murder of *John Morris*.

His only ground of complaint against the ruling of the District Court is, that the testimony of *A. J. Bobo*, as to his alleged confessions in jail, was improperly permitted to go to the jury. The bill of exceptions sets forth, that the objections made to the admission of this testimony were but two: 1st, that at the time the confessions to the witness *Bobo* were made, the prisoner was still laboring under the influence of the threats and promises which had been held out to induce a previous confession, (which was offered and rejected on the trial;) and, 2d, that it was not shown that the confessions were made uninfluenced by any threats or promises. To the bill of exceptions the Judge appended the following remarks: "there was a strong doubt on the mind of the court whether the entire confessions made by the prisoner to *Murrell* and *Bobo*, in the jail, were not admissible, but that doubt was given in favor of the prisoner, and only so much of the prisoner's declarations were permitted to be

\* This case belongs to the Monroe decisions, having been omitted in its proper place.

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given in evidence as were corroborated by other testimony. In order to preserve an accurate history of the proceedings the questions and answers of the witnesses were reduced to writing and annexed hereto."

It is stated in the printed argument, filed on behalf of the prisoner, that *Bobo* was the only witness who established or was permitted to testify as to the statements and confessions of the accused. The evidence, as taken down and attached to the bill of exceptions, discloses but two declarations of the accused, neither of which directly avows his own guilt: first, that the deceased was struck five times on the head with a stick; and, secondly, that he was struck with the stick exhibited on the preliminary examination before the magistrate. These we suppose to be the facts alluded to by the Judge as corroborated by extraneous evidence.

The sole question for us is, was there any error which we are bound to correct in the ruling of the Judge admitting in evidence these two statements of the prisoner to *Bobo*? *Bobo* it appears testified, that there were no threats, promises or inducements held out to the accused, but that the statements above detailed were the prisoner's voluntary answers to him. The facts, that the prisoner was ironed and that *Bobo* was the Sheriff, do not imply the existence of an improper influence which elicited the statements. Ten days had elapsed from the time when the prisoner's rejected confessions, induced by advice to throw himself upon the mercy of the court, had been made.

The rule laid down in *Guild's* case, 5 Halst., 163, is generally conceded to be sound. "In that case, upon much consideration, the rule was stated to be, that although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts may be admitted, *if the court believes*, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. *In the absence of any such circumstances*, the influence of the motives, proved to have been offered, will be presumed to continue, and to have produced the confession, unless the contrary be shown, and the confession will, therefore, be rejected." 2 Russ. Crimes, \*p. 838; 1 Greenleaf Ev. 254.

The District Judges would seem, therefore, to have power, under the law, to infer that the original improper influence has ceased to operate either from the lapse of time or other sufficient cause. To give this court jurisdiction in a criminal case of a question of this class, the bill of exceptions must disclose, that the Judge erred in a conclusion of law and not in a deduction of fact.

Without deciding whether the lapse of time was sufficient in this case to obliterate the influence of improper advice upon the prisoner's mind, we are clear that the District Judge did not err in permitting the above statements of the accused to *Bobo* to go to the jury when the facts embraced therein had been corroborated by evidence *aliunde*. *State v. Moore*, 1 Hayne, 482.

It is, therefore, ordered that the judgment be affirmed, with costs.

# LIST OF CASES NOT REPORTED.

## NEW ORLEANS.

|                                                         |                                                 |
|---------------------------------------------------------|-------------------------------------------------|
| Howard & Mayer v. Succession of Mc-<br>Donogh.          | Succession of Charlotte Aguiard.                |
| J. A. Maurel v. N. Claudel.                             | Stone v. Conn.                                  |
| M. Eastman v. City of New Orleans.                      | Woods v. Woods, tutor.                          |
| Gaienné v. Snapp.                                       | Bird v. Hébert.                                 |
| Lamaitre v. Barrow & Ostrom.                            | Bell v. S. Kemp & A. B. James.                  |
| Dumas v. Fanin.                                         | Baton Rouge and Clinton Railroad v.<br>Coxe.    |
| Matthews v. Cutter.                                     | Heghley v. Ratliff et al.                       |
| Depas v. Depas & Z. Latour.                             | Stacy v. Police Jury of Carroll.                |
| Simmonds v. Pray.                                       | Harris, tutor, v. Barnes.                       |
| York v. Chilton.                                        | Taylor v. Tenenour.                             |
| United States of America v. Union<br>Bank of Louisiana. | Woodruff v. Morget.                             |
| Nimick v. Druhan.                                       | Holmes v. Chapman.                              |
| Favre v. Morgan.                                        | Bell v. Watson and Oakey & Hawkins.             |
| Barthet v. Boudreau.                                    | Beuquet v. City of New Orleans.                 |
| Simmonds v. Knox.                                       | Miller & Crenshaw v. Tate.                      |
| Burton v. McRae.                                        | Frost v. Newsom.                                |
| Davis v. Scott.                                         | Succession of Elizabeth Chaney.                 |
| Dunn v. Barrow.                                         | Rost v. N. J. Law, sheriff.                     |
| Legarde v. Steamboat Sparrowhawk.                       | Wilson v. Miller.                               |
| Walsh v. Wilson.                                        | St. Charles Hotel v. Breeden.                   |
| Spears & Wright v. Babcock & Fennell.                   | East v. Stone.                                  |
| Chowing v. McCulloch et al.                             | Russ v. Peck.                                   |
| Townsend & Co. v. Good, administrator.                  | Merrett v. Ducre.                               |
| McCulloch v. Holmes.                                    | Querouze & Langsdorff v. Matthews &<br>Newberg. |
| Duplessis v. Holland.                                   | Smith v. Hardy & Sandell.                       |
| Succession of Minville.                                 | Imbodin v. Hood.                                |
| Jarvis & Woodman v. Ford & Samos.                       | Beck v. Hendry and Sheriff.                     |
| Lery & Shaw v. Sheriff et al.                           | Shaw v. Reveau.                                 |
| Guedry et al. v. Mercer.                                | McCormick v. Conrad.                            |
| Bringier v. Bingay et al.                               | Goodrich v. Stochen.                            |
| McWilliams v. Wilson.                                   | Grisham v. Cannon.                              |
| Smith v. Caillavet.                                     | Christophe v. Curel.                            |
| Tillet v. Upton.                                        | Rowlett v. Lanier.                              |
| Cochran v. Hood.                                        | Heaton v. Winters.                              |
| Wood, Bacon & Co. v. Lyons et al.                       | Culbertson v. Walker.                           |
| Poydras v. Poydras.                                     | Freeman v. Amis.                                |
| Yeatman v. Yeatman et al.                               | Stevens v. Lentz.                               |
| Ward & Jonas v. Graves.                                 | Davis v. Sharpe.                                |
| Davidson v. Rawl.                                       | Burton et als. v. Nichols et als.               |
| Stewart v. Snodgrass.                                   | Miller v. New Orleans.                          |
| Succession of John Ducker.                              | Holland v. Lock.                                |
| Howes v. White.                                         | Millard v. Hopkins.                             |
| Jarvil v. Owen.                                         | Guthrie v. Miller.                              |
| Succession of Sarah M. C. Cobb.                         | Niles & Co. v. Walker.                          |
| McFall v. Knox.                                         | Kinchloe v. Holt.                               |
| Norris v. Hudson.                                       | Chamburg v. Mullen.                             |
| Stone v. Tate.                                          | Thornhill v. Hamilton.                          |
| Esclapon v. Landry.                                     | Moore v. Anderson & Co. et al.                  |
| Gasquet v. Woods.                                       | Hitzelberger v. Steamboat Strader.              |
| R. H. May & Co. v. Wagnon.                              | Yale & Co. v. McMahon.                          |

- Zeringue v. St. Arnaud.  
 Mertens v. McGuire & Co.  
 Negretto v. G. Edmonds & Co. et al.  
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## ACCOUNT.

1. Where an account has been rendered and a balance struck and acquiesced in by the debtor, the imputed credits are to be considered as payments, but the credits must first be imputed to the payment of such charges as the debtor was legally bound to pay and not to such as he was under no obligation to pay. *Keane v. Branden*, 20.
2. An acquiescence in an account containing illegal charges, will not estop the debtor from pleading their illegality—the only effect of such acknowledgment is to dispense the creditor from any affirmative proof. A mere charge in an account of interest beyond the legal rate which has not been acknowledged or acquiesced in, will not preclude the creditor from the recovery of legal interest. *Ibid.*

## ACTION.

1. Several distinct causes of action cannot be cumulated against several defendants in one suit, unless the defendants have a common interest to be adjudicated upon in one judgment. *Waldo v. Angomar*, 74.
2. Proceedings, under the Act of 1840, against a defendant for fraud, may be cumulated with a revocatory action for the rescission of the alleged fraudulent sale; and in such a proceeding it is not only the right but the duty of the plaintiff to make parties to the suit all who have an interest to be affected by the judgment. *Ibid.*
3. Actual possession of the land is a fact indispensable to be proved in order to sustain the possessory action. C. P. 47. *Searles v. Costillo*, 208.
4. A mere civil or legal possession is insufficient, unless it is shown to have been preceded at some time by a natural possession in the plaintiff or his author. *Ibid.*
5. No action lies for the price of fraud. The law leaves parties who traffic in forbidden things and then break faith with each other, to such mutual redress as their own standard of honor may award. *Boatner v. Yarborough*, 249.
6. When the defendant in a petitory action is evicted from land upon which he has for several years paid the taxes, the writ of possession should be suspended until the taxes are refunded to the defendant as *negotiorum gestor* of the plaintiff. *Weber v. Coussey*, 534.

ACTION (*Continued*).

7. The surety may be sued without making the principal a party to the suit.  
*State v. McDonnell*, 741.

8. As against a naked trespasser, the plaintiff in the petitory action is not bound to show a title perfect against the whole world.  
*Coucy v. Cummings*, 743.

9. The Board of Underwriters in New Orleans being a body composed of private individuals, without being incorporated, and through their treasurer having received on deposit money to which the plaintiff was entitled, it was *held*: That a suit to recover the money could be maintained against the treasurer in his individual capacity.  
*Bennett v. Wheeler*, 763.

10. A party may institute a petitory action for one tract of land, and in the same petition may sue the same defendant for slander of title of another and distinct tract, but could not in the same suit sue for a tract of land and for damages for slander of title to such tract.  
*Williams v. Close*, 873.

11. The purchaser of property while in the peaceable and undisturbed possession of it, cannot maintain the revocatory action against his vendor to set aside the sale of the property to his own vendor, on the ground of fraud and simulation.  
*Suthon v. Castille*, 889.

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## ADVANCES.

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## AGENT.

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## APPEAL.

1. Where property is under seizure at the suit of several attaching creditors, and judgment is rendered in favor of the plaintiff in the prior attachment, the others have a right of appeal from such judgment under Art. 571 of the Code of Practice, notwithstanding there had been no issue joined and no curator *ad hoc* appointed to represent the defendant in the subsequent attachment.  
*Keys, Maltby & Co. v. Riley*, 19.
2. Where defendant admits a part of the plaintiff's claim and deposits the amount in court, and the balance for which judgment is rendered is less than \$300, the judgment being an entirety and the whole amount claimed in the suit being over \$300, the court has jurisdiction of an appeal.  
*New Orleans v. Estate McArthur*, 47.

APPEAL (*Continued*).

3. Where property is seized under execution and the sale is enjoined by a third person claiming to be the owner, it is the value of the property under seizure, and not the amount for which the writ issued, which determines the right of appeal.  
*State v. The Judge of the Seventh District*, 48.
4. When the defendant in a petitory action has called in his warrantor with whom issue is joined, the plaintiff cannot appeal from a judgment against him without making the warrantor a party to the appeal. If there be no appeal bond given in favor of the warrantor, the appeal will be dismissed.  
*Nouet v. Heirs Armant*, 71.
5. If the appeal bond was insufficient at the time the appeal was brought up, the defect cannot be subsequently cured by the substitution of another bond.  
*Ibid*.
6. Where an appeal is taken from an interlocutory order and it neither appears that the matter in dispute exceeds \$300, nor is alleged that the order appealed from will work an irreparable injury, the court will *ex officio* dismiss the appeal, although the appellee has not moved for the dismissal.  
*New Orleans v. Imley*, 87.
7. It is the amount due at the institution of the suit which constitutes the matter in dispute, and determines the right to appeal as affected by the amount involved.  
*Klein v. Wild*, 87.
8. When an appeal bond is not large enough for a suspensive appeal, it will sustain a devolutive appeal.  
*Montan v. Whitley*, 175.
9. An agent is a competent surety on an appeal bond.  
*Ibid*.
10. An appeal will not be dismissed merely on account of the carelessness of the officer in an obvious omission of a word in his return of the service of the copy of the petition of appeal. Such a case is completely within the scope of the Act of 1839.  
*Oulliber v. Joubanc*, 237.
11. A motion filed in the Supreme Court by the defendant, who is appellee, to have the judgment of the lower court amended by dismissing plaintiff's demand, is a substantial compliance with Articles 888 and 890 of the Code of Practice, and authorizes the entire reversal of the judgment of the lower court and a judgment of the appellate court in favor of defendant.  
*Hawford v. Adler*, 241.
12. An appeal from an order submitting a cause to referees is premature and will be dismissed.  
*Junck v. Hezeau*, 248.
13. When appeal is taken by motion in open court, one who is a party to the suit and who signed the appeal bond, although only as surety, will not be permitted to allege that he was not a party to the appeal.  
*Conery v. Webb*, 282.
14. Under the terms "*et alii*," parties to the suit not expressly named, may be considered as included among the obligees in the bond.  
*Ibid*.
15. An appeal will not be dismissed on the ground that the judgment was not signed when the order of appeal was made, if it appears to have been signed at the time the transcript was made out.  
*McGregor v. Barker*, 289.

APPEAL (*Continued*).

16. It is not necessary there should be as many copies of a record of appeal made out and filed as there may happen to be appellants with interests in any way conflicting. When the necessary parties are before the court, a transcript filed by any one of them will authorize the court to adjudicate upon the merits of the whole cause. *Ibid.*
17. An appeal will not be dismissed, in a case where the Clerk has notice that citations are necessary, by the filing of the petition of appeal, but fails to issue them. It is not indispensable that the petition of appeal should contain a prayer for a citation to the appellees.  
*Barton v. Kavanaugh*, 332.
18. When a party has an adequate remedy by appeal, an application for a writ of mandamus will be refused.  
*State v. Judge of the Sixth District Court of N. O.*, 342.
19. The refusal of the District Judge to allow the attorney in fact of the relator to represent him upon the trial, is a matter which could be presented to this court for revision by a bill of exceptions. *Ibid.*
20. Where proceedings are instituted *via executiva* against the widow in community and tutrix, who taxes a suspensive appeal in her capacity as *administratrix of her deceased husband's estate*, she is not entitled to a delay in the Supreme Court to have the heirs of her husband made parties to the appeal. If the heirs ought to have been made parties, and were not, the appellee might have moved to dismiss, but the appellant could not have been permitted to take advantage of her own laches. But it was not necessary to join the heirs in the appeal, for the purposes for which the administratrix had full capacity to represent the whole estate.  
*McCalop v. Fluker's Heirs*, 345.
21. The State may appeal in criminal cases where the indictment, charging an offence punishable with death or imprisonment at hard labor, has been quashed before trial, or held bad upon a demurrer. *State v. Ellis*, 390.
22. The appeal will be dismissed under the rule of court of 29th May, 1854, where the appellant has died since the appeal, and the administrator having received the twenty-five days' notice required by that rule, fails to make himself a party. *Rayne v. O'Brien*, 400.
23. The delay for applications for re-hearing is fixed by law at three judicial days, and longer time should not be allowed within which to move to reinstate an appeal dismissed under a rule of court. *Ibid.*
24. When in a redhibitory action an interlocutory order was made, authorizing the delivery of the slave into the custody of the defendant, upon the execution of a bond in favor of the plaintiff, it was held that the order was one which was calculated to produce, or which might occasion an irreparable injury, and that an appeal from such an order should be allowed.  
*State v. Judge of the Fifth District Court*, 455.
25. Even after a motion to dismiss an appeal has been filed, the certificate of the Clerk of the lower court to the transcript may be amended.  
*The State v. Cole*, 471.

APPEAL (*Continued*).

26. The Act of 20th March, 1839, §19, enlarged the discretionary power of the Supreme Court contained in Art. 898 C. P., and made it imperative not to dismiss appeals for clerical errors not attributable to the appellant. *Ibid.*
27. It is not a sufficient reason to dismiss an appeal, "that the appeal was asked and granted, and the appeal bond given and approved before the judgment was signed, and at a time when there was no legal judgment thereon," for it is usual in the country to apply for an appeal before the judgment is signed. The appeal is considered as taken *nunc pro tunc*.  
*State v. McKeown*, 596.
28. An appeal from an interlocutory order, over-ruling a motion to dissolve an attachment, will be dismissed unless it appear that such order will work an irreparable injury. *Powel v. Hopson*, 615.
29. A motion to dismiss the appeal is too late after the lapse of three judicial days, from the filing of the transcript, and after the cause has been set down for trial at the instance of the party who moves for the dismissal.  
*Creery et al. v. Breedlove*, 745.
30. Where an appeal is taken by one of the opposing creditors from a judgment homologating the tableau of distribution, it is not sufficient to give an appeal bond in favor of the syndic. The creditors on the tableau interested in maintaining the judgment, must be made parties to the appeal, or it will be dismissed, on the motion of any of them.  
*Simmons v. His Creditors*, 755.
31. The motion to dismiss on such a ground, is not too late after the expiration of three days from the filing of the record, as the court will, *ex-officio*, notice the want of parties for a final decree. *Ibid.*
32. The appellee, at any time before the cause is at issue on the merits, may have the appeal dismissed as being premature; the judgment of the lower court not having been signed. *Derbigny v. Trepagnier*, 756.
33. An appeal from a judgment against the two members of a commercial firm *in solido*, taken by one of the partners only, dismissed on the ground that the other partner against whom the judgment was rendered should have been made a party to the appeal, he having an interest in maintaining the judgment to secure his recourse against the appellant for his portion of the debt. *Saux v. Lefevre*, 757.
34. In a contestation between opposing creditors and the syndic of an insolvent, on their oppositions to the tableau of distribution filed by the latter, the decision of the court below on each of the claims in litigation, is a separate judgment belonging to the party in whose favor it was rendered, and binding upon all parties who did not appeal from it; nor can such judgment be disturbed on appeal, unless the party having an interest to maintain it is made a party to the appeal.  
*Beer & Co. v. Their Creditors*, 774.
35. Creditors whose claims have been disallowed, cannot make themselves parties to the appeal without giving bond; the appeal bond given by the syndic, will not suffice to maintain the appeal on the part of such

APPEAL (*Continued*).

- creditors; these creditors are alone aggrieved by the judgment disallowing their claims, and not the estate represented by the syndic. In conflicts between creditors in which the syndic is without interest, he cannot be permitted to interfere, and cannot maintain an appeal. *Ibid.*
36. An appeal will not lie to the Supreme Court in an injunction suit to arrest the execution of an order of seizure and sale for a less amount than three hundred dollars, although the property seized is worth more than \$300, and the plaintiff in injunction claims in his petition a larger sum for damages and attorney's fees. *Holland v. Duchamp*, 784.
37. A party who appeals from a judgment homologating an account, must make the heirs and creditors who are interested in maintaining it, parties to the appeal. *Condon v. Samory*, 801.
38. The Supreme Court will notice the want of proper parties to an appeal, without a motion to dismiss. *Ibid.*
39. Appeals in cases of contested elections must be considered as falling within the general rules applicable to appeals in all civil cases and where proper and necessary the return day may be extended. *Auld v. Walton*, 825.
40. The husband is a necessary party to an appeal taken from a judgment in favor of his wife, and if his name is omitted in the appeal bond, when the appeal is granted, as if on motion in open court, the appeal will be dismissed. *Lawrence v. Burris*, 843.
41. A party may abandon his appeal from the portion of the judgment which passed upon the title to the property, and retain the appeal as to the part of the judgment which condemned him to pay the fruits and revenues or their value. *Dwight v. Brashear*, 860.

## APPRAISEMENT.

See SALE JUDICIAL—*Waddell v. Judson*, 13.

## ARBITRATION AND AWARD.

1. The mere delay to make payment of the amount of an award, when the debtor has taken no steps to set it aside and has not denied its obligatory force, and when no formal demand upon him to enforce it has been made, will not subject the debtor to the payment of the stipulated penalty in addition to the amount of the award. *Bodett v. Lees*, 761.

## ARSON.

See CRIMINAL LAW—*State v. Rohfrisch*, 892.

## ATTACHMENT.

1. In every sale of a seaworthy steamer, where time is given for the payment of the price, it is to be considered as having been in the contemplation of the parties, that the vessel was to be employed in navigation, and even if that navigation extends beyond the waters of the State, in the absence of any allegation of fraud or insolvency, the vendor will not be permitted to attach the boat where the price is not yet due, by swearing that the debtor is about to remove his property out of the State before the debt becomes due. *Hogan v. Carras*, 49.

ATTACHMENT (*Continued*).

2. An attachment will not lie in an action for damages *ex delicto*; nor in an action for the settlement of a partnership before any liquidation of accounts, when, from the nature of the business, it is impossible that the plaintiff can swear with certainty to the amount that will be found due to him on a final settlement. *Barrow v. McDonald*, 110.
3. The true owner of goods in a factor's hands on consignment may require an account of the factor, although unknown to him. When the true owner has not presented himself to make any claims, and the factor, without having received any communication from him, and being under advances to the agent upon his drafts, passes the proceeds to the credit of the agent, by whom the goods were shipped, with instructions to that effect at the time of the shipment, he will be protected from liability to pay a second time. *Bullitt v. Walker*, 276.
4. When the goods, under such circumstances, were undisposed of at the time of the service of the interrogatories on the garnishees, *held*: that they are liable to seizure for the debts of the owner. *Held*, also, that in this case the owner of the goods, and defendant in the suit, was not a competent witness for the plaintiffs, but that the agent was a competent witness for the garnishees. *Ibid*.
5. The right of a plaintiff in attachment to follow the property attached into the hands of third persons who have acquired rights from the owner after the attachment, depends on the reality of the Sheriff's possession under the attachment. *Whann v. Hufty*, 280.
6. The possession of the keeper appointed by the plaintiff is the possession of the Sheriff, but if the plaintiff in the attachment is himself the keeper and suffers the property attached to be taken out of his possession and carried to a distant parish from his own residence, where it is sold without any steps having been taken to regain the possession, he cannot disturb the title of the purchaser. *Ibid*.
7. The garnishees had received from the defendants certain promissory notes, with instructions to place the proceeds to the credit of the intervenor, to whom the defendants were indebted. *Held*: That the property in the notes could only enure to the benefit of the intervenor when he had been informed of what was done, and had assented thereto; until then the defendants might have changed the destination of the property. The rule is that, when the proprietor may sell and deliver, the creditor can seize. *Conery v. Webb*, 282.
8. The right of priority of a creditor making the first attachment, will not be defeated in consequence of another creditor having discovered that there was a dormant partner interested in the property attached, and having attached his interest. *McGregor v. Barker*, 289.
9. When property is attached within the jurisdiction of our State courts, questions of privilege and priority among the attaching creditors, must be determined by the laws of Louisiana. *Ibid*.
10. A bill was drawn in Tennessee on a merchant in London, under an authorization to draw against shipments of tobacco to an agent of the London merchant at New Orleans. On the faith of such an authorization,

ATTACHMENT (*Continued*).

the intervenors discounted the bill, which the drawer afterwards refused either to accept or pay. *Held*: That the intervenors acquired no privilege upon the tobacco, which they attached in New Orleans, in the hands of the agent of the drawee, because they had no actual possession or control of the tobacco by themselves or by their agents.

*Ibid.*

11. Under such circumstances, in order to give the bill-holder such an interest in the tobacco as would defeat attaching creditors of the consignors, there should have been an agreement between the consignors and the consignee, that the tobacco should be held by the consignee for the benefit of the bill-holder, so that the latter would look to the fund for payment, and not to the consignee's personal credit. *Ibid.*
12. In attaching a vacant lot of ground or tract of land, it is not necessary the Sheriff should take possession of the property attached by the actual and corporeal detention of the same. *Boyle v. Ferry*, 425.
13. The execution of the writ has the legal effect of vesting in the Sheriff the civil possession of the defendant. *Ibid.*
14. Where the defendant in the writ, or his tenant, held the natural possession of the property attached, it would be different. *Ibid.*
15. The accidental omission in the petition of the name of one of the plaintiffs, where they are a firm, will not vitiate an attachment where the affidavit was made by one of the firm on behalf of the firm, and the bond was given by the firm as principals. *Barrière v. McBean*, 493.
16. In such a case no new bond and affidavit are required. *Ibid.*
17. The property of a partnership having a domicile out of the State can be attached here in a suit against one of the partners. *Ibid.*
18. The garnishees received a lot of cotton from the defendants, with instructions to sell as soon as practicable or advisable, and pay over the proceeds to the intervenors. The garnishees communicated at once with the intervenors, and submitted themselves to their arbitrament of the propriety of an immediate sale, tendering their advice to hold on for a rising market. The intervenors accepted this advice, and directed the garnishees to delay sales. *Held*: That the stipulation *pour autrui* contained in the letter of instructions to the garnishees, having been accepted by the party for whose benefit it was made, could no longer be revoked by the shipper of the cotton.  
*Burnside v. McKinley*, 505.
19. The intervenors acquired a vested interest in the cotton, which entitled them to a preference over an attaching creditor. *Ibid.*
20. Where the garnishee in an attachment suit has in his answers acknowledged to be in possession of property belonging to the defendant, it is not necessary there should be a seizure by the Sheriff to support the attachment. *Dwight v. Mason*, 846.

See DOMICIL—*Winter Iron Works v. Toy*, 200.See GARNISHEE—*Gaty v. Franklin Insurance Co.*, 272.See PRACTICE—*Yale v. Hoopes*, 460.See OFFSET—*Vincent v. Gandolfo*, 526.

## ATTORNEY-AT-LAW.

1. An attorney-at-law is entitled to claim commissions upon judgments obtained through his agency as well as upon moneys actually collected on executions and accounted for to his clients, although he be superseded by the appointment of another attorney.

*Morel v. New Orleans*, 485.

2. The curator *ad hoc* appointed to represent several defendants, is only entitled to the simple tax fee of ten dollars, unless he has made application on proof, to have the allowance increased in proportion to the services rendered.

*Taylor v. Simpson*, 587.

See NEW ORLEANS—*Succession of Fletcher*, 498.

See INSOLVENCY—*McIntosh v. Merchants' Insurance Co.*, 533.

## AUCTIONEERS.

See JUDICIAL SALE—*Laflon v. Doiron*, 164.

## AUTHENTICATION OF RECORD.

1. Where the clerk of a county court in another State, certifies the exemplification of a record, as being a true and correct copy of the record, &c., as far as the same remains on file and of record in his office, he certifies all that the law requires him to certify. It is not a valid objection to the completeness of the record, that the reasons on which the judgment was founded are not set forth; the reasons for the judgment do not form a part of the decree. The opinion of the court may be and often is given *ore tenus*. The judgment is of necessity a matter of record.

*West Feliciana Railroad v. Thornton*, 736.

2. The clerk of the county court properly copied into the exemplification of the record, and certified as a part of it, the decree made in the case by the High Court of Errors and Appeals, and the objection that it is a copy of a copy, is not tenable. Any paper properly made a part of the record in the cause, although in reality a copy, becomes an original for the purpose of making out a transcript of the cause as it appears of record in the court whence it comes.

*Ibid.*

## BAIL.

See BONDS.

## BANKS.

1. The Act of the Legislature of 1852, which relieved the Citizens' Bank from the decree of forfeiture of its charter, while it restored the "rights and privileges" of the corporation, is not to be understood as having restored those of the individual corporators, so as to entitle the original stockholders to a credit at the hands of the Bank, as at present organized, of thirty-three dollars per share, as a loan payable in installments, according to the original charter.

*Pollock v. Citizens' Bank*, 228.

2. The Act of the Legislature incorporating the Louisiana Savings Company, was not intended to create a banking institution; it conferred no power to issue notes for circulation, and the laws relative to banking corporations are not applicable to such an institution.

*State v. Louisiana Savings Company*, 568.

BANKS (*Continued*).

3. The business of a Savings Company is of such a character that temporary suspension of payment which is almost necessarily connected with its organization, and must have been contemplated by the Legislature, cannot be regarded as an absolute cause of forfeiture. A fraudulent suspension of payment or gross negligence in loaning money without sufficient guaranty by which temporary suspension of payment might ensue, would be different. *Ibid.*
4. From the peculiar nature of the charter of the company, it was held: That the closing of the doors, the cessation of business and the temporary suspension of the company for a few days, were not sufficient causes for forfeiture. *Ibid.*
5. It is no part of the duty of a bank to employ counsel, and bring suit upon notes left with it on deposit.

*Crow v. Mechanics' and Traders' Bank*, 692.

See CORPORATIONS.

## BATTURE.

See NEW ORLEANS—*Remy v. 2d Municipality*, 500.

## BETTING ON ELECTIONS.

1. A Court of Justice will not enforce an obligation where it appears to be nothing more than a bet in disguise on a presidential election.

*Barham v. Livingston*, 618.

## BILL OF EXCEPTIONS.

See PRACTICE—*State v. Judge 2d District*, 113.

See EVIDENCE—*State v. Rohfricht*, 333.

See PRACTICE—*Porche v. LeBlanc*, 778.

## BILLS AND NOTES.

1. A conditional endorsement does not bind the endorser if the condition be not accomplished. *Johnson v. Barrow*, 83.
2. When one has acquired a negotiable note after its maturity, he will, notwithstanding, be protected as an innocent holder if the immediate party who transferred the note to him took it by endorsement *bona fide* for value, before it was due. *Howell v. Crane*, 126.
3. The draft sued upon being an instrument *sous seing privé*, and no *proel aliunde* offered of its date, the only date which can be assigned to it is that of its protest. *New Orleans v. North*, 205.
4. The plaintiff residing in Missouri sent an endorsed note to *J. J. Anderson & Co.* at St. Louis, with instructions to forward the same for collection to New Orleans, where it was payable. The note was sent to *Corning & Co.*, at New Orleans, who caused it to be protested by a notary for non-payment. The notary, under the instruction of his employers, sent the notice of protest for the endorser to *J. J. Anderson & Co.* Held: That the notary was exonerated from the obligation of giving notice to the endorser. *Moore v. Corning*, 256.
5. The agents, *Corning & Co.*, were only bound to give notice of the dishonor of the note to their principals, and could not be held liable to the plaintiff whose interest in the note was not disclosed to them by their principals. *Ibid.*

BILLS AND NOTES (*Continued*).

6. Where one endorses his name on a negotiable note with a space left in blank for the name of the person to whose order it was to be made payable to be afterwards inserted, and the maker sells the note in that condition without the blank space being filled, the holder cannot treat the party who had thus endorsed his name as merely surety and hold him liable without notice of protest. *Weaver v. Marvel*, 517.
7. It is not unusual to endorse promissory notes containing blanks to be afterwards filled up so as to make the party an endorser, and the note as to him is to be treated exactly as if it had been filled up before he endorsed it. *Ibid.*
8. Where the consideration of a note due *in presenti* was the acceptance by the plaintiff of the maker's draft payable at twelve months, by which the latter was enabled to purchase property—*Held*: That the maker could not resist payment on the ground that the note was not immediately exigible. *Shannon v. Steamer America*, 519.
9. The maker of a promissory note cannot object to the failure of the holder to demand payment at the place of payment, unless he can show that by such failure his funds there deposited to meet his obligation had been lost. *McCalop v. Fluker's Heirs*, 551.
10. This action was against the drawers of a draft; one of the grounds of defence was, that it had not been properly presented for acceptance. The notary certified that he "had presented the draft to a clerk of the drawers at their office, the drawers not being in, and demanded acceptance thereof, and was answered that the same would not be accepted." *Held*: That this was a sufficient presentment, the defendants being merchants, having a counting room in New Orleans. *Held, also*: That it is questionable whether the drawer was entitled to notice, as he had no funds in the hands of drawees, and it did not conclusively appear that the agreement with them was such as to authorize the drawer to expect an acceptance. *Whaley v. Houston*, 585.
11. If the day on which a draft should, by its terms, be presented, comes on Sunday, it may be presented on the day previous. The court should take notice of the fact, that the date of its maturity is Sunday. *Ibid.*
12. The special endorsee of a bill or note, may disregard all posterior endorsements, even though special, and avail himself of the possession of the instrument to sue the maker. *Alcock v. McKain*, 614.

See PRINCIPAL AND SURETY—*Manice v. Duncan*, 715.

See EVIDENCE—*Skannel v. Taylor*, 779.

See INTEREST—*Hawley v. Stoo*, 816.

## BONDS.

1. A judicial bond must be construed by reference to the order of court, in pursuance of which it was given. *Mason v. Fuller*, 68.
2. When, by a clerical inadvertence, at the time of signing the bond, it was not filled up with the amount fixed as the penalty, but a blank space left for its insertion, the law implies that the bond was given for the sum fixed by the order, and the principal and sureties will be bound thereby for that amount. *Ibid.*

BONDS (*Continued*).

3. When the bond has not been filed it cannot be considered as in evidence, or as produced on the trial. *State v. Wilson*, 180.
4. There must be an order of court admitting to bail one charged with murder and fixing the amount of his bond, otherwise the bond taken by the Deputy Sheriff is not binding on the sureties. *State v. Cravey*, 324.
5. The surety in an appearance bond cannot be held liable when it does not appear that there was any order of court admitting the accused to bail, fixing the amount of the bail bond, or authorizing the Sheriff to take the same. *State v. Smith*, 349.
6. In a bond requiring the accused to appear "when notified," when the Sheriff returns that he could not find the accused after diligent search, and his surety, who was personally notified in time, failed to produce him as he was bound to do, this was sufficient to put the parties in default, and the bond was properly forfeited against both principal and surety. *State v. Cole*, 471.
7. An objection that the bond only required the accused to appear and answer the charge of robbery, whereas an information was filed against him for the crime of larceny alone, is sufficiently answered by the fact that the accused bound himself, not only to appear at court to answer that specific charge, but also not to depart thence without leave of the court first obtained. *Ibid.*
8. The insertion of the name of the former instead of the present executive, as the obligee of a bail bond, will be regarded as a mistake, and will not vitiate the bond. *State v. McKeown*, 596.
9. Where the Sheriff takes an illegal bail bond, he may abandon it and take another bond. *Ibid.*
10. It cannot be objected to the validity of an appearance bond, that it was taken without authority, where it appears that the Sheriff accepted the bond, and that he was authorized to take and approve it by the court. *Ibid.*
11. A bond given for the appearance of the accused after he had been convicted of larceny is *null*, and the surety on such a bond will be discharged. *State v. Vion*, 698.

See DELIVERY BONDS.

## BOUNDARY.

1. Plaintiff and defendant had acquired their estates from one common proprietor, the sale to the former was of the most ancient date and was not a sale *per aversionem*—the lower boundary of plaintiff's tract was fixed after the date of the sale to plaintiff. *Held*: That in an action of boundary preference should be given to him whose title was of the most ancient date, unless an adverse possession had produced a difference in the situation of the parties. C. C., Art. 843.  
*Lacour v. Watson*, 214.
2. Although the limits had been fixed, as there was no adverse possession

BOUNDARY (*Continued*).

to defeat the plaintiff's right by prescription, any errors in the operation of fixing the limits could be corrected in a court of justice.

*Ibid.*

3. A survey which starts from certain points and lines not recognized as boundaries by the parties themselves and not shown by the evidence to be true points of departure, cannot be made the basis of a judgment establishing a boundary.

*Martin v. Breauz*, 689.

4. Parties are not bound by a consent to boundaries which have been fixed under an evident error, unless perhaps by the prescription of thirty years.

*Gray v. Courillon*, 730.

BROKER.

See PRINCIPAL AND AGENT—*Soudieu v. Faures*, 746.

CARRIER.

See COMMON CARRIER.

CASES AFFIRMED, OVERRULED, &c.

1. The principles of law involved in this case were settled in the cases of the *State of Louisiana v. Judge Bermudez*, 14 La. 478; *same v. same*, 2 Rob. 160; *same v. same*, 2 Rob. 420; *Succession of Richard Winn*, 3 Rob. 303; *Butler v. Her Creditors*, 6 N. S. 625; *E. Gonsoulin et al. v. Salvador Miguez et al.*, 5 Ann. 565; C. C. 332.

*Chamberlain v. Chamberlain*, 60.

2. The principles of law settled in the case of *Stewart v. The City of New Orleans*, 9 An. 461, reaffirmed.

*Lewis v. New Orleans*, 190.

3. Under that authority, *held*, that the city was not liable in the present case for the nonfeasance or misfeasance of the officers of the police jail.

*Ibid.*

4. Same case, 10th Annual, pages 208 and 792.

*M. S. Hedrick v. Bannister*, 373.

5. The ruling of the late Court of Errors and Appeals, that the term felony is unknown to the laws of Louisiana, was an unadvised *dictum*, and is not concurred in by this court.

*State v. Rohfrisch*, 382.

6. *State v. Hendry*, 10 Ann., overruled.

*State v. Ellis*, 390.

7. The principle as to the liability of common carriers laid down in the case of *Watts v. Steamer Saxon*, 11 An. 43, re-affirmed.

*Blocker v. Whittenberg*, 410.

8. The decision in the case of *McIntosh v. Merchants' and Planters' Insurance Co.*, 9th An. 403, that the guarantee notes belonging to the company were not liable to be seized and sold for the benefit of a single creditor, re-examined and affirmed.

*McIntosh v. Merchants' Insurance Co.*, 533.

9. The refusal of the court in that and in the present case, to apply the privilege accorded by Art. 722 of the Code of Practice, turns upon the particular facts of these cases, the assets having a peculiar character and destination, rendering it impossible to make them the subject of an ordinary seizure, at the instance of a creditor of the company. *Ibid.*

CASES AFFIRMED, OVERRULED, &c. (*Continued*).

10. The case of *Hemkin v. Overly* affirmed, and the cases of *Pierce v. Frattum*, 16 L. 422; *Kellum v. Rippey*, 3 Rob. 138, and *Williams v. Booker*, 12 Rob. 253, so far as inconsistent with the present opinion, overruled. *Gibson v. Hutchins*, 545.
11. *Smith v. McMicken*, 3 Ann. 321, reaffirmed. *Beauchamp v. Cachere*, 851.

## CLERKS OF COURT.

1. Clerks of Court have not the power to grant orders of seizure and sale. *Mason v. Fuller*, 68.
2. The power conferred on Clerks of Court (out of the parish of Orleans) to grant orders for the sale of succession property is confined to such orders as are required and asked for by Curators, Administrators and Executors in the regular course of their administration. Such orders cannot be made by the Clerk, at the instance of creditors, to enforce the payment of a debt. *Ibid*.
3. The principles settled in the case of the same plaintiff against *E. R. Fuller*, ante p. 68, as to the power of Clerks of Court in the country to grant orders of sale, are affirmed. *Mason v. Hall*, 94.
4. Orders rendered by the Clerk in the special cases authorized by law under the Constitution, have the same effect as they would have, if rendered by the Judge himself. *Succession of Boyd*, 611.
5. The Clerk of the District Court tendered his resignation to the Judge of the District, who, thereupon, appointed a clerk for the remainder of the unexpired term of the clerk who had resigned: Held that the resignation was properly tendered to the Judge, who is empowered, by Art. 70 of the Constitution, to fill any vacancy that may occur subsequent to an election, and the person so appointed holds his office until the next general election. *State v. Morgan*, 712.
6. It is not requisite that the person so appointed by the Judge should be commissioned by the Governor. *Ibid*.

## COMMON CARRIER.

1. The common carrier is not required, upon his own responsibility, to decide upon the validity of the title of shippers to property which is shipped, but the shipowner has complied with the law, if he has in good faith received the slave from a person claiming to be owner, and holding under an apparent title. *Farwell v. Harris*, 50.
2. The duties which the law imposes on common carriers of passengers by water, in relation to the treatment and accommodation of passengers during the voyage, necessarily cease, on the termination of the voyage. If, during the voyage, a contagious disease breaks out on the vessel, and on her arrival at port the city authorities find it necessary, in order to prevent the spreading of the infection, to have her sick passengers sent to the hospital to be treated, the owners of the vessel cannot be made liable for the expenses incurred thereby.

*New Orleans v. Windermere*, 84.

COMMON CARRIER (*Continued*).

3. A merchant in Louisville filled an order on him for merchandize to be shipped to the purchaser at Vicksburg, and took a bill of lading for the same, deliverable to the purchaser at Vicksburg, from the agent of a steamboat on which the goods were to be transported. The goods were taken by drays from Louisville to Portland, to be there received on the boat according to the custom of the trade in low water on the Ohio river. At Portland the goods were delivered to a different boat from the one from which a bill of lading had been taken, and were never delivered to the purchaser at Vicksburg. *Held*: That the bill of lading in such a case is conditional, and only binding in case of actual delivery of the goods to the steamboat. *Fearn v. Richardson*, 753.
4. The vendor of the goods did not use ordinary care and diligence in shipping the goods, and the purchaser is entitled to recover back the price paid for them. *Ibid.*
5. The clause in a steamboat's bill of lading reserving the privilege of re-shipment, implies an obligation on the part of the boat to reship, if the stage of water in the river does not permit her to prosecute her voyage to her point of destination, and the reshipment is possible; and the additional expense of thus forwarding the goods by another boat, is charged to the boat with which the original contract of affreightment was made, the consignors being bound to pay only the freight specified in the bill of lading. *Hatchett v. Steamer Compromise*, 783.
6. Low water is not to be classed among the dangers of the river, excepted in the bill of lading, and which absolve the carrier from his obligation to deliver the goods without unnecessary delay and in good order and condition. *Ibid.*

See CASES AFFIRMED, &c.—*Blocker v. Whittenburg*, 410.

## COMMUNITY.

1. The wife who had obtained a separation of her property from her husband in his lifetime, in order to exercise the right of accepting the community, is bound, on the death of her husband, to cause an inventory to be made. *Audrich v. Lamothe*, 76.
2. The law presumes the acceptance of the community by the wife, when it is dissolved by the death of the husband, but where it had been previously dissolved by a judgment of separation of property, the renunciation by the wife is presumed if, at the death of the husband, she does not cause an inventory to be made. *Ibid.*
3. Notwithstanding such implied renunciation, the concealment by her, or making away with any of the effects of the community, would render her liable as a partner. *Ibid.*
4. The interdiction of the wife for the cause of insanity, is no ground for a decree of separation of property against her in favor of the husband. *Hotard v. Hotard*, 145.
5. The community can be dissolved by the husband, only by the effects of the dissolution of the marriage bond, or a separation *a mensa et thoro*, of which a dissolution of the community is the logical sequence. *Ibid.*

COMMUNITY (*Continued*).

6. When the front tract belonged to the husband before marriage, the *double concession* purchased by him after the marriage, under the Act of Congress of June 15th, 1822, became the property of the husband. The only right of the community is that of claiming a reimbursement of the sum paid as the price, if the payment has been made out of the funds of the community. *Succession of Morgan*, 158.
7. The widow has a vested interest in the community property after the death of her husband, but her acceptance of the community will no more take the administration out of the hands of the executor or administrator of her husband's estate than would a like acceptance on the part of the heir. *Succession of McLean*, 222.
8. The administration of the succession of the deceased husband involves with it the administration of the community, and the executor or administrator may rightfully cause the community property to be sold for the purpose of paying the debts of the succession. *Ibid.*
9. The purchaser at a sale thus ordered, acquires all the interest which the widow in community could have had in the property. *Ibid.*
10. When the wife in opposition to a creditor of the husband, in whose favor she had made a formal renunciation, claimed the property mortgaged by him as her separate property—*Held*: that a conveyance of the property to the wife, by act under private signature, not recorded, in which the consideration of the transfer was stated to be a partial payment of the amount due to the wife from her father's succession, without its being shown where the father's succession was opened, or what amount the wife was entitled to inherit, was insufficient to rebut the legal presumption of title in the community. *Wilson v. Hendry*, 244.
11. When, during the existence of the community, a stock of goods was bought in the name of the wife but it was not shown that she had been a public merchant, either before or since the sale—*Held*: that the purchase must be considered as having been made by the husband, and the debt incurred by it a debt of the community. *Sarran v. Regouffre*, 350.
12. A crop growing at the time of the dissolution of the marriage forms part of the acquets and gains. *Harrell v. Harrell*, 549.
13. Where a wife in community takes the title to immovable property in her own name, she must clearly show that it was paid for with her separate funds to rescue it from the community. *Clark v. Norwood*, 598.
14. A. S. died, leaving a will in which was the following clause: "I will and bequeath to my wife A. L. S., the use of all my property both personal and real, during her life." "However, if any of my children sue for a portion during her life, I then will and bequeath to her all of the property that I can dispose of by will, forever." A child sued for partition, and the question was what were the wife's rights under the will. *Held*: That the husband having made a will, his wife's rights must be fixed by it, and she has no usufruct of his share of the community under the Act of 1844. In the absence of proof to the contrary, the

COMMUNITY (*Continued*).

law presumes a community. After payment of the debts of the succession, the wife is entitled to one-half of the residue in her own right, and her husband having left three children, she is entitled to but one-third of his share of the community, and one-third of his separate estate.

*Grayson v. Sandford*, 646.

See HUSBAND AND WIFE—*Wooters v. Feeny*, 449.

*Succession of Pratt*, 457.

## COMPENSATION.

1. The defendant, who was a private banker, being sued for a cash deposit made with him by the plaintiff, pleaded, by way of reconvention, that he had credited the amount on a protested draft of the plaintiff in his favor for a larger amount. *Held*: That plaintiff and defendant being both residents of New Orleans, and the reconventional demand not being connected with plaintiff's original demand, proof of the reconventional demand was properly rejected.

*Morgan v. Lathrop*, 257.

2. Conceding the answer to be equivalent to a plea in compensation, the defence could not be sustained, because, under our jurisprudence, as now settled by frequent decisions, compensation does not take place in the confidential contracts arising from irregular deposits of this nature.

*Ibid.*

3. The depositary is not authorized to apply the funds on deposit in his hands to the payment of the debts of the depositor, except there is a special mandate from the depositor, or a course of dealing which will justify such application of the funds.

*Ibid.*

4. Compensation takes place between a debtor of a succession and a creditor of one of the heirs, to the extent of the portion of such heir in the debt due to the succession by the individual creditor of such heir, and the heir cannot defeat the compensation by a transfer of his interest in the succession to a third person.

*Plunkett v. Perkins*, 558.

5. A creditor of the succession has the means of preventing the injurious effects of the compensation as between the heirs and the debtor of the succession, by demanding a separation of patrimony, by taking out letters of administration in proper time, or by enforcing the collection of his claim against the administrator or executor already appointed.

*Ibid.*

6. The knowledge on the part of the judgment debtor, that the notes on which the judgment was obtained were the property of the wife, would not prevent the compensation from taking place at any time while the legal ownership of the judgment remained in the husband.

*Succession of Gilmore*, 562.

7. *S.* purchased property at the succession sale of *F.* and gave his note for the price. *S.* having married *F.*'s widow, and suit having been brought on the note, he pleaded in compensation the interest of his wife in the community of *F.*—her former husband—and herself. But *held*, that the plea was bad, because the quality of debtor and creditor was not united in the same person, and because, also, the debts were not equally liquidated and demandable.

*Stokes v. Forman*, 671.

See JUDGMENT—*Crow v. Watkin's Heirs*, 845.

## COSTS.

See *Courts—Musina v. Alling*, 700.

## CONFLICT OF LAWS.

1. Where a deed was executed in the State of Mississippi in the form adopted in a common law State to create a mortgage there, and real estate situated in Louisiana was embraced in the deed, *Held*: That the instrument must be considered as having but a single aspect, and it was not reasonable to suppose that the parties contemplated a mortgage as to the property situated in Mississippi, and a sale as to the property in Louisiana. *Bernard v. Scott*, 490.
2. From the fact that the parties to the deed were both residents in States where the common law prevails, and that the instrument was executed in a common law State in the form of a mortgage, part of the property to be affected by the instrument being situated in that State, it must be considered that it was the intention of the parties to create a mortgage to secure the payment of a sum of money. *Ibid.*
3. When the purchaser of property was fully informed of the title of his vendor, and that he claimed under a deed executed in another State and embracing property situated there as well as in this State, he was bound to enquire what effect the law would give to such a deed. *Ibid.*
4. The character and effect of a deed to slaves, made in Alabama, must be construed by the laws of that State although the parties afterwards remove to Louisiana. *Hollomon v. Hollomon*, 607.
5. *H.* in consideration of love and affection, and the further consideration of one dollar, the receipt of which he acknowledged, did give and grant with warranty, to *W. H.*, (his son,) and his heirs and assigns "at the death of *H.* and the wife of *H.*" certain slaves. *Held*: That by the laws of Alabama this was a deed of gift to the son with the reservation of a life estate in the slaves to *H.* and his wife. *Ibid.*

## CONSTITUTIONAL LAW.

1. The plaintiffs were not subrogated, either by law or covenant, to the rights and privileges of the "Orleans Navigation Company," which corporation was dissolved by decree of this court in 1852. It is for the party only whose rights have been invaded to plead the nullity of a law as impairing the obligation of a contract. *N. O. Navigation Company v. New Orleans*, 364.
2. There is nothing repugnant to the Constitution in the provisions of the Acts of the Legislature of 1813 and 1814, conferring certain powers on the Police Juries in regard to opening natural drains, &c. *Avery v. Police Jury of Iberville*, 554.
3. The courts will presume that the power conferred on the Police Jury has been properly and judiciously exercised by them, and it is for the party complaining to show that the making or opening of works was unnecessary or detrimental to such party. *Ibid.*
4. The Act of the Legislature of the 25th of April, 1853, since repealed, which declared "that each and every incorporated insurance company,

CONSTITUTIONAL LAW (*Continued*)

and agency of foreign insurance company, *in the city of New Orleans*, shall be taxed five hundred dollars per annum, was in contravention of Article 123 of the Constitution, declaring that taxes should be equal and uniform throughout the State.

*State v. Merchants' Insurance Co.*, 802.

5. The fact that the Act provided that the amount of the tax should be paid into the treasury department to be divided equally between the different fire, hose and hook and ladder companies of New Orleans, did not render it a local assessment for local benefit. *Ibid.*

See TAXES—*State v. Waples*, 349.

See SUPREME COURT—*State v. Judge, &c.*, 405.

See JUDGMENT—*Jacobs v. Levy*, 410.

See NEW ORLEANS—*Guillotte v. New Orleans*, 452.

*Layton v. New Orleans*, 515.

See CRIMINAL LAW—*State v. Bass*, 862.

CONSTRUCTION, FOR RULES OF.

See SALE—*Deligny v. David*, 30.

See BONDS—*Mason v. Fuller*, 68.

See STATUTES—*LaSelle v. Whitfield*, 51.

*State v. Ellis*, 390.

*State v. King*, 598.

See JUDGMENT—*Succession of Regan*, 156.

See WILL—*Fink v. Fink*, 301.

*Succession of Thorame*, 334.

See CONFLICT OF LAWS—*Bernard v. Scott*, 459

*Hollomon v. Hollomon*, 807.

See INSOLVENT PROCEEDINGS—*Rouanel v. Castel*, 520.

See TAXES—*State v. Winfree*, 643.

See COURTS—*State v. Judge of the Ninth District*, 777.

See LAWS—*Saunders v. Carroll*, 793.

CONTINUANCE.

1. A continuance was properly refused when the party desiring the testimony of a witness absent in a distant parish, instead of taking out a commission to examine him, dispatched a special messenger to bring the witness; by doing so, he took upon himself the risk of the witness being in court on the trial. *Jeter v. Heard*, 3.

CONTRACTS.

1. Courts of justice will not aid parties to enforce or relieve them from the effects of contracts made in violation of law. *State v. Reiss*, 166.
2. A contract stipulating a compensation for services to be rendered in procuring an Act to be passed by the Legislature for the relief of the party promising to pay therefor, is *contra bonos mores*, and cannot be enforced, even although no improper means are alleged or shown to have been resorted to by the agent in obtaining the passage of the Act. *Gil v. Davis*, 219.
3. In a case of this kind, which is an exception to the general rule, the party himself will be permitted to allege that the contract was contrary to good morals. *Ibid.*

CONTRACTS (*Continued*).

4. Where parties have entered into a contract for building a house and subsequently deviated from it, the contract price should, as far as applicable, indicate the measure of the value of the work done. *Jones v. Adams*, 621.
5. Although no sentence of interdiction may have been pronounced, yet it will be sufficient to vitiate a contract if it can be shown that insanity or imbecility of mind has been taken advantage of.  
*Holland v. Miller*, 624.
6. When the consideration of the assignment of a judgment by *A.* to *B.* was, that *B.* might avail himself of the judgment to compensate certain unmatured notes due by him to *C.*, the judgment debtor, and *B.* promised and undertook to pay the amount of said notes when they become due to *A.* *Held*: That the contract might be enforced by *A.* although the notes were not in his possession. *Christian v. Monette*, 635.
7. Where a party is aware of the injury that may result to him from a compliance with his part of the contract, and yet voluntarily enters into it, he cannot afterwards require an indemnifying bond, and if a bond was given at the time of the contract, he can require no other, even if its amount is insufficient to protect him against loss. *Ibid.*
8. If a planter, for a consideration, engages to ship his crop to a factor, and violates his engagements, he will be liable for commissions on the crop.  
*Haven v. Hudson*, 660.
9. Plaintiff employed *K.*, the defendant, as her overseer, and stipulated that he should receive a portion of the proceeds of the crop as compensation for his services. Plaintiff, on grounds deemed sufficient, dismissed him before his time was up. *Held*: That *K.* was entitled to compensation for the value of his services up to the time of his discharge, and that in estimating the value, reference should be had to the stipulations of the contract; to the probable amount which the defendant would have received, had there been no violation of the contract; and to the probable receipts of the plaintiff, had *K.* discharged his duty in every respect.  
*Lambert v. King*, 662.
10. An overseer cannot maintain an adverse possession of the plantation against the owner who has hired him. If the owner discharge the overseer without just cause, before the term of his services has expired, the latter has a remedy, under the provisions of the Code in the title of letting and hiring.  
*Perret v. Sanchez*, 687.
11. A resolutive condition is implied in every commutative contract, where either party fails to comply with his obligations; but such contract is not dissolved of right, and the party complaining of its breach may either sue for its dissolution, or demand a specific performance.

*Porche v. LeBlanc*, 778.See ESTOPPEL—*Mourain v. Mourain*, 147.See DAMAGES—*Curtiss v. Morehouse*, 649.See INSANITY—*Chevalier v. Whalley*, 651.

## COPIES.

See AUTHENTICATION OF RECORD—*W. Feliciana R.R. v. Thornton*, 796.

## CORPORATIONS.

1. Under the Act of the Legislature of March 15th, 1855, the Governor has authority to appoint a liquidator to take charge of and liquidate the affairs of any corporation, when its charter has been decreed to be forfeited and there is no law existing at the time which provides for its liquidation. *State v. Haynes*, 285.
2. The certificate of the secretary of an incorporated company, bearing its seal, affords *prima facie* evidence of the facts therein stated. The court is bound to presume, from such certificate, that legal notice was given to the stockholders of the company of a meeting of which they were entitled to be notified. A special tax was imposed in aid of the corporation, the holders of the tax receipts to become stockholders in the company for the amount thereof. *Held*: That the payment of the tax does not release the stockholders from the obligations contracted by them under the charter.  
*N. O., Jackson and Great Northern Railroad Co. v. Lea*, 888.
3. Instalments of the subscription of the stockholders, fixed and required to be paid in by resolutions of the Board of Directors, cannot be regarded as open accounts, and prescribed against as such. *Ibid*.
4. Such instalments may be considered at least as equal to *accounts stated*. *Ibid*.
5. Corporations possess only *jura minorum*. They have not the power of contracting on all subjects, like persons of full age and *sui juris*. Having only such powers as are conferred by their acts of incorporation, they cannot be bound by contracts made by those not authorized to represent them. *Seibrecht v. New Orleans*, 496.
6. A corporation cannot be bound for any contract made without its authorization expressed by a resolution of the Common Council. *Ibid*.
7. A stock subscriber who had not paid his five per cent. at the time of subscribing, could not avail himself of the plea that the charter required it to be paid at the time of subscribing, and in default thereof, declared his subscription forfeited—for it was his duty to make the payment, and to sustain such a defence, would be to permit a party to avail himself of his own wrong. *Vicksburg RR. v. McKean*, 638.
8. A general printed notice in the newspapers of the dissolution of a copartnership, is not sufficient to bind one who has had dealings therewith; such person is entitled to special notice. Even if special notice is given, accompanied with the notification that certain persons will carry on the business, and settle that of the late commercial firm, these persons will be considered as agents of this firm for the settlement of its indebtedness. *Skannel v. Taylor*, 773.
9. Where a creditor of the former partnership drew on those persons (who continued the social style of the late firm) for account of a balance due him by the former partnership, and his drafts are protested for non-payment, and paid by the drawer *super protest*, a member of the former partnership who is sued for such balance, cannot maintain that there

CORPORATIONS (*Continued*).

was a novation of the debt; the drafts are to be held as having been drawn on his agents by his authority. *Ibid.*

See BANKS.

See EVIDENCE—*Vicksburg RR. v. McKean*, 639.

See ACTION—*Bennett v. Wheeler*, 763.

## COUNTER-LETTER.

See SALE—*Wolf v. Wolf*, 529.

## COURTS.

1. The court takes judicial knowledge that slaves are personal property in other States. *Farwell v. Harris*, 50.
2. District Judges have power to admit the accused to bail, at chambers, without proceeding by *habeas corpus*. An error in the mode of proceeding will not invalidate the decree or the bond taken under it. *State v. Wilson*, 189.
3. Courts can enforce only legal obligations and redress injuries to legal rights. *Orr v. Home Mutual Ins. Co.*, 255.
4. The court takes judicial cognizance of the signatures of recorders, and when no objection has been made to the introduction of the certificate, it must be held as proving whatever can be reasonably and fairly implied from it. *Scott v. Jackson*, 640.
5. The Act of 19th of March, 1857, providing for an interchange between the Judges of the 7th and 9th Districts, intended that, after the elections of April, 1857, those Judges should first hold the regular *series* of jury terms, each in his own district, before commencing the interchange. *State v. The Judge of the Ninth District*, 777.
6. The meaning of ambiguous words, &c., in a law, may be ascertained by examining and comparing with them the context of the law, and by considering its reason and spirit, and the cause inducing its enactment. C. C. 16, 18. *Ibid.*
7. It is competent for the court to order the plaintiff to furnish security for costs, where the Clerk has neglected to exact such security, or has taken insufficient security. *Mussina v. Alling*, 799.
8. The defendant cannot proceed by rule against the security on a bond for costs of suit, but must proceed by an ordinary action. A summary remedy is provided by law for Clerks and Sheriffs against plaintiffs for their costs, and where the plaintiff does not reside in the parish where the suit is instituted, they have the same remedy against the surety for costs. *Ibid.*

See ACTION.

See RECEIVER—*Helme v. Littlejohn*, 298.

See CLERKS OF COURT—*State v. Morgan*, 712.

## CRIMINAL LAW.

1. Any additional instructions desired by the prisoner to be given to the jury, should be prepared and submitted to the court by his counsel. *State v. Bogain*, 264.

CRIMINAL LAW (*Continued*).

2. The object of polling a jury is to ascertain whether the verdict, as announced by the foreman, was concurred in by all the jurors, and the inquiry should be restricted to the question "is this your verdict?"  
*Ibid.*
3. The prisoner was charged with having committed larceny of the property of *Mary Buckley*. Proof having been adduced that she was a married woman and that the goods stolen were bought by her while residing with her husband, it was *held*, that the Judge should have charged the jury, that all property bought during the existence of the marriage is presumed to belong to the community. *State v. Gaffery*, 265.
4. For any larceny committed against the property of the community, the chattels stolen should be alleged to be the property of the community.  
*Ibid.*
5. Proof that the chattels belonged to the community, will not sustain the charge that the same belonged to the wife.  
*Ibid.*
6. The presumption of ownership by the husband might be rebutted by the State by showing that the wife was separate in property from her husband, or that the property was bought in her own name by the wife with her paraphernal funds, or that the husband had himself transferred the goods to the wife for the purpose of replacing her paraphernal effects.  
*Ibid.*
7. Declarations are called "dying declarations" when made under a consciousness of impending death. *State v. Scott*, 274.
8. It is not necessary that the declarant should express in direct terms a sense of approaching dissolution; his bodily condition, his appearance, conduct and language, as well as the statements made to him by physicians and other attendants, may be considered and a conclusion deduced therefrom, as to the state of his consciousness at the time.  
*Ibid.*
9. In a charge of murder, before the jury can convict the defendant, they must believe from the evidence that the deceased died of the wounds inflicted by the accused and *from no other cause*. If he did, the facts that he had no surgeon, or an unskillful one, or a nurse whose ill appliances may have aggravated the original wound, cannot mitigate the crime of the person whose malice caused the death.  
*Ibid.*
10. To do that, it must plainly appear that the death was caused, not by the wound, but only by the misconduct, malpractice or ill treatment on the part of other persons than the accused.  
*Ibid.*
11. As the jury in trying an indictment for murder have the power to find the prisoner guilty of manslaughter, it was pertinent and right for the Judge to instruct the jury in the law both of murder and manslaughter, notwithstanding his counsel chose to assert that the only issue for the jury to try was the sanity of the accused.  
*State v. James Patton*, 288.
12. The Judge did not err in refusing to allow the tardy motion for an inquiry of lunacy, there being no pretence that the prisoner had become

CRIMINAL LAW (*Continued*).

insane since the trial, and the question of his sanity at that time having been fully considered and passed upon by the jury as a question of fact.  
*Ibid.*

13. A verdict in a capital case of "guilty without capital punishment," is justified by the 25th section of the Act of 1855, relative to criminal proceedings.  
*State v. Rohfrisch, 382.*
14. The endorsement of the name of the offence on the indictment, is no part of the finding of the Grand Jury.  
*Ibid.*
15. In providing against the crime of arson the statute makes no distinction in reference to the ownership of the house, whether belonging to the accused or to a third person.  
*Ibid.*
16. Where, at request of prisoner's counsel, the Judge charged the jury that they were the judges of the law as well as of the facts, that this was the law of the case and of the State, as decided by the Supreme Court, but added, that in his opinion, it was "bad law"—*Held*: That the accused was not prejudiced by the Judge's expressing his personal opinion against the law.  
*State v. Smelaer, 386.*
17. His telling the jury that *this was the law of the case before them*, was equivalent to telling them that his private opinion, in regard to the correctness or policy of the law, should not weigh with them, but they must take the law as expounded by the Supreme Court.  
*Ibid.*
18. But the charge as given, without qualification, conceded too much to the prisoner, and did not represent accurately the ruling heretofore made by this tribunal upon the point in question. The jury are *not* judges of the law and facts in the same sense. They are exclusively judges of the facts; but of the law only subordinately. They may find a general verdict of guilty or not guilty, and on so doing must pass upon the law as well as the fact. But while they are under no *compulsion* to take the instructions of the court as law, they are expected to apply the law as expounded by the court to the facts which they may find.  
*Ibid.*
19. The omission of the Judge to charge some matter which may occur to the counsel as favorable to the prisoner, but which the Judge was not asked to give in charge to the jury cannot be regarded as error.  
*Ibid.*
20. A person present aiding and abetting at the commission of an offence is a principal, and may be punished as such; (overruling the decision in the case of the *State v. Hendry, 10 An., 207.*)  
*State v. Ellis, 390.*
21. The repealing clause of the Act of the Legislature of 1855, relative to crimes and offences, repealed the second section of the Act of February 21st, 1828, which made it a crime, punishable with imprisonment at hard labor, "to prepare combustible materials, and put them in any place, with an intention to set fire to a mansion house or other building."  
*State v. Clay, 431.*

CRIMINAL LAW (*Continued*).

22. In the punishment of offences, where the law leaves it to the discretion of the court, the discretion of the court does not extend to the infliction of the penalty of imprisonment at hard labor.

*State v. Myhand*, 504.

23. The accused, a slave, was prosecuted under the 6th Section of the Act of 1843, and convicted of stabbing, with intent to kill, one *Smith*, a white man. The Act under which he was indicted, was re-enacted in 1855. (Sess. Acts, p. 50, Sec. 4). The same Statute was re-enacted *verbatim*, by the Act of 19th March, 1857. By Section 43, of the latter Act, it was declared "That all laws, or parts of laws, conflicting with the provisions of this Act, and all laws on the same subject matter, except what is contained in the Civil Code, or Code of Practice, be repealed, and that this Act shall take effect from its passage." (Acts of 1857, p. 234, Sec. 13). The crime charged, was alleged to have been committed anterior to the passage of the Act of 1857. *Held*: That the Statute, under which the slave was prosecuted, was repealed by the Statute of 1857, and that the rule of law is, that when a law is repealed, before the final action of the appellate court, the prosecution must be dismissed.

*State v. King*, 593.

24. The indictment charged, that the accused, on the 2d day of December, 1855, at &c., "upon the body of one *Adam Lammert*, a free white person, in the peace of the State, then and there being, with a certain dangerous weapon, called a shot gun, then and there loaded with gun powder and divers leaden shot, which the said *John Munco*, then and there, in both his hands, had and held at and against the said *Adam Lammert*, feloniously, wilfully and of his malice aforethought, did shoot and discharge with intent, thereby, wilfully and of his malice aforethought, the said *Adam Lammert*, to kill and murder, contrary, &c." *Held*: That, although the indictment does not follow the language of the Statute, yet it sufficiently charges the accused: First, with an assault, by wilfully shooting at *Lammert*, &c. and second, with an assault with an intent, in that manner, to commit murder.

*State v. Munco*, 625.

25. Although the word "assault," may not be used, yet when the indictment charges the accused with shooting a gun, at and against another, with intent to commit murder, it will sufficiently imply an assault. *Ibid*.
26. On the trial of the accused, the State offered to prove that *L.* was struck with shot: objection was made to the evidence, that "there was no allegation in the indictment that *L.* was shot or wounded." *Held*: That the testimony was admissible. *Ibid*.
27. Where the proof offered in evidence supports the indictment, although it proves a more heinous offence, it is within the discretion of the Judge to receive it. *Ibid*.
28. The District Judge charged the jury "That although death did not ensue from the act, yet the malice aforethought, was equally implied from the act, as though death did ensue." *Held*: The charge is erroneous, because it implies an opinion upon the act proven, which the Judge is now prohibited from giving. *Ibid*.

CRIMINAL LAW (*Continued*).

29. It is not necessary, on a prosecution for shooting, &c., &c., that it should be shown how the gun was loaded. This may be presumed from all the circumstances. *Ibid.*
30. There is no principle of law which forbids a man who is threatened with violence, or deems it necessary to his personal security, to employ about him persons capable of rendering him efficient assistance in time of need. *Succesasion of Irwin, 676.*
31. The proceeding against a person for retailing spirituous liquors, without previously obtaining a license, should be by indictment, and not by civil suit. *State v. Hollin, 677.*
32. One accused of murder cannot show, as a justification, that the deceased bore the general character of a quarrelsome and vicious man. The effect of testimony, offered by the accused, that a previous quarrel existed between him and the deceased, would tend to aggravate rather than to mitigate the offence. *State v. Jackson, 679.*
33. When the accused goes to trial without objection, it will be too late after conviction, to urge, as error, that he had not been served with a copy of the indictment and a list of the jurors who were to try him. *Ibid.*
34. If an imperfect copy of an indictment be served upon the accused, and he consent to go to trial, without insisting upon a perfect copy and the delay accorded to him by law, it will be too late to make the objection after conviction. *Ibid.*
35. In the absence of a bill of exceptions, it will be presumed, that the accused accepted the jurors who tried his case, and it will be too late to object after verdict. *Ibid.*
36. The information charged that the prisoner on, &c., at, &c., "with a certain dangerous weapon, to wit: a pistol, in and upon one *Thomas Martin*, did make an assault, by wilfully shooting at him with the intent, him the said *Thomas Martin*, then and there to kill and murder." There was endorsed on the information the words "Information with intent to kill," which formula was repeated by the clerk in the entry on the minutes of the court. *Held:* That the mistake of the clerk neither enlarged nor reduced, nor violated the authentic accusation contained in the body of the information on which the prisoner had been arraigned and pleaded not guilty. *State v. McGinnis, 743.*
37. The verdict of guilty, found by the jury, was properly followed by a sentence against the prisoner for the offence charged in the body of the information. The minor offence of "an assault with intent to kill," endorsed in the information, was not the offence for which he should have been punished. *Ibid.*
38. The Act of March 9th, 1855, "to provide for the trial of slaves accused of capital crimes in the parish of Orleans," was not repealed by the Act of 19th March, 1857, "relative to slaves." The Acts are not upon the same "subject matter." The former is a local law providing a local tribunal for certain specified cases; the latter is a general law applicable

CRIMINAL LAW (*Continued*).

- to the State at large, and the rule is, that a general statute without negative words will not repeal the particular provisions of a former one, unless the two Acts are irreconcilably inconsistent. *State v. Kitty*, 805.
39. The Act of 19th March, 1857, "relative to slaves," repeals all laws, so far as the offences of slaves, specially made such by statutes relative to slaves, alone, are concerned, for the former Act contains no clause saving pending prosecutions or providing for the punishment of persons who had committed crimes under the repealed laws. *Ibid.*
40. The word "whoever," in the Act of 14th March, 1855, "relative to crimes and offences," as used in the first section thereof, comprehends slaves considered as persons, as well as free men. And slaves, in our law, when held to answer for offences, are treated as persons, and may be punished under the general laws relative to crimes and offences, as well as under special statutes framed exclusively for that class of our population. *Ibid.*
41. The accused had made certain statements as to his guilt to *B.* *Held*: that the District Judge did not err in permitting the statements of the accused to *B.* to go to the jury when the facts embraced therein had been corroborated by evidence *aliunde*. *State v. Hash*, 895.
42. Although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts may be admitted, *if the Court believes*, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. *In the absence of any such circumstances* the influence of the motives, proved to have been offered, will be presumed to continue and to have produced the confession, unless the contrary be shown, and the confession will therefore be rejected. *Ibid.*
43. The Act of the Legislature empowering the Judge to appoint an Attorney to prosecute in behalf of the State (*pro tempore*), when the District Attorney shall not attend, is not unconstitutional. *State v. Bass*, 862.
44. In all criminal cases as well as civil cases, a written assignment of errors must be filed, in conformity to Art. 897 of the Code of Practice. *Ibid.*
45. If the assignment is not filed before the cause is submitted the right to file it is waived. *Ibid.*

See JURY—*State v. Populus*, 710.

See EVIDENCE—*State v. Kitty*, 805.

## CURATOR.

See EXECUTORS.

## DAMAGES.

1. The city is responsible for damages occasioned by the tortious acts of municipal officers, done within the scope of their employment and ratified by their superiors. *Wilde v. New Orleans*, 15.
2. In such a case, when the evidence is unsatisfactory as to the amount of damages, and the property of the use of which the plaintiff had been deprived, is of trifling value, only nominal damages will be awarded.

*Ibid.*

DAMAGES (*Continued*).

8. In an action against the owners of a ship for the value of a slave carried away in the ship, the plaintiff, under the general denial, is bound to prove that he is the owner of the slave carried away.  
*Farwell v. Harris*, 50.
4. It is a good defence to such an action, that another person than the plaintiff is the owner of the slave, and that the defendant was authorized and employed by such other person to receive the slave and carry him to another port.  
*Ibid.*
5. When the consignees of the ship have paid the contribution imposed by the Statute as hospital money, and the act of introducing the passengers is not in violation of any prohibitory law, an action for damages arising from a *quasi offence* will not lie. *New Orleans v. Windermere*, 84.
6. Damages incident to the institution of a suit for the recovery of any civil right cannot, as a general rule, be recovered upon a demand in reconviction.  
*Knox v. Thompson*, 114.
7. In an action by an overseer for his wages, a plea in reconviction may be set up by the defendant, claiming damages for the unlawful killing of one of the negroes by the overseer.  
*Miller v. Stewart*, 170.
8. An overseer is not permitted to chastise the slaves of his employer with unusual rigor, nor to maim or mutilate them, or to expose them to the danger of loss of life.  
*Ibid.*
9. A recovery against and payment by either of two persons severally bound therefor, of the value of a slave unlawfully carried away, vests the title to the slave in the one from whom the damages were claimed and received.  
*Owen v. Brown*, 172.
10. Counsel fees in the suit to annul the judgment and enjoin its execution were properly disallowed to the plaintiff as damages.  
*Flynn v. Rhodes*, 239.
11. Insurance companies cannot be made liable in an action for damages, for having conspired and agreed with each other that they would not insure any boat in which a particular person should be employed, in order to prevent that person from obtaining employment.  
*Orr v. Home Mutual Insurance Co.*, 255.
12. The defendants had the right, separately or acting in concert, to decline taking any risk in any boat on which the plaintiff should be employed as master.  
*Ibid.*
13. In an action for damages for malicious arrest, the following instructions to the jury were asked by the defendant: "That the plaintiff must not only prove malice, but must also show that there was no probable cause for the prosecution, and that the defendant is not bound to prove probable cause until the plaintiff has shown the absence of it, and that if the plaintiff show malice and not the want of probable cause, the defendant cannot be condemned, as it is just as necessary to show the want of probable cause as it is malice, before a recovery can be had." *Held*: that the charge asked for was proper, and should have been given to the jury.  
*Barton v. Kavanaugh*, 332.

DAMAGES (*Continued*).

14. Where a person maliciously and without probable cause procures the arrest of another, the error of the magistrate in ordering the arrest on an affidavit which charged no act or offence punishable by law, will not absolve the party procuring the arrest. *Ibid.*
15. The court did not err in declining to instruct the jury that the mere belief of the affiant in the truth of the charges would exonerate him, but it would have been proper to instruct the jury that "probable cause does not depend upon the actual state of the case in point of fact, but upon the *honest and reasonable belief* of the party prosecuting" *Ibid.*
16. Evidence of malice on the part of the defendant towards other persons than the complaining parties is inadmissible. *Ibid.*
17. Damages will not be allowed for delay when no time was specified in the contract within which the work was to be completed.  
*Ferguson v. Millaudon*, 348.
18. Where goods are injured on shipboard the measure of damages is the difference between their value in their damaged state, and their value at the port of destination if they had been delivered in good order, which should be ascertained by a public sale to the highest bidder.  
*Henderson v. Maid of Orleans*, 352.
19. Where a runaway slave is received on board ship by an imposition practiced on the officers by a forged pass and calculated to deceive, and it is clear from the evidence that the officers were actually deceived thereby, the owner recovering such slave is not entitled to damages from the master of the vessel on account of the deterioration in value of the slave by his running away; this viciousness of character was manifested before he was received on board the ship by his running away and procuring the forged pass.  
*Daret v. Gray*, 394.
20. Masters of ships and other vessels being prohibited, by the third section of the Act of 1816, from transporting or attempting to transport any negro, mulatto or other person of color, from New Orleans, *under any pretence whatsoever*, without the observance of certain prescribed formalities, the failure by the officers of the ship to conform to the requirements of the law, will make the master liable for the reasonable expenses of the owner in recovering his slave, and this on general principles as well as by the terms of the fourth section of the Act of 1816. *Ibid.*
21. The master of a ship is bound to third persons, both by the commercial law and this statute, for the acts of all persons under, or supposed to be under, his command, while engaged about their ordinary duties as subordinate officers of the ship or seamen. *Ibid.*
22. A judgment rendered against two or more parties for damages, arising from the fault or negligence of the defendants, cannot be for different amounts; for they are bound *in solido* for the injury under the Act of 1844, (p. 14,) and the amount of damages for which one party is bound is the measure of damages for the other also. The payment of the damages by the one is the discharge of the other from the same obligation. C. C. 2130.  
*Howe v. New Orleans*, 481.

DAMAGES (*Continued*).

23. Nuisances may exist in the city without rendering the same liable for the consequences. *Ibid.*
24. The city is no general warrantor against the acts of individuals. *Ibid.*
25. The city at large cannot be held responsible for acts of third persons, which, under a more sagacious and efficient police, might possibly have been prevented. *Ibid.*
26. Any citizen aggrieved by a public nuisance, is entitled to an action of damages against the offending party, especially if such nuisance involves also the breach of a private warranty.  
*Bruning v. New Orleans Canal Co.*, 541.
27. This was an action for damages. The jury found for the defendant, although the court did not consider the defendant free from blame, yet, in affirming the verdict, much stress is laid on the fact that plaintiff had not only acted in a manner grossly improper, but in palpable violation of law.  
*Clement v. Wafer*, 599.
28. Plaintiffs claiming to have a charter of the Louisiana Legislature to construct a turnpike road from Point Pleasant, in the parish of Morehouse, to Bœuf River, in the same parish, alleged that the police jury of Morehouse had opened a road running some distance, parallel with their turnpike, and intersecting it at one point, thus diverting travellers from the turnpike and inflicting heavy damages in the way of loss of tolls. The action was for damages against the police jury. *Held*: The charter of the plaintiffs does not deprive the parish of the prerogative of making other public roads from other points even if these roads should cause a diminution of plaintiffs' receipts.  
*Curtis v. Parish of Morehouse*, 649.
29. Two members of a patrol company while on duty hailed a slave, at night, who was riding into a village. The slave attempted to escape, whereupon the patrol fired on him, and inflicted wounds of which he died. In an action by the master, against the patrol who shot his slave, for damages—*Held*: That the plaintiff could not under the circumstances of the case, recover.  
*Duperier v. Dautrive*, 664.
30. Where it appears that the plaintiff, in obtaining a writ of arrest, acted in good faith and upon an apparent cause of action, in some degree, arising from defendant's own conduct and declarations, he ought not to be condemned to pay damages. Nor are the jury at liberty in assessing damages to estimate the traveling expenses and loss of time of defendant in preparing his defence and attending court. In the eye of the law the expenses of a suit which a party incurs, are, as a general rule, considered as covered by the taxed costs.  
*Osborne v. Moore*, 714.
31. Damages refused to a builder against whom an injunction has been sued out, where the whole foundation of his claim for damages is a supposed hindrance thrown in his way in executing a building contract which confessedly required for its execution the use of a side wall erected by the plaintiff in the injunction, and for which he has not been compensated.  
*Jamison v. Duncan*, 785.

DAMAGES (*Continued*).

32. The courts should restrain within reasonable bounds, the infliction of pecuniary penalties against a party who has only attempted to pursue what he in good faith supposed to be his legal rights, according to the forms of law. *Ibid.*
33. By a contract made in Alabama, and which was not recorded in Louisiana, defendant put it in the power of *W.* so to act, that an innocent purchaser in Louisiana might be deceived and defrauded. Plaintiff was deceived and purchased in good faith a slave, which the defendant, without plaintiff's consent, afterwards got possession of and carried away—defendant was condemned to return the slave or to pay his value in damages. *Lowber v. McCoy*, 795.
34. Where it appeared that defendants had sold the barge that plaintiffs illegally attached—*Held*: That defendants could not maintain an action of damages for loss of freight, by reason of the illegal seizure. *Watts v. Shropshire*, 797.
35. No remedy is given by statute against a parish for a private injury caused by the absence of bridges or a neglect to keep them in repair. *King v. Police Jury of St. Landry*, 858.
36. Where it was not shown that the Police Jury of the parish were under a legal obligation to keep the bridge over a certain water course always in repair—*Held*: They were not liable for damages occasioned by the ruinous condition of the bridge. *Ibid.*
37. In the jurisprudence of Louisiana a distinction is not made between words actionable and words not actionable as the basis of damages in a suit for slander where no special damages are proved. *Feray v. Foote*, 894.

See MALICIOUS PROSECUTION—*McCormick v. Conway*, 53.

See INJUNCTION—*McRae v. Brown*, 181.

See PUBLIC LANDS—*Gibson v. Hutchins*, 545.

## DEFAULT.

See SALE—*Harris v. Harris*, 10.

## DELIVERY BOND.

1. The defendant, whose property has been seized under an execution, and who has given a delivery bond under the Act of 1842, (Rev. Stat., p. 528, Sec. 5,) may make a valid sale of the property. The judgment creditor cannot seize the property in the hands of the vendee; his remedy is against the parties to the bond. And when the sheriff has declared the bond forfeited, subsequent seizing creditors cannot complain of informalities in the declaration of forfeiture. It is an answer to them to say that the bond was rightfully forfeited.

*Brander v. Bobo*, 616.

## DEPOSIT.

1. The mere designation of the Recorder's office, as the place where the note is to be paid, does not authorize the payment of it to the Recorder himself. *Aguilar v. Bourgeois*, 122.
2. Without a special authority to the Recorder to collect it, the money left with him is to be considered a deposit and at the risk of the depositor.

DEPOSIT (*Continued*).

The fact that the creditor endeavored to collect from the Recorder the money which had thus been deposited for him does not imply that he considered the deposit as a payment, nor bar his recovery from the debtor. *Ibid.*

## DEPOSITIONS.

1. When the return day mentioned in a commission for taking testimony has expired, testimony taken under it is taken without authority and cannot be received. *Wiggins v. Guier*, 177.
2. An order extending the return day, made after it had already expired, would not render testimony admissible which had been taken without authority. *Ibid.*
3. A public officer ought not to be permitted to testify as to the contents of documents in his office, without annexing copies of such documents to his deposition. The witness may annex to his answers the entries made in books and explanation of erasures. *Ibid.*
4. Where the answers of a witness to cross-interrogatories are imperfect and evasive, the deposition cannot be rejected on that account. The objection goes to the credibility of the witness alone, if all the cross-interrogatories have been answered. *Lurty v. Maryman*, 180.

See WITNESS—*Delee v. Sandel*, 208.

## DEPUTIES.

See SHERIFF—*State v. Wilson*, 189.

## DERELICT PROPERTY.

1. Property sunk in a steamboat and unclaimed for twenty-three years held to be clearly derelict. *Creevy v. Breedlove*, 745.

## DIVORCE.

1. In cross-actions brought by husband and wife for a separation from bed and board it was *Held*: That where the faults of the parties are nearly balanced, and are of a similar nature, neither party can be heard to complain in a court of justice. *Troubridge v. Carlin*, 882.
2. Under the law of Louisiana, as hitherto interpreted, disappointments in the marriage relation, and mere incompatibility of temper, are not cause for a judicial separation between husband and wife—excesses, outrages and cruel treatment of a nature to render the conjugal life intolerable are; but with the qualification, that the party complaining must be comparatively innocent. Mutual insults and outrages, the fruit of mutual provocations, unless there be a great and palpable disproportion of guilt as between the parties, furnish no sufficient ground of action to either. *Ibid.*

## DOMICIL.

1. The Acts of the Legislature, approved March 7th, 1816, and March 14th, 1818, pointing out the manner of obtaining residence within the State related to the acquisition of political rights. *Winter Iron Works v. Toy*, 200.

DOMICIL (*Continued*).

2. They prescribed conditions on which a political domicile could be acquired.  
*Ibid.*
3. A person who actually lives in the State, *animo manendi*, must be sued personally. He cannot be brought into court by attachment, because he has occasionally gone out of the State, for temporary purposes, in each year since he came to the State to live.  
*Ibid.*

## DONATIONS.

1. A donation *inter vivos*, in which the donor makes a reservation in favor of himself of an annuity sufficient for his subsistence according to his previous habits and condition in life, is not a donation "*omnium bonorum*," prohibited by Article 1484 of the Civil Code.  
*Bourgeat v. Dumoulin*, 204.
2. With a view to emancipate her slave, *A.* passed an act of sale of him to *B.*, *B.* attempted, but failed, to effect his emancipation, and offered to return him to *A.*, who refused to receive him, and abandoned him to *B.* The heirs of *A.* sued *B.* to recover the slave, but, under the facts of the case, the court maintained the title of *B.*  
*Sémère v. Sémère*, 681.
3. A donation of a slave with the reservation of the usufruct to the donor, during his life, is radically null.  
*Carmouche v. Carmouche*, 721.

See WILLS.

## ELECTIONS.

1. Whatever may have been the authority of a Commissioner of Election to inquire into the evidence of citizenship of a voter, prior to the passage of the Act approved the 20th of March, 1856, entitled "an Act providing for the registry of the names and residence of all the qualified electors of the city of New Orleans, according to Article eleventh of the Constitution of the State," he has no such power as the law now stands.  
*Auld v. Walton*, 129.
2. By the said Act of March 20th, 1856, an officer is created having authority to receive and consider the proof of citizenship of any person desirous of exercising the elective franchise in New Orleans, and proof being made according to certain rules and forms of evidence set forth in the statute to enregister the name of the applicant as a qualified elector, and to deliver him a certificate.  
*Ibid.*
3. This certificate is, by law, full proof of the right to vote at the day of its date of the person named in it, and no person can vote in New Orleans who is not the bearer of a certificate of registry.  
*Ibid.*
4. The office of Register, under the statute, is a special tribunal for the trial of the right to vote in New Orleans; and the certificate is in the nature of a judgment, which is not subject to revision by the Commissioners of Election.  
*Ibid.*
5. These judgments of the Register are, however, subject to revision. The 9th section of the Act provides a mode of redress, by a suit against the Register, by an applicant to whom the Register shall refuse a certificate. And the validity of the certificate, and the sufficiency of the proof upon which it was based, may in all cases be examined upon the contest of an election, by the tribunals seized of the jurisdiction of such contest.  
*Ibid.*

ELECTIONS (*Continued*).

6. Where the registry of a vote is more than three months old, and there is no change of domicile endorsed upon the certificate, the vote may be challenged upon the ground that the voter has changed his domicile since the date of registry, and by such change of domicile has lost his vote in that precinct. Upon such challenge being made, the Commissioners of Election may lawfully swear the voter as to the fact of his change of domicile. *Ibid.*
7. The statute under which plaintiff contests the election of defendant as Judge of the Fifth District of New Orleans, required him to set forth *specially all the grounds of contest*; if on account of the alleged violation of a particular law, he ought to have specified what provisions of such law were violated. *Augustin v. Eggleston*, 306.
8. The mere position of the ballot-box will not make an election null and void without any resulting injury. *Ibid.*
9. Elections are to be determined by the majority of the ballots cast, and are not to be set aside on account of the meagreness of the vote, without distinct and circumstantial allegations of error, fraud, violence, or illegality *affecting the result*. *Ibid.*

See BETTING—*Barham v. Livingston*, 618

See CLERKS OF COURT—*State v. Morgan*, 712.

See SHERIFF—*State v. Hyams*, 719.

## EMANCIPATION.

1. The plaintiff was the slave of a citizen of Louisiana, by whose formal act and consent she was emancipated, in the year 1839, in the State of Ohio, where she was carried for that purpose. She subsequently returned to Louisiana and has been residing here since as a free person of color, her former master also residing here. *Held*: That she did not forfeit her freedom thus acquired abroad, by returning to the State. Such penalty is not imposed upon free persons of color for returning to the State in contravention of law. The Act of the Legislature in 1846 does not prohibit an *express* emancipation of a slave in a foreign State by a master resident in Louisiana. It only guards against manumission being implied from the mere fact that the slave, whether with or without the consent of the master, has been upon the soil of a territory where slavery is prohibited. *Barclay v. Sevell*, 262.

See WILLS—*Turner v. Smith*, 417.

## ESTOPPEL.

1. When the wife by the marriage contract constituted to herself as dowry certain slaves, and her father became a party to the contract and signed it, he is estopped from contesting his daughter's title to the slaves. *Mourain v. Mourain*, 147.
2. Where a party is present at a sale of property by the Sheriff, and does not notify the persons present, nor the purchaser, of his rights, he cannot afterwards set up a claim to the property. *Gottschalk v. De Santos*, 473.
3. Where a party, whose property was sold under an order of seizure and sale, was present at the sale and bid himself for the property, he is es-

ESTOPPEL (*Continued*).

topped from contesting the validity of the sale on merely formal grounds which were obvious to him at the date of the sale.

*Mullen v. Follain*, 888.

4. If the advertisement of the sale was defective in not describing particularly the buildings, he should have objected to the sale and not enticed other persons into bidding. *Ibid*.

## EVIDENCE.

1. The bare fact that *A.* handed a certain sum of money to *B.* unexplained will not authorize *A.* to recover it back, on the allegation that it was a loan; it is the presumptive evidence of either the payment of an antecedent debt or of a gift. *Rohrbacker v. Schilling*, 17.
2. A copy of a sale or deed of conveyance made and executed by any Sheriff in this State, certified to be a correct copy by the Clerk, has the same effect as evidence in every respect as a duly certified copy of an authentic act. *Massey v. Hackett*, 54.
3. Parol evidence is inadmissible either to create or to destroy title to real estate. *Ibid*.
4. A witness can only refer to memoranda made by himself to refresh his memory. *Ibid*.
5. The fact that the party against whom evidence is offered of the contents of a deed is in possession of the instrument does not authorize secondary evidence to prove the contents of it, without first giving him an opportunity of producing the original. *Williams v. Benton*, 91.
6. Where the true agreement between the parties in relation to the transfer of real estate, can only be arrived at by consulting parol evidence which is inadmissible, a title cannot be established. *Heiss v. Cronan*, 213.
7. When the only subscribing witness to an act of sale is dead, and after diligent search and inquiry no one can be found who is acquainted with the signature or place of residence of the vendor, proof of the genuineness of the signature of the subscribing witness will be sufficient proof of the execution of the instrument. *McGowan v. Laughlin*, 242.
8. The ownership of real estate can only be established by a written title. *Boyle v. Succession of Leitch*, 261.
9. When an instrument offered in evidence is not objected to, any indorsement on it is considered as proved. *Bell v. Keefe*, 340.
10. The judicial acts of a court of record are evidenced by the record alone. *Ferguson v. Millaudon*, 348.
11. Parol evidence was improperly admitted to show that a verbal order had been given in open court to take a bond. *Ibid*.
12. Where the book-keeper of a commission merchant, offered as a witness to prove his accounts, swears to their correctness, but it appears, on cross-examination, that he made no original entries on the day book, cash book and invoice book—saw none of the goods purchased, and only knows that "he kept the ledger correctly from the entries furnished him by the partners and other clerks." *Held*: That the proof

EVIDENCE (*Continued*).

was insufficient. The clerks who made purchases for defendant ought to have been examined, and the drafts and receipts ought to have been produced.

*White v. Wilkinson*, 359.

13. The presumption created by the Act of 1840 that slaves found on ships, steamboats or other vessels, without the consent in writing of the owner, were received on board with the intention of depriving their masters of them, is liable to be destroyed by the testimony of at least two witnesses, not employed on board, and corroborating circumstances.

*Barry v. Kimball*, 372.

14. The circumstance of plaintiff having suffered more than four years to elapse from the maturity of the due-bill held by him before he put it in suit, combined with the fact of a settlement made in the meantime between the parties, which purported to be in full of all demands, is sufficient to throw upon the plaintiff the *onus* of proving that the consideration of the due-bill was something distinct from the credit allowed him in the settlement in question.

*Hedrick v. Bannister*, 372.

15. Where testimony had been given without objection, as shown by the bill of exceptions, and its exclusion had, therefore, become impossible, the Jury being already in possession of it. *Held*: That a motion to exclude such testimony was unmeaning and was properly overruled.

*State v. Rohfrisch*, 382.

16. The Judge *a quo* did not err in admitting evidence that another and different firing of the premises had taken place three or four weeks previously to the firing charged in the indictment, and under circumstances tending to throw suspicion on the defendants of the same crime they are now charged with, and of which testimony had already been offered to the Jury.

*Ibid.*

17. It is competent for the State to prove by a witness that the defendant had offered such witness a bribe to swear falsely that certain other witnesses who had testified on part of the State, had threatened to burn defendants' house the day before the fire testified to by them. It is not a sufficient objection to such evidence, that the defendant had not introduced any testimony. The evidence objected to did not purport to rebut or discredit any evidence which it was anticipated the accused was about to offer.

*Ibid.*

18. The copy of a sale under private signature, introduced in evidence for the purpose of proving its registry, has no effect without the original.

*Knight v. Knight*, 396.

19. The certificate of the Register of Births and Deaths for the Parish of Orleans is a legal document, creating of itself a *prima facie* presumption of the death of a party.

*Succession of Jones*, 397.

19. Proof of verbal acknowledgments of indebtedness is not entitled to much weight, particularly after the death of the person who is alleged to have made them.

*Succession of Celeste Croiset*, 401.

20. Where a minor arrived at the age of majority gives a receipt to his tutor, the receipt is not conclusive against him, and the fact which it recites may be contradicted by oral testimony.

*Ibid.*

## EVIDENCE (Continued).

21. The *lex fori* governs the admissibility and effect of evidence.  
*Blocker v. Whittenburg*, 410.
22. The family Bible being produced as evidence to show that a party to judicial proceedings was a minor when they took place, it appeared that a blank had been left for the date of his birth, which was filled up in pencil; it also appeared that the Bible, instead of being kept as a record of events at the time of their occurrence, contained several entries made with the same pen and ink, and apparently at the same time. *Held*: That as the witnesses, after a lapse of fifty-one years, could not refer to any distinct positive fact occurring at the time, by which the date could be satisfactorily fixed, the testimony was not sufficient to set aside proceedings which had been acted upon and tacitly acquiesced in for nearly thirty years.  
*Greenwood v. The City of New Orleans*, 426.
23. The plaintiffs in a petitory action claimed to have derived their title by inheritance from their grandmother, who they alleged inherited the property from her husband, *Thomas Bally*, who died intestate. The instructions to the jury were: "*That it was sufficient for the plaintiffs, in default of affirmative proof, showing that Thomas Bally died without leaving any ascendants, to show that one hundred years had elapsed between the birth of the nearest ascendant of said Thomas Bally and the institution of this suit. That in order to ascertain whether one hundred years had elapsed from the birth of such ascendant to the time of the institution of this suit, it was sufficient for the jury to take into consideration the age of the witness, the length of time since the death of Thomas Bally, his age when he died, and the age that his father must necessarily have been at the time of the birth of Thomas Bally, and that no direct proof of the time of the birth of the father or other ascendant of Thomas Bally was required.*" It was *held* that the charge was substantially correct. It suffices to deny that there are heirs in the descending line, and this being a negative, no proof need be given of it. But collaterals must always prove the death of ascendants by evidence, or show that one hundred years had elapsed since the death, in which case death is presumed, and not before.  
*Miller v. McElwee*, 476.
24. It was also *held* that the lapse of one hundred years from the birth of *Thomas Bally's* ascendants to the date of the institution of this suit, was sufficient presumptive evidence to establish that they were not in existence at the death of *Thomas Bally*, the controversy being one between the heirs of *Thomas Bally's* wife and the defendant claiming without any title whatever.  
*Ibid.*
25. In cases where a sale or transfer of property is attacked, upon the grounds of alleged fraud and simulation, the defendant is not bound to produce proof of his good faith and the reality of the sale, when the property did not remain in the possession of his vendor. The *onus* of proving it is on the part of plaintiff, who alleges the fraud.  
*Martin v. Drumm*, 494.
26. The court did not err in excluding the opinion of the Civil Engineer as to whether the right fork of a bayou was a natural outlet, or caused by

EVIDENCE (*Continued*).

a crevasse, or some sudden eruption of nature. Whether it was caused by a crevasse or some sudden eruption of nature, it was not artificial.

*Avery v. Police Jury*, 534.

27. As a general rule, an executor who endorses a bill or note, although he does so as executor, is personally bound; he is therefore, incompetent as a witness to fix a liability on a prior party to it.

*Leverich v. Bossier*, 583.

28. To enable a party to introduce secondary evidence of the contents of a lost instrument, it will be sufficient if it appear, from all the evidence, that the loss was advertised and the proper exertions made to recover it.

*Peace v. Head*, 582.

29. Alleged co-trespassers, who have been sued in another parish for the same cause of action, may be received to testify on behalf of a defendant charged also, as a co-trespasser: his position may possibly affect his credibility, but not his competency.

*Clement v. Wafer*, 599.

30. Parol declarations made by officers of a company on public occasions, if admissible at all to invalidate a subscription for stock, cannot avail a subscriber who does not show that such declarations amounted to fraud on the part of the company, including error on his own part when he subscribed.

*Vicksburg Railroad v. McKean*, 658.

31. The Act incorporating the Vicksburg, Shreveport and Texas Railroad Company, required the company to commence the work in sections as nearly simultaneously as may be, and pointed out where the sections should begin, and in what direction the work should be carried on. It contained a proviso that the stock subscribers in each parish or corporation, or a majority in amount should have the right to designate on what section of the road they desired their stock subscriptions to be used. Defendant, when sued for his stock subscription, offered to prove that the company had abandoned the idea of working on one section, and had determined to appropriate the funds of the company to work another section. *Held*: That the evidence was properly rejected, for the defence set up could not avail defendant.

*Ibid.*

32. Remarks made by a slave, in conversation—he being incompetent to testify—and consisting merely of a detailed narrative of a past occurrence, should not be received in evidence, as forming part of the *res gesta*.

*Duperrier v. Dautrice*, 664.

33. A judgment against the principal debtor is *prima facie* proof of the amount for which the surety on an administrator's bond is liable, and until rebutted by sufficient evidence, no other proof is required.

*Ferguson v. Glaze*, 667.

34. Neither the principal nor his surety can introduce parol evidence to vary a written contract.

*Ibid.*

35. A party who offers proof, that would be inadmissible under our law, of a contract said to have taken place in another State, must show that such proof would be admissible, to prove the contract, in the State where it took place.

*Gault v. Gault*, 673.

EVIDENCE (*Continued*).

36. The Auditor's account, charging a delinquent tax collector with the amount of his defalcation, is sufficient evidence to establish the liability of the surety on the collector's bond. *State v. McDonnell*, 741.
37. The written admission of a party of the fact that he had made a verbal sale of a slave to another, is primary evidence, and makes legal proof of title to the property. *Bair v. Abrams*, 753.
38. Where the relevancy or competency of the evidence offered by a party on the trial of a cause cannot be judged of without knowing the purpose for which it was offered, and it does not appear by the bill of exceptions to the rejection of the evidence, that the party offering it was prejudiced by its rejection, the action of the lower court will not be reversed. *Succession of Pasquier*, 758.
39. Where the evidence offered is apparently foreign to the case, the party offering it must show that it would be rendered material by other evidence which he undertook to produce. *Ibid.*
40. Entries made by a Clerk in his employer's books, are *prima facie* evidence in favor of the former against the latter, when it is shown that the books were annually examined by the employer and that balance-sheets were semi-annually furnished to him, which embraced the disputed items. *Rayne v. Taylor*, 765.
41. The possession of protested drafts by the drawer is *prima facie* evidence of their payment by him. *Skannel v. Taylor*, 773.
42. A merchant's books are not evidence in his favor; nor can they be used as such by his creditors to establish a debt claimed as being due to him, especially where no fraud or collusion between the merchant and his alleged debtor is charged or proved; nor can a partner be received as a witness to prove a debt due to the partnership. *Porche v. LeBlanc*, 778.
43. Art. 2260, C. C., must be construed as applicable to cases in which the interest of an ascendant or descendant of the witness is directly involved. *Ibid.*
44. The lack of full and explicit pleadings, will not compel the rejection of pertinent evidence, the existence of which was previously known to the party objecting to its introduction. *Louber v. McCoy*, 795.
45. The voluntary statements of the prisoner before accusation received against her. *State v. Kitty*, 805.
46. In cases requiring proof of dates of delivery of a great variety of articles, &c., a memorandum, made at the time, may be referred to by a witness, because of the difficulty, and often impossibility, of making the proof with certainty without such reference. *Davidson v. Lallande*, 826.
47. Where a plantation, slaves, &c., were sold at public auction, testimony offered by the purchaser to establish his claim to certain articles alleged by him to have formed a part of his purchase, was properly excluded on the objection, that they were not embraced either in the printed advertisement or in the inventory read at the sale. *Ibid.*

EVIDENCE (*Continued*).

48. A plat of survey purporting to be an extract from an approved map of a particular township, certified by the Register of the Land Office is inadmissible as evidence, it being only the copy of a copy and therefore not the best evidence. *Laurence v. Grout*, 835.
49. Evidence may be received to show that a note which was given by the former tutor of a minor, in his own name, was in fact signed by him in his capacity of tutor, and that the consideration was a debt due by the minor. Such testimony does not contradict any part of the note, and will authorize a judgment on the note against another tutor to the minor subsequently appointed. *Leonard v. Hudson*, 840.
50. Where the contract in relation to movables embraced in a sale was in writing—*Held*: That the vendee could not be permitted to prove by parol, that it was the intention of the parties certain articles not designated should be included in the sale, unless he has alleged mistakes or fraudulent omissions to his prejudice. *Angomar v. Wilson*, 857.
51. The certificate of a Commissioner for Louisiana of the official capacity of the Clerk of a county court in another State, affords *prima facie* presumption of the legal authority of the Clerk to do what he is shown to have done, to wit, to receive the acknowledgemet of a deed. *Tucker v. Burris*, 871.
52. Article 2256 of the Civil Code which declares "Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before or at the time of making them, or since, applies, as a rule governing real estate, to adjudications made at Sheriff sales. *Linton v. Wikoff*, 878.

## See WITNESS.

See SLANDER OF TITLE—*Grifon v. Blanc*, 5.See PLEADING—*Elliott v. Robb*, 12.See SALE JUDICIAL—*Waddell v. Judson*, 13.See ACCOUNT—*Keane v. Branden*, 20.See SALE—*Delogny v. David*, 30.*Lesseps v. Wicks*, 739.See PLEADINGS—*Kathman v. General Mutual Insurance Company*, 35.See DAMAGES—*Farwell v. Harris*, 50.*Barton v. Cavanaugh*, 332.See REDHIBITORY ACTION—*Phippe v. Berger*, 111.See DEPOSITION—*Wiggins v. Guler*, 177.See PARTNERSHIP—*Hill v. Matta*, 179.See ATTACHMENT—*Bullitt v. Walker*, 276.See EVIDENCE—*Cornish v. Shelton*, 415.See AUTHENTICATION OF RECORD—*West Feliciana RR. Co. v. Thornton*, 738.See CRIMINAL LAW—*State v. Hash*, 395.

## EXECUTION.

1. The principles settled in the case of *Smith v. McMicken*, 3 An. 321, re-affirmed. A judgment belonging to a partnership in a steamboat, is not liable to seizure under executions issued on a judgment against the individual members of the partnership. *Beauchamp v. Chacheré*, 851.
2. On a judgment of the Supreme Court which condemned a party to pay the fruits at a certain rate per annum, until the restoration of the property, execution could only be issued for the fruits up to the time at which the possession of the property was abandoned to the owner.

*Brashear v. Dwight*, 860.

## EXECUTORS AND ADMINISTRATORS.

1. *A.*, executrix of the estate of *B.*, left the State, after having appointed *C.* as her agent. Certain property of the estate was afterwards sold by order of court, and the price in cash and notes paid over to *C.* as the agent of the executrix. Shortly after *A.* died, and *C.*, the agent, was appointed executor of *B.*'s estate, and in that capacity collected the part of the price unpaid. No account of the price was rendered to the heirs of *B.* by the representatives of *A.*, and her successor in office rendered no account thereof. *Held*: That the failure to deposit the power of attorney of the executrix in the office of the Recorder of Mortgages did not affect the validity of the proceedings under which the property was sold.  
*Coussy v. Vicent*, 44.

2. That the heirs of the executrix, at whose instance the property was sold, could not be made liable for the price: 1st, because the part of the price unpaid at her death was properly paid to her successor in office, and 2d, because the cash payment having been made to *C.*, as agent of *A.*, in her capacity as executrix, he is presumed to have been in possession of the amount at the death of *A.*, and when afterwards appointed the successor in office of *A.*, to have kept possession of the fund in that capacity.  
*Ibid.*

3. Where a tableau of distribution, filed by the executor, has been advertised and published in the manner required by law, after the expiration of the delay given by such notice, if no opposition be made, the law makes it the duty of the Judge to grant an order authorizing the executor to pay the creditors according to his tableau.

*Succession of Minvielle*, 72.

4. If, at the expiration of the legal delay, the tableau is homologated, except so far as opposed, those creditors whose claims are not contested have a right to immediate payment, without waiting for the delay for a suspensive appeal from the judgment of homologation.  
*Ibid.*

5. The executor is bound for five per cent. interest on the dividends allowed by the tableau to the creditors whose claims are not opposed, from the date of the service of a rule on him to coerce payment.  
*Ibid.*

6. The functions of an executor are at an end when a judgment has been rendered on his final account and no appeal is taken from it.

*Succession of Anderson*, 95.

7. When the final account of the executors had been opposed by the residuary legatees and the production of their bank book demanded, the judgment rendered on such opposition being unappealed from, is *res judicata*, and may be pleaded as a bar to a subsequent claim against them for 20 per cent. per annum interest, as the penalty under the statute for failing to deposit the money of the estate in bank. *Ibid.*

8. The administrator of a succession, as respects debts due to himself by the deceased, is upon the same footing as the other creditors.

*Bujac v. Loste*, 96.

9. Under a clause in a will by which the testator constituted his executor *detainer* of his estate, *held*, that the *seizin* of the executor did not em-

EXECUTORS AND ADMINISTRATORS (*Continued*).

- brace the testator's interest in property belonging to a particular partnership, which the will provided should be continued in accordance with the contract of partnership. *Succession of Grover*, 334.
10. The executor is entitled, however, to his commissions on the net proceeds of the crops received by him from the surviving partner. *Ibid.*
  11. A testamentary executor domiciled out of the State is not entitled to letters without giving security, as is required from dative testamentary executors. *Succession of Davis*, 396.
  12. A suit to remove an executor from office may be maintained by a portion of the heirs named in the will. *Reed v. Crocker*, 445.
  13. The Act of the Legislature of March 13th, 1837, sec. 3d, reënacted 12th of March, 1855, imposing a penalty on executors, administrators, &c., for withdrawing the funds of the succession from bank without an order of court, is imperative and must be enforced when there are no peculiar circumstances which form an exception. *Ibid.*
  14. The statute is equally imperative that the executor must render a full account of his administration at least once in every twelve months, and the neglect of the counsel of absent heirs to compel an account, will not exonerate the executor. *Ibid.*
  15. Where the heirs have authorized the curator to settle up the affairs of the estate out of court, they have no reason to invoke the penal statute of 1837 against the curator. *Plunkett v. Perkins*, 558.
  16. The allegation by the curator that there was another heir in existence besides those whose authority he had, will not render his former acts unlawful, and subject him to the penalty of the statute. *Ibid.*
  17. The beneficiary heir, of age and present in the State, has a preference for the administration over the tutor of a co-heir who is a minor. *Succession of Sloane*, 610.
  18. The term, beneficiary heir, applies to one who may accept, as well to one who has accepted with the benefit of inventory. *Ibid.*
  19. A woman may be appointed to administer a succession in which she is interested as heir. *Ibid.*
  20. The executor, without seizin being given to him by the will, has full power of administration, and unless the heirs furnish him with money to pay the debts and legacies, they cannot prevent him from taking possession of the property and causing sufficient to be sold to settle up the estate. *Succession of Boyd*, 611.
  21. The destitution of an executor cannot be demanded by way of opposition, but should be done, if there is cause, by direct action. *Ibid.*
  22. The cases of *Taylor v. Jeffrey's Estate*, 10 La. 435, and *Michat v. Flotté's Administrator*, 12 La. 129, deciding that the functions of an administrator of an estate did not, like those of an executor, cease at the end of a year, but continued until the administration was finished, correctly declared the law. *Ferguson v. Glaze*, 667.

EXECUTORS AND ADMINISTRATORS (*Continued*).

23. An Administrator dies without having rendered his account. An Administrator is appointed for his estate. The only regular account the latter can render is of the succession of which he is the administrator. By pursuing the forms of law, his account of this administration may bind such persons as are bound to take notice thereof; but he can bind no one by a pretended account of the administration, by his intestate and himself, of a succession of which he himself never was the legal representative.  
*Succession of Rachal, 717.*
24. The penalty of ten per cent. interest upon the funds in hand, for a failure by an administrator to render an annual account, can only be enforced when accompanied by a proceeding to remove the administrator.  
*Dejol v. Johnson, 853.*

See MINORS—*Succession of Lyne, 155.*

See JUDICIAL SALE—*Laflon v. Doiron, 164.*

See SUCCESSION—*Succession of McLean, 222.*

*Succession of Harrell, 337.*

*Succession of Foulkes, 537.*

See CASES AFFIRMED, &c.—*Ferguson v. Glase, 667.*

## EXECUTORY PROCESS.

1. To sustain an order of seizure and sale at the suit of the administrator of a succession, authentic evidence of the plaintiff's appointment as administrator is necessary.  
*Landry v. Landry, 167.*
2. It is too late to supply that evidence after the appeal from the order is granted.  
*Ibid.*
3. Executory process may be taken out against mortgaged property of an estate yet in course of administration.  
*McCalop v. Fluker's Heirs, 551.*
4. Where notice of an order of seizure and sale was given to the defendant as tutrix, she having full authority as such to represent the estate in the proceeding, her qualifying as administratrix did not render it necessary that she should be notified in this latter capacity also.  
*Ibid.*
5. Where plaintiff prays that defendant "be notified of his demand by service of citation and a copy of the petition," and defendant is cited in the usual way it will be regarded as an ordinary action.  
*Jenkins v. Grigsby, 642.*
6. If plaintiff who has a right to an executory proceeding selects the ordinary process, the defendant has a right to answer, and after issue joined, the plaintiff is precluded from discontinuing the ordinary, and resorting to the executory process.  
*Ibid.*

## EXPERTS, ETC., THEIR REPORT.

1. When the homologation of the report of experts is opposed, the trial of the opposition involves the hearing of evidence on such questions of fact as are distinctly put at issue by the opposition.

*Thompson v. Parrent, 183.*

EXPERTS, ETC., THEIR REPORT, (*Continued*).

2. There was error in the Judge's refusal to hear evidence, on the ground that it rested merely in his discretion, and that he was satisfied of the correctness of the report from its face. *Ibid.*
3. After the report of experts is homologated, the matters decided by it are not open to investigation in the same court. *Ibid.*

## EXPROPRIATION OF PROPERTY.

1. Usurpations and wrongs to private rights of property, cannot be justified by considerations of benefit to commerce, and the right of expropriation of private property can only be exercised according to the forms of law. *Bruning v. New Orleans Canal Co.*, 541.
2. The confirmation of the tableau of assessment against property owners for their share of the benefit conferred by opening and improving streets, will not authorize the ordinary writ of *fi. fa.* to be issued against the party assessed.  
*Municipality No. One, v. Laurent Millaudon*, 769.
3. The statute regulating that subject specially prescribes the mode of procedure, and being in derogation of the ordinary rules of practice should, therefore, be strictly pursued. *Ibid.*

See JURY—*Remy v. Second Municipality*, 500.

## FACTORS.

ADVANCES—See *Kean v. Branden*, 20.

SUPPLIES—See *Shaw v. Knox*, 41.

See ATTACHMENT—*Bullitt v. Walker*, 276.

## FI. FA.

See EXECUTION.

## FRAUD.

See ACTIONS—*Boatner v. Yarrowborough*, 249.

## GARNISHEE AND GARNISHMENT PROCESS.

1. When the answer of the garnishee admits in effect, the possession of funds belonging to the defendant, and he refuses to state their amount, a point upon which he was specially interrogated, he is presumed to have had a sufficient amount to satisfy the demand of the plaintiff.  
*Gaty v. Franklin Ins. Co.*, 272.
2. Debtors cannot be permitted to tie up their funds indefinitely by putting them in the hands of an agent. *Ibid.*
3. Until notice to third persons interested in the dedication of the fund, creditors may attach. *Ibid.*
4. Judgment was rendered upon a rule against a garnishee, who was ordered to deliver the assets in his possession to the Sheriff, within a delay fixed, to satisfy plaintiff's judgment against defendant, otherwise to be held liable therefor. *Held*: That after his appearance and joinder of issue on the rule, the garnishee was bound, without further notice, to comply with the order, or assign sufficient reasons for his non-compliance.

*Slatter v. Tiernan*, 375.

**GARNISHEE AND GARNISHMENT PROCESS** (*Continued*).

5. The property and effects of the defendant are considered as levied upon by the Sheriff from the date of the service of the interrogatories upon the garnishee. *Ibid.*
6. In tendering a compliance with the order, the garnishee would have the right to require a copy of the order, otherwise when he refuses to comply with the order. *Ibid.*
7. The garnishees, in answer to interrogatories, denied indebtedness to the defendant, but acknowledged the possession of a note past due and protested, which the garnishees had received from the defendant (payee of the note) who was their debtor; the said note exceeding the amount which was due them by defendant and received with an agreement that when paid, its proceeds should be applied, 1st, to the payment of defendant's indebtedness to garnishees; 2d, to that of various other creditors of defendant. Judgment was rendered condemning the garnishees to pay the judgment of plaintiff against defendant, or, in default thereof, to deposit in court the promissory note above-mentioned. *Held*: The judgment appealed from is manifestly erroneous. No money judgment could be rendered against the garnishees, because the answer denied indebtedness and the traverse neither alleged nor was it proved that any money of defendant came into the hands of the garnishees. As to the alternative judgment for the delivery of the note, we hold it to be irregular, because it annuls the pledge of the note for the security of defendant's debt to the garnishees, a contract which could only be annulled by a direct action. *Pooley v. Snow*, 814.

See ATTACHMENT.

**HOMESTEAD.**

See SUCCESSION—*Succession of Foulkes*, 587.

**HOMESTEAD ACT.**

1. The Act of the 17th of March, 1852, providing a homestead for the widows and children of deceased persons, is without effect as to creditors whose rights had accrued before the passage of the Act. *Milne v. Schmidt*, 553.
2. Under the second section of the Act of March 17th, 1852, "to provide a homestead for the widows and children of deceased persons," it was *held*: That the surviving widow was bound to give security as usufructuary, the usufruct being of money belonging to her deceased husband's children by a former marriage. *Succession of Tassin*, 885.

**HUSBAND AND WIFE.**

1. The receipt by a husband residing abroad, of money belonging to his wife, does not entitle the wife to a legal mortgage on property acquired by the husband in this State after their subsequent removal to it. *Stewart v. His Creditors*, 89.
2. Where the wife had obtained a judgment of separation of property from her husband, and subsequently purchased property in her own name, and the proceedings were charged by the creditors of the husband to have been fraudulent and collusive between the wife and the hus-

HUSBAND AND WIFE (*Continued*).

band—*Held*: That to support the wife's separate title, the judgment of separation is not sufficient. The creditors have a right to demand the evidence on which it was rendered. *Campbell v. Bell*, 193.

3. It must also be shown that the property was purchased with the wife's separate funds. *Ibid.*
4. When a husband and wife had voluntarily lived separate and apart, and the wife during that time had purchased real estate, the title to which, being on record in the name of the wife, as a donation made to her individually, was subsequently acquired by an innocent third person in good faith, under a chain of title from the wife, it was *held* that the husband could not, after the wife's death, recover the property, as having belonged to the community, and having been sold by the wife without authority. *Wooters v. Feeny*, 449.
5. The husband, by parol evidence, could not thus despoil the purchaser of immovable property, acquired under a chain of recorded titles apparently perfect, without notice, actual or constructive, of the husband's latent claim, which has no basis in equity. *Ibid.*
6. At the decease of husband or wife, all the property possessed by them is presumed to be community property until the contrary is shown. *Succession of Pratt*, 457.
7. If the surviving wife expresses her willingness to pay all the debts, and no creditors desire it, an administration on the husband's estate, so far as it concerns the community, is unnecessary. *Ibid.*
8. When it is not alleged or shown that any part of the estate was the separate property of the husband, the surviving wife has the right to be put in possession of all the property left by him, on complying with the obligations of the usufructuary, as explained in the Civil Code. Her usufruct of the share of her deceased husband commences from the moment of his death. *Ibid.*
9. The heirs of the husband should be protected against the debts of the estate by requiring the wife to advance the money to pay them, or procure the release of the heirs from all liability for them. *Ibid.*
10. When the wife's paraphernal property was sold and negotiable notes taken for the price, payable to the husband, on which the husband sued the makers, and obtained judgment against them in his own name for the amount of the notes, it was *held*: That the legal ownership of the judgment was in the husband—that the original notes were merged in and novated by the judgment, and that the judgment might be compensated by any debts equally liquidated due by the husband to the judgment debtor. *Succession of Gilmore*, 562.
11. A married man may sue his wife in her executorial capacity, for a debt due him by the testator. The institution of the suit by the husband will be considered as an authority to her to be sued.

*Alexander v. Alexander*, 588.

HUSBAND AND WIFE (*Continued*).

12. Where husband and wife make a note during the coverture, judgment cannot be obtained against the wife, where there is no proof that she was not separate in property, and no evidence to show that the consideration inured to her benefit. *White v. Baillio*, 663.
13. The wife, whether separated in property by contract or judgment, or not separated, cannot bind herself for her husband, nor conjointly with him for debts contracted by him before or during the marriage. C. C. 2412. *Heald v. Owings*, 725.

See COMMUNITY—*Audrich v. Lamothe*, 76.  
*Hotard v. Hotard*, 175.  
*Succession of McLean*, 222.  
*Wilson v. Hendry*, 244.

See SEQUESTRATION—*Goodin v. Allen*, 448.

See PRACTICE—*Barton v. Kavanaugh*, 832.

See MORTGAGE—*Succession of Valansart*, 848.  
*Theriet v. Voorhies*, 852.

See DIVORCE—*Trowbridge v. Carlin*, 883.

## INJUNCTION.

1. An injunction will not be maintained in arrest of an execution on grounds that might have been pleaded in defence before judgment. *McRae v. Purvis*, 85.
2. Where no ground is laid for an action of nullity, an injunction is allowable only for a payment alleged to have been made after judgment rendered. *Todd v. Paton*, 88.
3. Where a judgment, the execution of which has been enjoined, bears interest, such additional interest only can be allowed, under the Acts of 1831 and 1833, on dissolving the injunction, as will make the rate allowed equal to the highest conventional interest. Whatever else is allowed can only be in the shape of damages, and the interest is to be allowed only upon the principal of the debt enjoined. *Ibid*.
4. Where the plaintiff in an injunction seeks to restrain the execution of a judgment, on the ground that the property seized does not belong to the judgment debtor, but to the plaintiff in injunction, no other issue can be made but that of ownership. An affidavit that the Sheriff had "seized" the individual property of the defendant, without any description of the property seized, or statement of its value, is too vague to authorize an injunction, and the petition which is not sworn to cannot supply the defect. *McRae v. Brown*, 181.
5. The fee of counsel for the defendant should be assessed as damages on dissolving the injunction, although it was not shown to have been actually paid. The liability to pay it is sufficient. *Ibid*.
6. Where an injunction has been sued out on grave charges of fraud and simulation, and the plaintiff offers no evidence whatever to sustain them, the maximum of damages allowed by law should be awarded to the defendant on the dissolution of the injunction. *Oulliber v. Joubanc*, 237.
7. The plaintiffs being joint owners with the city of the land on which the Magazine Street Market is erected, and having recovered a judgment

INJUNCTION (*Continued*).

against the city fixing their right to a certain proportion of the revenues of the market, the city obtained an order for a sale of the property to effect a partition, and the Council passed a resolution to discontinue the market as a public market. *Held*: That the plaintiffs are entitled to enjoin the execution of the ordinance as an invasion of their right of property and a violation of the tenure and contrary to the title by which the city holds an interest in the property, as established by the judgments between the parties. *Heirs of Guillotte v. New Orleans*, 479.

8. Where the sale of specific property alleged to have been seized under execution is informal, and there had in fact been no seizure of the property, it was error in the court below in dissolving the injunction to allow special damages. *Taylor v. Simpson*, 587.
9. Successive injunctions upon different grounds which might have been put at issue in one proceeding, will not be allowed.

*Pluker v. Davis*, 613.

See JUDGMENT—*Crow v. Watkins*, 843.

## INSANITY.

1. Where the defence set up to a recovery upon a contract is the insanity of the obligor, it must be shown that the mental derangement was notorious when the contract was entered into, where there had been no interdiction of the party sought to be charged. C. C., 1781.  
*Succession of Smith*, 24.
2. Insanity, which of itself, is sufficient to strike an act with nullity, cannot be set up, unless the interdiction of the insane person had been pronounced or petitioned for previous to the death of such person, except in cases in which the mental alienation manifested itself within ten days previous to the decease, or when the want of reason results from the act itself which is contested. *Chevalier v. Whatley*, 651.
3. But when the contract is sought to be set aside, the state of mind of the party at the time, may be proven, although the proof tends to show imbecility and there has been no interdiction. *Ibid*.
4. Contracts made with weak-minded persons will be closely scrutinized, and presumption of fraud will arise from circumstances, indicative of over influence or any advantage improperly taken, which would not arise in a strong-minded person. *Ibid*.

## INSOLVENCY AND INSOLVENT PROCEEDINGS.

1. A syndic who has a surplus in his hands, after paying all the debts placed upon his tableau of distribution, is not bound to pay over such balance to the ceding debtor, if subsequent to the filing of the tableau new debts were discovered to exist. The syndic is bound to administer any surplus in his hands for the benefit of such newly discovered creditors, and until all the creditors are paid the assets in the hands of the syndic must be applied to the payment of the debts of the insolvent.

*Gottschalk v. His Creditors*, 70.

INSOLVENCY AND INSOLVENT PROCEEDINGS (*Continued*).

2. Where an insolvent had neglected to make one of his creditors a party to the insolvent proceedings and being himself syndic, had, in violation of the Act of 1837, suffered nine years to elapse without filing a tableau of distribution, it was *held*, he was not in a condition to compel such creditor to become a party to his stale proceedings in surrender, but that the creditor might wholly disregard them.

*Metcalfe v. Clark*, 424.

3. The presumption established by the Act of 1817, reenacted in 1855, (Revised Statutes, p. 27, § 28), applies to cases alone in which proceedings are instituted against the insolvent to deprive him of the benefit of the insolvent laws, on the ground of his having given an unjust preference to one or more of his creditors over others.

*Martin v. Drumm*, 494.

4. The Code of 1825, on the subject of respite, has not introduced a new rule of counting the votes at the meeting of the creditors. The majority in number and amount is to be ascertained by reference to those admitted by the debtor upon the tableau.

*Rouanet v. Castel*, 520.

5. The Legislature having apparently acquiesced in this previous construction of the law, which is one favoring the obligation of contracts, the court has less difficulty in adopting it.

*Ibid*.

6. The charges for professional services in the settlement of insolvent estates, ought to be in proportion to the results of the liquidation.

*McIntosh v. Merchants' Insurance Co.*, 533.

7. The 6th section of the Act of the 29th of March, 1826, (session Acts, p. 140) which provides for a sequestration of the property and a meeting of the creditors of any merchant or trader who shall abscond or conceal himself in order to avoid the payment of his debts, is still in force.

*Levois v. Gerke*, 828.

8. This law provides for a mode of proceeding different from the one had in view in cases of voluntary and forced surrender, and is not affected by the Acts of 1855 upon those subjects.

*Ibid*.

See INTEREST—*Finley v. Mallard*, 883.

INSURANCE.

1. Freight paid in advance is a lawful object of insurance, and the underwriter cannot avoid liability on the ground that freight thus paid in advance might be recovered back in consequence of the loss of the cargo.

*Kathman v. Gen. Mutual Ins. Co.*, 35.

2. Where, by the terms of the policy of insurance, the party desiring to be insured, upon any particular shipment of merchandize, was bound to present to the Insurance Company an invoice of the goods, and pay or secure the premium to the company—*Held*: That on a policy of insurance in this form, there must necessarily exist as many contracts of insurance as the endorsements upon the policy of separate shipments of goods; that such contracts only became complete when the invoices of the goods were presented and endorsed upon the policy.

*Douville v. Sun Mutual In. Co.*, 259.

INSURANCE (*Continued*).

3. The assured under such a policy could not recover from the underwriters for the loss of goods the shipment of which did not appear by any bill of lading, and of which no invoice had been furnished to the company previous to the loss. *Ibid.*
4. The doctrine of abandonment for a constructive total loss, does not appear to apply to a contract of affreightment.  
*Henderson v. Maid of Orleans, 352.*
5. If, upon a general survey of the provisions of the policy and the circumstances under which it was procured, it appears that the intention of the company was to insure for the benefit of any person in interest, although not named, the common interest of the parties shall not be defeated for the want of technical or even customary phrases. If, on the other hand, the most natural construction of the policy is, that the party named as the assured only sought to protect his own interest, the contract is not to be extended so as to cover the interest of a third person.

*Duncan v. Sun Mutual In. Co., 486.*

See PRINCIPAL AND AGENT—*Keane v. Brandon, 20.*

*Miller v. Tate, 160.*

See PLEADING—*Kathman v. General Mutual Insurance Company, 85.*

## INTEREST.

1. Where the factor has made advances to the planter from his own resources, all charges for negotiations, discounts and commissions, if charged in addition to eight per cent. per annum, are illegal.  
*Keane v. Brandon, 20.*
2. Interest may be charged on the balance of an account rendered and acquiesced in, although the account was made up in part of interest, provided the interest so charged was not usurious. *Ibid.*
3. Interest cannot be claimed distinctly from the principal; the law makes no distinction between interest claimed as damages and interest as in other cases; the interest should have been claimed on the trial of the opposition.  
*Succession of Anderson, 95.*
4. Interest cannot be claimed on a judgment which does not bear interest on its face, and which was rendered when no general law was in force by which interest was superadded to it. *Barnes v. Crandell, 112.*
5. The claim of the appellant, for interest upon her judgment against the estate as heir of her father, was rejected on the ground that the judgment carried no interest on its face. *Succession of Regan, 116.*
6. Where usurious interest was stipulated before the passage of the Act of 20th March, 1856, "relative to the rate of interest," but paid since the promulgation of that Act—*Held*: That the whole of the interest paid could be recovered back under the second section of the Act of February 19th, 1844.  
*Merville v. LeBlanc, 221.*
7. The contract relative to interest was void at the time it was entered into, and it remained unaffected by the subsequent law in existence when the payment was made. *Ibid.*

INTEREST (*Continued*).

8. The Act of 1839 repealed Article 554 C. P., and implies the allowance of interest on unliquidated demands. *Roper v. Magee*, 409.
9. The Act of the Legislature of 9th March, 1852, giving legal interest from the maturity of debts, does not affect debts contracted anterior to the passage of the Act. *Cooper v. Harrison*, 631.
10. The highest rate of conventional interest for the loan of money, and two-and-a-half per cent. in addition thereto for advancing, is usurious. *Haven v. Hudson*, 660.
11. The State has a right to recover legal interest on a forfeited bail bond from the principal and surety therein from the date of the judgment. *State v. Sullivan*, 720.
12. The Act of the Legislature declaring that debts shall bear interest at the rate of five per cent. per annum from the time they become due, unless otherwise stipulated, is not applicable to debts which were contracted and became due before the passage of that law. *Saunders v. Carroll*, 793.
13. A promissory note payable generally must bear the rate of interest of the place where it is made. *Hawley v. Sloo*, 815.
14. If the place of performance is different from that of the contract the interest will be according to the latter. *Ibid.*
15. The interest on a claim is not suspended by the debtor placing it upon his schedule, where the creditor takes no part in the proceeding although the debtor may obtain a respite. *Finley v. Mallard*, 833.

See USURY.

INTERROGATORIES ON FACTS, &c.

1. It is only when there has been an actual delivery of immovables or slaves sold that the law receives as evidence of the sale the confession of the party when interrogated on oath. C. C. 2255. Parol evidence cannot be received to contradict the answers. *Knox v. Thompson*, 114.
2. Where a party who has been put upon oath gives all the facts of the case which are necessary to the determination of the question propounded to him, he has complied with the law, and he is not bound nor permitted to answer questions of law based upon those facts. *Ibid.*

INTERVENOR.

See PRACTICE—*Yale v. Hoopes*, 460.

JUDGMENT.

1. A judgment rendered against a married woman in a suit regularly prosecuted by attachment, is not open and cannot be questioned as to the original indebtedness, without any action of rescission having been brought or any appeal taken from the judgment within two years. *Waddell and Husband v. Judson*, 13.
2. When a judgment has once been signed by the Judge, it should be interpreted by the court which rendered it, as well as by all others, as the foreign writers say, objectively; that is, it should be construed with reference to the pleadings and the subject matter of the controversy

JUDGMENT (*Continued*).

according to the natural and legal import of the terms used, without any reference to any subsequent explanation of the court of what was its intention or in its mind at the time the decree was rendered.

*Succession of Regan*, 156.

3. It is a sufficient compliance with Art. 72 of the Constitution, for the Judge to state in his decree that, "after hearing evidence and argument of counsel for the reasons assigned in open court, it is adjudged and decreed, &c."

*Jacobs v. Levy*, 410.

4. Where judgment was rendered without a hearing or consent of parties, *held*, that although rendered in favor of the plaintiff, he had a right to have it set aside if it was not such a judgment as he wanted.

*May v. Ball*, 416.

5. When the proper parties are before the court for the rendition of a decree, the parties to it can only take advantage of any irregularities in it by an appeal or action of nullity prosecuted in due time.

*Greenwood v. New Orleans*, 426.

6. A judgment signed before a motion for a new trial is overruled, cannot be considered as having its effect until the motion is disposed of.

*Succession of Gilmore*, 562.

7. Where a judgment is rendered upon a note, the latter is merged in the former, and can be severed only by a reversal or rescission of the judgment.

*West Feliciana Rail Road v. Thornton*, 736.

8. A final judgment of a competent court of a sister State after citation, is conclusive of the matters therein determined between the same parties here, in the absence of evidence positively impeaching it.

*Ibid.*

9. Suit was brought in Mississippi against defendant by attachment. No service of process was made upon him, and the only evidence of his appearance was an entry on the minutes, that "defendant waives proof of publication, and saying nothing in bar or preclusion of the plaintiff's action, but herein wholly make default whereby the same remains altogether undefended." *Held*: The judgment against the defendant by the laws of Mississippi was not personal, and no action can be maintained upon it, as such, in our courts.

*Feltus v. Starke*, 798.

10. A judgment cannot be enjoined by a plea in compensation founded on notes of the plaintiff held by defendant before the judgment enjoined was rendered.

*Crow v. Watkins' Heirs*, 845.

11. In the absence of proof it will be presumed that the notes were acquired before their maturity.

*Ibid.*

See EXECUTION.

See SALE JUDICIAL—*Laforest v. Barrow*, 148.

See PRACTICE—*Flynn v. Rhodes*, 289.

See APPEAL—*Beer & Co. v. Their Creditors*, 774.

## JURISDICTION.

1. When the value of the object in controversy is sufficient, according to the allegations of the petition, to give the court jurisdiction, the fact that the price paid for it by the plaintiff is below the amount required to give the court jurisdiction is not sufficient of itself to destroy the allega-

JURISDICTION (*Continued*).

tion as to the true value. The allegation in the petition as to the value of the object in controversy determines the question of jurisdiction when the claim is not evidently fictitious. *Oakey v. Aiken*, 11.

2. The District Judge of the Parish in which the slaves are situated, has jurisdiction to try an action for their partition.

*Anderson v. Stille*, 689.

JURY AND JURORS.

1. The affidavit of the jurors who tried the case, as to what they understood at the time of rendering their verdict would be its effect, is inadmissible. The effect of the verdict is a matter of legal construction, and the jurors have no capacity to serve as its interpreters. *Jeter v. Heard*, 3.

2. The Judge has the right to assume, in his instructions to the jury, a hypothetical state of facts, and say to the jury if they believe such a state of facts to be proved, that it amounts to a commission of the crime or offence charged. *State v. Lenares*, 226.

3. But the jury are the sole judges of the facts, and, under the instruction of the court, they have the right to say whether the offence charged is a violation of the statute or not. *Ibid*.

4. The jury to be empannelled under Art. 2608 of the Civil Code, to estimate the value of property to be expropriated, should have a personal knowledge of the value of real estate in the vicinage; they act as experts, and though it is proper, especially if they request it, that they should be aided by the opinions of witnesses, a personal examination of the premises by the jury in a body, after it is empannelled, should be a feature of every proceeding under that Article of the Code.

*Remy v. Second Municipality*, 500.

5. In all criminal cases the separation of the jury, though by leave of the court and with the consent of the accused and his counsel, will vitiate the verdict if such separation take place after the evidence had been closed and the charge given. *State v. Populus*, 710.

6. In a suit for damages where one of the defendants is charged with aiding and abetting the other in the commission of a wrong or injury, he has a right to demand a severance, and trial by jury.

*Fonda v. Broom*, 768.

See CRIMINAL LAW—*State v. Bogain*, 264.

*State v. Smelser*, 386.

LAWS.

1. It is a sound rule of construction never to consider laws as applicable to cases which arose previous to their passage, unless the Legislature have in express terms declared such to be their intention.

*Saunders v. Carroll*, 793.

LEASE.

1. Where the right to the unexpired term of a lease, together with the movables on the premises, were sold under an execution against the lessee, and the leased premises were afterwards destroyed by fire—*Held*: That the purchaser had no right of action against the lessor for

LEASE (*Continued*).

- the repetition of the rent which had been paid to him on the distribution of the proceeds of the sale. *Hayden v. Heirs of Shiff*, 524.
2. Plaintiffs purchased certain premises of which defendant had been the lessee of their vendor for a term of years, already expired, they assuming to prosecute to final judgment a suit commenced by him to oust him lessee, who claimed a tacit reconduction of the lease. This suit resulted in a judgment in their favor, under which defendant surrendered the property to them. *Held*: That a written notice given by the plaintiffs to defendant of their purchase, and that they would look to him for the rent, was not an agreement on their part to charge the same rent as was stipulated in the expired lease. *Jamison v. Fairie*, 790.
  3. The provisions of our laws on letting and hiring do not favor abrogation of leases, where the loss or inconvenience is not caused by the fault of the lessor. Except in extreme cases the remedy of the lessee is for indemnification. *Denman v. Lopez*, 623.

## LEGACY.

1. *John McDonogh*, by his will, instituted as his universal heirs the city of New Orleans and the city of Baltimore; he gave as an annuity to the *Society for the Relief of Destitute Orphan Boys*, one eighth part of the net yearly revenues of the rents of the whole of his estate, until \$400,000 was realized; the said one-eighth part of the revenues to be set apart yearly or half yearly by the commissioners and agents of the general estate, (for whose appointment the will provided,) and deposited in some one or more of the banks of New Orleans until the same should amount to \$400,000. The will provided that the said amount should be invested in the purchase of real estate, from which a perpetual revenue from the rents of said estate should be drawn for the support of the Institution; that the directors of the said society, assisted by the Mayor and Aldermen of the city of New Orleans should make the investments, and that the Mayor and Aldermen should approve of the purchases of real estate and become parties to the deeds by which the property should be acquired. *Held*: That the pendency of a suit between the cities for a partition of the succession, was no bar to an action for such installments of the annuity as had fallen due; that the mode of investment was a matter of mere form which could not operate to annul or defeat the bequest; that it was not in the power of the testator to compel the city, through its Mayor and Aldermen, to become a party to the purchases in real estate in which it was to have no interest, it being the intention of the testator that the *Society for the Relief of Destitute Orphan Boys* should be the recipient of the bounty: that the liability of the defendants to discharge the legacy was not affected by the control over the estate given in the will to the commissioners and agents whose appointment was directed; that it was contrary to public law and policy that the simple tenures by which alone our laws permit property to be held, should be so complicated; and that such illegal modes, conditions and charges imposed by the will are to be disregarded.

*Orphan Society v. New Orleans*, 62.

**LIS PENDENS.**

1. A party who has appealed from a judgment homologating the proceedings of a family meeting, cannot, at the same time, carry on an action to annul these proceedings. The action of nullity will be dismissed on the exception *lis pendens*.  
*Stone v. Tucker*, 726.

**LITIGIOUS RIGHT.**

1. The transfer of a judgment rendered in another State, which is final between the parties, cannot be resisted when sued on by the assignee in this State, as being the sale of a litigious right.

*Lackey v. Tiffin*, 53.

**MALICIOUS PROSECUTION.**

1. An action for damages for malicious prosecution should not be maintained without proof of malice or bad faith on the part of the prosecutor.

*McCormick v. Conway*, 53.

2. Malice may be inferred from an utter absence of probable cause, but in such case, the absence of probable cause, to form the basis of a presumption of malice, should be shown affirmatively and positively.

*Ibid.*

**MANDAMUS.**

See APPEAL—*State v. Judge*, &c. 342.

See SUPREME COURT—*State v. Judge*, &c. 405.

**MANDATE AND MANDATORY.**

See PRINCIPAL AND AGENT.

**MARRIED WOMEN.**

1. A married woman is responsible *civiliter* for her wrongful acts, even when done in the presence of her husband.

*Clement v. Wafer*, 599.

See PRESCRIPTION—*Orcutt v. Berrett*, 178.

See SUPREME COURT—*State v. Judge*, &c. 405.

**MINORS.**

1. In cases of partition where some of the part owners are minors, the Judge has no power of his own will to order a sale of the property to be divided, upon terms of credit. This can only be done at the instance of the tutor and upon the advice of a family meeting. C. C. 1263.

*Succession of Morgan*, 153.

2. A minor emancipated under the Act of the Legislature of March, 1855, but not yet over twenty-one years of age, is invested with all the capacities in relation to his property and obligations which he would have had actually at the age of twenty-one years, and may be appointed Administrator of a succession.

*Succession of Lyne*, 155.

3. The doctrine in the case of *Maillefer v. Saillet*, 4 An. 375, that the marriage of a minor in another State, when contracted in violation of our own laws, does not operate the emancipation of the minor, recognized and reaffirmed.

*Babin v. LeBlanc*, 367.

4. An allowance cannot be made for the support of the minor heirs of a succession, under the Act of the 29th March, 1826, when such minor heirs are not creditors of the succession of their deceased parent.

*Succession of Broderick*, 521.

MINORS (*Continued*).

5. The marriage of a minor, domiciled in Louisiana, contracted in another State, in fraud of our laws, does not emancipate the minor, and her tutor cannot be held responsible for affording shelter and protection to his ward, and even counselling her in her difficulties.

*Clement v. Wafer*, 599.

6. A person who, without the consent of the tutor, persuades a minor to elope with, and marry him, in fraud of our laws, acquires no right to administer her estate, and, perhaps, no right to her person and to her society, except so far as voluntarily yielded to him.

*Ibid.*

See TUTORS AND TUTORSHIP.

See MORTGAGE—*Massey v. Steeg*, 78.

See EVIDENCE—*Succession of Croiset*, 401.

See PLEADING—*Edwards v. Morrow*, 887.

## MORTGAGE.

1. When the price of property was paid in cash, with money borrowed by the purchaser, but at the same time the purchaser executed his note for the amount to the order of the vendor, and consented, in the act of sale, to a mortgage upon the property, in favor of the vendor, or any *bona fide* holder of the note, the transaction cannot be considered simulated, and the lender of the money, as holder of the note, will be protected in his right of mortgage.

*Cole v. Lovenskiold*, 16.

2. The adjudication to the surviving father or mother of property held in common with the minor child under Article 338 of the Civil Code, is not restricted to immovables and slaves.

*Massey v. Steeg*, 78.

3. Where such adjudication takes place, the special mortgage in favor of the minor, resulting from the adjudication, attaches to such of the property adjudicated as is susceptible of mortgage. The right of mortgage in this case is not restricted to the individual share of the minors, but the whole property remains specially mortgaged for the security of the payment of the price of the adjudication.

*Ibid.*

4. Any one whose rights are affected by such mortgage, may require that the exact amount of the testator's indebtedness to the minors be judicially ascertained.

*Ibid.*

5. A judicial mortgage affects the debtor's slaves attached to a plantation in a parish where the judgment was not recorded, from the date of the registry in the parish of the debtor's domicil. C. C. 3318, 3328, 3317, 3296, 3217.

*Spencer v. Amis*, 127.

6. The mortgage and seizure by executory process of the defendants having been made before the debt of plaintiff accrued, the latter is precluded, by Art. 1988 of the Civil Code, from having them annulled, as made in fraud of her rights.

*New Orleans v. North*, 205.

7. A right of preëmption and improvements on the public domain, are not susceptible of mortgage under the Code. *Penn v. Ott*, 233—See 235.

8. An order of seizure and sale on a mortgage of such objects, is a nullity.

*Ibid.*

MORTGAGE (*Continued*)

9. The tacit mortgage of the minor on the property of his tutor can only be enforced for the balance which will appear to be due him, upon an account of tutorship rendered or ascertained by a judgment obtained against his tutor in default of rendition of account.  
*McHugh v. Stewart*, 361.
10. The tutor himself cannot assert this tacit mortgage upon property which was affected by it in his hands, and which he has alienated or incumbered in favor of third persons: *non constat*, that at the termination of the tutorship he will owe the minor anything, and even if this should be the case, the latter would have to proceed first against such property as his tutor might then be possessed of, the law reserving to the third possessors of property sold by the tutor the right of discussion.  
*Ibid.*
11. A steamboat is not an object susceptible of hypothecation under the laws of this State.  
*Succession of Broderick*, 521.
12. The Act of Congress regulating the mode of registering mortgages on vessels was not intended to legalize contracts between citizens of the same State, made within the limits of that State, and intended to be executed there, which are contrary to the law of the State. *Ibid.*
13. When a wife had obtained a judgment for separation of property against the husband, and under her execution had purchased a tract of land, but omitted to record the Sheriff's deed to the same, until after a creditor of the husband had obtained and recorded a judgment against him. *Held*: that the sale to the wife, as to the judgment creditor of the husband was null and void, because not recorded according to law, and that the wife had the option to pay the creditor or suffer the property to be sold and assert her mortgage (and the valid mortgages to which she was legally subrogated,) upon the proceeds of the sale.  
*Scott v. Jackson*, 640.
14. A mortgage executed by defendant on property claimed by plaintiff, pending the suit of the latter for its recovery, is without effect against him.  
*Masson v. Saloy*, 776.
15. Where the wife renounces, in favor of a mortgage creditor of her husband, her prior tacit mortgage on his property, for the restitution of her paraphernal effects, such renunciation, which is a mere waiver of the rank to which her mortgage was entitled, does not subrogate the creditor to the wife's paraphernal claims against her husband; and this creditor, not being the transferee of these claims, cannot exercise the wife's right of mortgage. In asserting his claims upon the mortgaged property he can look only to his own mortgage, taking effect from the date of its inscription. Such a renunciation by the wife does not contravene Art. 2412 of the C. C. and is expressly authorized by the Act of 1835. A declaration, in the act of renunciation, that it shall deprive the wife irrevocably of all recourse on her husband's property, will not invalidate the contract, but may be treated as mere subterfuge, and is not binding on her. Nor does the husband's having stipulated

MORTGAGE (*Continued*).

with his creditor to procure his wife's renunciation affect in the least its validity, without proof of threats of violence on his part, or of fraud.

*Porche v. LeBlanc*, 778.

16. The vendor of an immovable or slave must cause the act of sale to be duly recorded, in order to preserve his privilege; if not so recorded within six days from its date, if passed in the place where the registry of mortgages is kept, adding one day for every two leagues from the place where it was passed to that where the Register's office is kept, it has no effect as a privilege—*i. e.*, it confers no preference over creditors who have acquired a mortgage in the meantime, which they have recorded before it; but it will still avail as a mortgage, and be good against third persons from the time of its being recorded. *Ibid.*
17. On the removal to this State of French subjects, who were married and resided long after their marriage in France, a tacit mortgage in favor of the wife for preëxisting claims against her husband, originating during their residence in France, does not attach to the immovables acquired by her husband after his arrival here. *Succession of Valansart*, 848.
18. When the husband mortgaged the separate property of his wife to secure a debt due by himself, and the wife appeared in the act and made a formal renunciation of all her rights, it was held that the act was not binding on the wife. *Theriet v. Voorhies*, 852.
19. The word "immovables," as employed in Article 3256 of the Civil Code, which specifies the objects which *alone* are susceptible of mortgage, was intended to embrace only such things as are immovable by their nature, as lands, buildings, &c. *Voorhies v. DeBlanc*, 864.
20. "An action for the recovery of an immovable estate or an entire succession," although, by legal intendment considered an incorporeal immovable, is not susceptible of mortgage. *Ibid.*
21. An entire succession, disregarding the elements which enter into its composition, is not an object susceptible of mortgage. *Ibid.*
22. A judicial mortgage will not attach to an immovable action as distinguished from the property which is the object of the action, nor to the entire interest of the debtor in the movables, slaves and immovables which composed the active mass of a succession falling to him as heir. *Ibid.*

See HUSBAND AND WIFE—*Stewart v. His Creditors*, 89.

See PRESCRIPTION—*Succession of Flower*, 276.

See SALE, JUDICIAL—*Finley v. Babin*, 236.

See SALE—*Johnston v. Bloodworth*, 199.

## NEW ORLEANS.

1. Such portions of the Act No. 71 of 1852, entitled "An Act to consolidate the city of New Orleans and provide for the government and administration of its affairs," as are not contrary to the Act No. 164 of 1856, entitled "An Act to amend an Act entitled 'An Act to consolidate the city of New Orleans and to provide for the government of the city of New Orleans and the administration of the affairs thereof,'" are not repealed by the latter Act. *Guillotte v. City of New Orleans*, 432.

NEW ORLEANS (*Continued*).

2. The former city authorities having had the power "to regulate every thing which relates to bakers," the present city authorities have not been deprived of it by the Act of 1856. *Ibid.*
3. There is nothing unconstitutional in those parts of the city ordinance which regulate the weight and inspection of bread. *Ibid.*
4. The authority given by the ordinance to seize bread unstamped or deficient in weight, and to conduct the offender before the Recorder to be by him dealt with, is not a violation of Article 6 of the amendments to the Constitution of the United States. *Ibid.*
5. Violations of the city ordinance may be prosecuted before the Recorders of New Orleans, where it is so directed by law or the ordinance. *Ibid.*
6. The forfeiture, for the use of the city workhouse, of bread illegally baked, is not a violation of Article 105 of the Constitution. *Ibid.*
7. The contract spoken of by Article 105 of the Constitution, the obligation of which the Legislature is prohibited from impairing, is a contract in existence at the time of the passage of the law. *Ibid.*
8. The Auditor of Public Accounts has no authority, under the Act of the Legislature of 13th March, 1855, (sec. 9,) to appoint counsel to appear for the State in civil suits in the District Courts in New Orleans, or to appear for the State in the Supreme Court in New Orleans.  
*Succession of Fletcher, 498.*
9. In the city of New Orleans the State is represented by the Attorney General, its highest law officer, who is required by law to keep his office there. *Ibid.*
10. It was the intention of the Legislature, in the above recited Act, to provide for the collection of money due the State in parishes or in courts where the State should be unprovided with an official representative. *Ibid.*
11. Previous to the compromise of September, 1820, between the city and various claimants of the batture of the faubourg St. Mary, the levee followed the outer edge of Tchoupitoulas street, which was the original high road along the river bank, and lots for private occupation could not have been lawfully laid out upon the soil of Tchoupitoulas street.  
*Remy v. Second Municipality, 500.*
12. The Act of the Legislature of the 21st of March, 1850, authorizing the city of New Orleans to lay out and establish lots upon the batture in front of the faubourg St. Mary, raised an interdict which the Legislature had imposed by the Act of March 8th, 1836, upon the private occupation of the batture outside of New Levee street. *Ibid.*
13. Until the Act of the Legislature of 3d of April, 1853, the corporation had the exclusive right to determine where and to what extent the riparian proprietors might take pssession of the batture. *Ibid.*
14. The division of the batture outside of New Levee street as far as Front street, into streets and squares, was not an expropriation of the pro-

NEW ORLEANS (*Continued*).

perty so far as the streets were concerned, of which the riparian proprietors had never been in possession. *Ibid.*

15. As it respects municipal corporations it has always been held that the law of the State creating them and conferring upon their officers a part of the sovereign authority as mandataries of the government is not a contract, and, as a consequence, that the Legislature may modify such Acts of incorporation at its pleasure.

*Layton v. New Orleans*, 515.

16. The Legislature had the power to abolish entirely the corporation of the former city of Lafayette, until it became incorporated in the city of New Orleans, and was finally protected as a part of the same by the Constitution of 1852. *Ibid.*

17. The Acts of the Legislature which, in consolidating the three municipalities and the city of Lafayette under one government, directed that the debts of each, which were to be assessed by the city at large, should alternately be liquidated and paid by taxation of the inhabitants of the respective districts, in proportion to the burden which they imposed upon the new government by their respective debts, were not contracts. There was nothing to prevent the Legislature from changing its policy and providing, as was done by the Act of 12th March, 1856, that the taxes should be equal and uniform within the entire limits of the city. The statute complained of is a literal compliance with the commands of the Constitution, and does not violate any contract or interfere with any vested right. *Ibid.*

18. The city of New Orleans having voluntarily accepted a partnership with individuals in the profits to be derived from a market-house, cannot claim to be on a different footing as regards its social rights, at least in what regards the financial administration of the partnership property, from another partner. The peculiar quality of this corporation, clothed by the Constitution with many of the most important functions of government, does not take from the other party to the partnership the right to be consulted in matters which concerned the social interest.

*New Orleans v. Heirs of Guillotte*, 818.

See DAMAGES—*Wilde v. New Orleans*, 15.

*How v. New Orleans*, 481.

## NEW TRIAL.

1. Where a part of the testimony taken in the lower court has been lost, the case will be remanded for a new trial. *Barrow v. Landry*, 83.
2. Where plaintiff applied for a new trial, on the ground that the introduction of his letters and account sales, to prove facts specially pleaded, of which facts those letters and accounts were the best and most direct evidence, had taken him by surprise. *Held*: that the new trial was properly refused. *Donnell v. Parrott*, 690.

## NOTICE.

See REGISTRY—*Sheppard v. Leeds*, 1.

## NOVATION.

1. Novation will not be presumed. "It can only be established by an express declaration to that effect by the creditor or by acts which are tantamount to such a declaration." C. C. 2188.

*Smith v. Brown*, 299.

2. When the tutor gave his individual notes for the amount of an account rendered by an attorney-at-law for professional services in suits in which the interest of the minor were involved, *held*: that it was not a novation of the debt.

*Ibid.*

## OFFICE AND OFFICER.

1. The city cannot be held liable under a contract made by the Municipal officers in violation of law. *Fox v. New Orleans*, 154.
2. A notary public cannot be allowed to increase his legal fees for those acts which he does in his official capacity, by testimony as to the value of extra services. *Hawford v. Adler*, 241.

For powers of Auditor to appoint counsel in New Orleans in certain cases,

See NEW ORLEANS—*Succession of Fletcher*, 498.

See PUBLIC LANDS—*Lawrence v. Grout*, 836.

## OFFSET.

1. Compensation rests upon good faith. *Vincent v. Gandolpho*, 526.
2. An assignee, for the purpose of distributing a fund which is the common pledge of one's creditors, cannot offset his own debt (the character and terms of which he does not disclose) against a portion of the common fund thus entrusted to him. *Ibid.*
3. The fund is liable to attachment in his hands at the suit of the creditors of the assignor. *Ibid.*

See COMPENSATION.

## OPPOSITION.

See PRACTICE—*Romagea v. Nodal*, 341.

*Yale v. Hoopes*, 460.

## OVERSEER.

See DAMAGES—*Miller v. Stewart*, 170.

See CONTRACTS—*Lambert v. King*, 662.

*Perret v. Sanchez*, 687.

## PARENT AND CHILD.

1. The legal presumption, that the husband of the mother is the father of all children conceived during the marriage, can only be rebutted in the mode and within the time prescribed by law. *Dejol v. Johnson*, 853.
2. The right to disavow or repudiate a child born under the protection of the legal presumption, is peculiar to the father and can be exercised only by him or his heirs within a given time and in certain cases; and if the father renounces the right expressly or tacitly, it is extinguished and can never more be exercised by any one. *Ibid.*
3. The disavowal by the father must be made in a judicial proceeding, an action to which the child is a necessary party. If the father has never legally contested the legitimacy of a child born in lawful wedlock, mere oral and ex parte declarations of the father, or his wife, or of the child whose claim is contested, touching the legitimacy, cannot be received as evidence. *Ibid.*

See PRACTICE—*Greenwood v. New Orleans*, 426.

## PARTITION.

1. The Judge in decreeing a partition must direct the manner in which it shall be made. *Harrell v. Harrell*, 549.
2. The partition spoken of by Art. 1449 C. C., applies only to partitions regular in form, as donations *inter vivos* or *mortis causa*, and not to a mere division of property without writing. Such divisions can only give rise to collations among the heirs, whenever a definitive partition is made. This case remanded for such partition under the plaintiffs' prayer for general relief. *Lacour v. Lacour*, 724.

## PARTNERSHIP.

1. In an action for the liquidation of the affairs of a partnership, when one partner, the plaintiff, sets up a claim under express contract for compensation for extra services or labor, testimony is inadmissible to prove the value of the services of the other partner under a claim by reconvention on a *quantum valebant*. *Hill v. Matta*, 179.
2. No partner is entitled, unless under a special agreement, to any compensation, commission or reward for his services while employed in the partnership business. *Ibid.*
3. Where it does not appear to have been more the duty of one partner than another to collect debts due to the partnership, and the partner who undertakes to collect them has placed them in the hands of a competent attorney, and has acted in good faith, he ought not to be held responsible for the negligent or irregular acts of such attorney (or other competent agent) although the suit was brought in the name of the individual partner instead of the names of the joint owners. *Aiken v. Ogilvie*, 353.
4. One who is clerk and also in partnership in a particular business with his employer, may, where his duties as clerk and partner are distinct, sue for his salary due him in the former capacity, without resorting to a suit for the settlement of the partnership transactions. *Alexander v. Alexander*, 588.
5. A sale made by two of three parties, of their interest in a commercial co-partnership, to the third partner, does not deprive the creditors of the partnership of their privilege upon such effects of the partnership as may be found in the succession of the latter partner, the vendee, at his death. *Succession of Beer*, 698.

For seizure of partnership property to pay debt of individual partner,  
See *Beauchamp v. Chacheré*, 851.

## PAYMENT.

1. A tender of payment by the creditor in order to exonerate him, must be followed by a consignment or deposit of the money or notes. C. C. 2163, 2165; C. P. 405, 407, 412. *Walker v. Brown*, 266.

## PAYMENTS, IMPUTATION OF.

See ACCOUNT—*Keane v. Brandon*, 20.

## PLEADING.

1. Where the plaintiff sued to recover the value of horses shipped on defendant's boat, and alleged to have died of a disease contracted in consequence of the negligence and want of skill of those in charge of the boat in removing the horses from one part of the boat to another, under the general denial it is competent for the defendants to give in evidence all circumstances going to relieve the act of removal, of the character of a tortious violation of the contract between the parties, by assigning a reasonable necessity for such removal.  
*Elliot v. Steamboat James Robb*, 12.
2. The defendant, in his answer to a suit for money loaned to him, averred that the money was not loaned but given to him, partly in payment of an antecedent indebtedness, and partly as a remunerative donation for services rendered. *Held*: That this was not an admission that the defendant was ever indebted to the plaintiff, and that the burden of proof rested on the plaintiff to establish that the transaction was a loan.  
*Rohrbacker v. Schilling*, 17.
3. In an action on a valued policy of insurance the plaintiff is not put on proof of interest in the object insured by a plea of the general issue.  
*Kathman v. General Mutual Insurance Co.*, 35.
4. When the shipper has insured the freight, unless there is a special denial in the answer that he paid the freight in advance the fact need not be proved.  
*Ibid.*
5. The appointment of a tutor by a court of competent jurisdiction cannot be questioned collaterally; such appointment must be avoided by a direct action, or in the mode pointed out by law.  
*Martin v. Jones*, 168.
6. As a general principle, a plan annexed to a petition should be used to explain anything that is ambiguous or unexplained in the petition, but it cannot control a written description of the metes and bounds of the land claimed in which there is nothing ambiguous.  
*Remy v. Municipality No. Two*, 500.
7. The party who relies on an exception dilatory in its nature, although arising on the face of the proceeding, must specially plead his exception and point out the particular defect upon which he relies.  
*Scott v. Jackson*, 640.
8. In an action on a penal statute which must be strictly construed, it is necessary that the facts constituting the *gravamen* should be clearly and distinctly stated.  
*New Orleans v. Gordon*, 749.
9. Compensation must be pleaded specially.  
*Porche v. LeBlanc*, 778.
10. In a suit to remove the father from the tutorship of his minor, on the ground of notoriously bad conduct, the party should allege particular facts of which the defendant was guilty, in order to enable the court to determine whether such facts constituted "notoriously bad conduct."  
*Edwards v. Morrow*, 887.
11. No cause of exclusion or removal from the tutorship is applicable to the father, except that of unfaithfulness of his administration and of notoriously bad conduct. C. C. 326  
*Ibid.*

## POLICE JURY.

1. The Legislature may constitutionally delegate to Police Juries authority to pass all such ordinances as they may deem necessary relative to roads and levees. *Hunsicker v. Briscoe*, 169.
2. The Police Jury may, in order to avoid the expense of expropriation of property, authorize the owners of the soil over which the road passes, to keep up gates by which the right of way may be secured to the public with the least injury to the owner. *Ibid.*

See CONSTITUTION—*Avery v. Police Jury*, 554.

## PRACTICE.

1. The plaintiff had filed supplemental petition, after answer and reconventional demand by the defendant. A default was taken on the supplemental petition, which was afterwards confirmed *ex parte* upon the deposition of a witness examined under commission. The case did not stand fixed for trial at the time. *Held*: That such a proceeding was irregular and that no judgment should have been rendered on the supplemental petition, until the whole case had been regularly tried. *Knight v. Knight*, 59.
2. The plaintiff in an action is not bound to set forth, and at the same time accompany by a specific denial, matters of defence which the defendant may urge in his own behalf. *McRae v. Purvis*, 85.
3. A bill of exceptions should be taken or reserved at the time the ruling of the Judge in the matter complained of was made. If not then reserved, the Judge cannot be compelled on a subsequent day to sign a bill of exceptions. *State v. The Judge of the Second District Court*, 113.
4. When a motion is made to take the answers of parties to interrogatories for confessed, on the ground of their being evasive, the court must act on the motion, it cannot be referred to the jury to determine on the merits of the cause. *Knox v. Thompson*, 114.
5. As a general rule, it is too late, after the evidence has been closed and the argument commenced, to allow new issues of fact to be made. The plea of payment, however, is highly favored. Courts always lean to the correction of an error that works injustice, and the strict rules of practice may, with more propriety, be relaxed, when the parties litigant are not the original contracting parties. The rule relaxed under the facts of this case. *Succession of Regan*, 116.
6. Judgment reversed where rendered on issue joined by defendant, a married woman, unauthorized by her husband or the court. *Tillet v. Upton*, 146.
7. The husband being sued with the wife, and both cited, the plaintiff might have made his judgment by default final on proving his demand, but it must appear from the record that such proof was made. *Ibid.*
8. The summary proceeding by rule can have place only in those cases expressly provided for by law. *Sumner v. Dunbar*, 182.
9. In the case of respite, which differs essentially from a surrender, one creditor cannot, by rule, contest a judgment and mortgage resulting from the recording of it, of another creditor. He must, for such purpose, resort to an ordinary action. *Ibid.*

## PRACTICE (Continued).

10. The fees for services of an attorney at law, although he has acted under an appointment by the court, as tutor *ad litem*, for minors, cannot be recovered in a proceeding by rule, after the determination of the litigation in which he has been employed. *Nolan v. Taylor*, 201.
11. There was error in condemning the plaintiff to pay any of the costs of suit. The costs produced by the call in warranty should be borne by the defendant. *Lacour v. Watson*, 214.
12. There is no law authorizing the court to appoint a curator *ad hoc* to represent the slaves of a testator in a suit brought by his forced heirs to annul the disposition of the will enfranchising them. *Molaison v. Hébert*, 232.
12. When the defendant had no acknowledged domicile or residence in the parish in which he was sued, *held*, that the return of the Sheriff that he had left the copies of the petition and citation at defendant's place of residence in the parish, with a white person over the age of fourteen years, "residing at said residence," was manifestly bad. *Flynn v. Rhodes*, 239.
13. The judgment rendered against the defendant after default thereupon, was null and void, as the defendant made no appearance in the cause. *Ibid*.
14. As the plaintiff, previous to bringing his action to annul the judgment, made a tender of the amount for which his rights in the succession had been sold, and which had gone to the payment of his judgment debtor, it was not necessary to make him a party to the suit to annul the Sheriff's sale. *Dearmond v. Courtney*, 251.
15. The proper mode of seizing a debt existing in the form of a judgment, is a notification of seizure by the Sheriff to the judgment debtor. *Monticon v. Mullen*, 275.
16. The husband has under his control personal actions to which his wife is entitled, but the joinder of the wife in the suit does not destroy the action. *Barton v. Kavanaugh*, 332.
17. The remedy given to third persons by opposition is limited to the cases specified in the Code of Practice. Such third persons may, as in a separate action, obtain an injunction and arrest the seizure of the property he claims, but cannot assail the regularity of the plaintiff's proceeding against the defendant in the seizure. *Romagosa v. Nodal*, 341.
18. An order rendered, but not entered at the time, may be entered *nunc pro tunc* in proper cases. *Ferguson v. Millaudon*, 348.
19. Plaintiff sued originally upon a *quantum meruit* for materials furnished and work done in building a house, and afterwards, by an amendment admitted by the court, set up a written contract. (10 An. 61.) On the case being remanded, the defendants objected to the action being maintained against them, because they had not been put in default. *Held*: That this case does not come within the rule relied on by defendants. *Roper v. Magee et al.*, 409.

PRACTICE (*Continued*).

20. When a party acknowledges service of a rule on him to set aside a judgment, and contests it on its merits, it has the effect of a waiver of all exceptions to the form of proceeding. *May v. Ball*, 416.
21. The father and mother, while their children are under their authority, may appear for them in court in any kind of civil suit in which they may be interested. *Greenwood v. New Orleans*, 426.
22. The interest of the parents does not conflict with that of their children, on account of the usufructuary interest the parents have in the property of their children. *Ibid.*
23. Interlocutory orders made in the progress of a cause have their effect without being signed by the Judge.  
*State v. The Judge of the Fifth District Court*, 455.
24. A party intervening in an attachment suit and claiming a privilege on the property attached, is bound to see that his intervention is properly put at issue and brought to trial. *Yale v. Hoopes*, 460.
25. When no default is taken and no issue joined on the petition in intervention, the plaintiff may proceed to render his judgment by default against the defendant final, without the cause being fixed for trial.  
*Ibid.*
26. The intervention falls with the decision of the main suit. *Ibid.*
27. The proper mode of testing the rights of one claiming the vendor's privilege on property attached, is not by way of intervention but by third opposition. *Ibid.*
28. Granting leave to defendants who have been joined in an action for damages, to have separate trials, rests in the discretion of the Judge who tries the case. *Clement v. Wafer*, 599.
29. Plaintiff objected to defendants filing an amended answer. *Held*: That he was properly allowed to do so. The matters set up in it having an important bearing on the merits of the case. *Ibid.*
30. A party who excepts to the proceedings in a cause in which he is interested, must show in his bill all the facts, not otherwise of record, necessary to give the act complained of its erroneous complexion.  
*State v. Jackson*, 679.
31. A bill of exceptions which does not state the grounds on which it is taken cannot be examined. *Porche v. LeBlanc*, 778.

See ACTION—*Williams v. Close*, 573.See CONTINUANCE—*Jeter v. Heard*, 3.See EXECUTORS (Homologating tableau)—*Succession of Minville*, 72.See ACTION—*Waldo v. Angomar*, 74.See NEW TRIAL—*Barrow v. Landry*, 83.See EXPERTS—*Thompson v. Parrent*, 183.See COURTS—*State v. Wilson*, 189.See JURY—*State v. Lenares*, 226.See GARNISHMENT—*Gaty v. Franklin Insurance Co.*, 272.See PROVISIONAL SEIZURE—*Rogues v. Steamer Clarke*, 300.See SUCCESSION—*Succession of Harrel*, 387.See JUDICIAL SALE—*Broten v. Kendall*, 347.See ELECTIONS—*Augustin v. Eggleston*, 366.See SUPREME COURT—*State v. Judge, &c.*, 405.*State v. Kitty*, 805.See DELIVERY BOND—*Brander v. Bobo*, 616.See EXECUTORY PROCESS—*Jenkins v. Grigsby*, 642.See SALE—*Lesseps v. Wicks*, 739.

## PRESCRIPTION.

1. The universal legatee cannot set up the will of the testator as a just title and make it the basis of the prescription of ten years. *Griffon v. Blanc*, 5.
2. The prescription of one year, under Art. 3499 of the Civil Code, as to workmen, laborers and servants, only applies where the employment has been by the day or by the month; it does not apply to claims for the value of work done by the job, and of materials furnished for such. *Keys et al. v. Riley*, 19.
3. Endorsements of partial payments in the handwriting of the holder of a written obligation, are not of themselves sufficient proof of an interruption of prescription. They will, however, when other facts are shown leading inevitably to the conclusion that the holder of the obligation made the endorsements before prescription was acquired, in favor of the debtor, and against his own interest. *Beatty v. Clement*, 82.
4. The heir who has permitted thirty years to elapse without having done any act showing an intention to accept the succession is barred by prescription from any right as heir. C. C. 1023. *Succession of Waters*, 97.
5. A suit brought against the husband on notes due by the community, interrupts prescription as to the heirs of his deceased wife. C. C. 3517. *Succession of Regan*, 116.
6. When defendant's title is not traced to a sovereign grant, possession in good faith under successive purchases from private vendors for more than ten years, will not constitute a title by prescription against one who claims under a patent from the United States, issued within ten years previous to the institution of the suit. *Laidlaw v. Landry*, 151.
7. In the absence of any other evidence, of the date of the actual severance of the land from the public domain, the date of the patent must be considered as the time when the severance took place. *Ibid.*
8. The burden of proof rests with the party pleading prescription to show affirmatively a state of facts which will sustain the plea. *Ibid.*
9. When an attorney's fee is contingent upon his success in collecting money for his client, the fee not being exigible until the money is collected, prescription against the attorney's demand does not begin to run from the date of the judgment he has obtained for his client. *Morgan v. Brown*, 159.
10. Although the action for a reduction of price of land on the ground of deficiency in quantity be prescribed, it may nevertheless be set up as a means of defence against a demand for the price. *Miller v. Tate*, 160.
11. The acknowledgment of a debt by a married woman in the presence of her husband, and tacitly assented to by him, will interrupt prescription. *Orcutt v. Bennett*, 178.
12. The Statute of 1852, which declares that the prescription of all other open accounts, the prescription of which is ten years, under existing laws,

PRESCRIPTION (*Continued*).

- shall be prescribed by three years," is not applicable to the case of a demand for balance of subscription to the capital stock of a corporation.  
*New Orleans and Jackson Railroad Company v. Estlin*, 184.
13. An inscription of a mortgage which is not renewed until after an interval of ten years, ceases to have effect against any third person having an adverse interest. *Succession of Flower*, 218.
  14. The subsequent reinscription only gives its effect from the date of such reinscription. *Ibid*.
  15. Prescription against the creditors of an insolvent is suspended by a surrender of his property, but the same principle is not applicable to successions whether solvent or insolvent. *Ibid*.
  16. The right of a mortgage creditor is lost by the failure to reinscribe within ten years, although before the ten years had expired the mortgagor had died. *Ibid*.
  17. When there has been fraud on the part of the vendor, and no proof that he had any knowledge of the existence of a redhibitory vice in the slave sold, the redhibitory action is prescribed in one year from the sale. *Riddle v. Kreinbiehl*, 297.
  18. in an action to recover a part of the price unpaid, the vendor may set up the redhibitory vice as matter of defence, although more than a year has elapsed since the sale. He cannot, however, by a reconventional demand, after the lapse of one year, recover back the part of the price which has been paid. *Ibid*.
  19. The petition charged that the defendants had unwarrantably and illegally destroyed a certain railroad; that the iron and materials of the road were the petitioners property, and that the iron and materials were kept from the petitioner by the defendants, and claimed the value of said materials. *Held*: That the action was one of damages for a tort, and the prescription of one year applicable to it.  
*Harper v. Municipality No. One*, 346.
  20. Where several persons buy a tract of land, in the name of one of themselves, for the purpose of dividing it into lots and squares, and selling the same at a profit to be shared among them, the notes and assets, as well as the unsold lots, are subject to the action of partition, and a suit by one of the partners against the other, to compel him to account for sales made by him, will not be barred by the prescription of ten years.  
*Aiken v. Ogilvie*, 359.
  21. In assumpsit of a debt *conditionally*, prescription does not commence to run until the condition is accomplished. *Stewart v. Marston*, 356.
  22. Prior to the Act of 1837 the office of curator of a vacant estate terminated in one year from the date of his appointment. The action to compel the curator of a vacant estate to render his account seems to be of the nature of the action of mandate, and subject to the prescription of ten years from the expiration of his office.  
*Wilson v. McGreal*, 357.

PRESCRIPTION (*Continued*).

22. The character the plaintiff has given to his action by his pleadings must determine the prescription applicable to it. *Ibid.*
24. The Act of the Legislature of the 5th March, 1852, having fixed the prescription of the accounts of merchants and all other open accounts at three years, whereas the prescription was previously ten years, when more than one-third of the time required for the prescription under the former law had elapsed. *Held*: that the account sued on was prescribed after the lapse of two years (being two-thirds of the time required under the new law) from the date of the promulgation of the statute to the institution of the suit. *Tate v. Garland*, 525.
25. The Act of the Legislature of 1848 abolishes the distinction between residents and absentees in matters of prescription. *Ibid.*
26. There is no prescription of obligations of individuals for the security of stock subscribed and unpaid, so long as the liquidation of the company continues. *Succession of Shropshire*, 527.
27. The claim of an agent against his principal for services in the selling of lands, is not embraced in the words "open accounts," which, by the Statute of 1852, are prescribed against in three years. *Cooper v. Harrison*, 631.
28. Ten years is the only prescription against such a demand. *Ibid.*
29. A credit appearing on a note, will not interrupt prescription, unless it is shown where and by whom the payment was made. *Maskell v. Pooley*, 661.
30. Where a judgment creditor seizes property on execution and a third opponent sets up a privilege on the thing seized, it is competent for the seizing creditor to plead prescription against the opponent, nor will the circumstance that the opponent, since the filing of his opposition, obtained a judgment on his claim in a different court, affect the seizing creditor's right to make the plea. *Ibid.*
31. An action brought against the principal debtor, interrupts the prescription on the part of the surety. C. C. 3518. *Ferguson v. Glaze*, 667.
32. A nonsuit entered up against a party who does not appear when called in court, is not such an abandonment of the suit, as prevents it from interrupting prescription. *Devalcourt v. Dillon*, 672.
33. No effect can be given to a plea of prescription where the boundaries are not established in a manner to show to what property the plea must be applied. *Martin v. Breaux*, 689.
34. Under Art. C. C. 2720, which is held to apply to all persons except menial servants, the right of action of a pilot, who has been discharged "without any serious ground of complaint," for his wages for the full term for which he was employed, accrues immediately upon his discharge, and the prescription of one year against his suit will commence when the right of action has accrued. *Shoemaker v. Bryan*, 697.

PRESCRIPTION (*Continued*).

35. An action to recover wages of the officers, sailors and crews of ships and other vessels, is prescribed in one year, whether they are employed by the season or by the month. *Martin v. Bryan*, 722.
36. An action of debt upon a judgment rendered in another State of the Union, is a personal action, the prescription of which is governed by Art. 3508 of the Civil Code. *Deal v. Patterson*, 728.
37. Since the Act of March, 1848, (promulgated 4th April, 1848,) placing absentees and non-residents on the same footing with residents of the State, in relation to the laws of prescription, ten years will suffice to enable a judgment debtor to prescribe against his creditor, though the latter be a resident of another State. *Ibid*.
38. When a statutory change is made in regard to a particular term of prescription, the time anterior to the promulgation of the change is reckoned according to the old law, and the subsequent time according to the new enactment. *Ibid*.
39. Thirty years uninterrupted possession is required to enable a party to prescribe beyond his title. *Gray v. Couvillon*, 730.
40. To sustain the plea of prescription under Art. 849, C. C., it is necessary not only to show a possession of ten years, but also that this possession has been held by boundaries fixed according to a common title or different titles. Art. 829, and the following articles, prescribe the mode of fixing boundaries, and the Art. 849 must be considered in connection with these. *Ibid*.
41. By the "action of workmen, laborers and servants for the payment of their wages," which is prescribed by one year under Art. 3499, C. C., is meant only the action of such workmen, laborers and servants against their immediate employers who hire them by the day or by the month, and not the action of a contractor who undertakes a specific job. *Setter v. Landry*, 842.
42. The action on the contract is not barred by one year, although the charge is made up partly of the items for which they had to pay workmen and material men. *Ibid*.
43. The prescription applicable to a demand by the holder of a note is not applicable to the demand of the surety for reimbursement against his principal. The latter is a personal action which is barred only by ten years. *Linton v. Wikeff*, 878.

See SALE—*Bennett v. Bennett*, 253.

Temple v. Baker, 658.

See PRIVILEGE—*Van Wickle v. Belle Gates*, 270.See TAXES—*State v. Winfree*, 648.

## PRINCIPAL AND AGENT.

1. An agent who has been instructed to insure, cannot take the risk upon himself as insurer; he cannot, if he does, recover from his principal premiums for insurance, but in case of loss he would be bound to indemnify his principal not as insurer but on the ground of having failed to comply with his instructions. *Keane v. Brandon*, 20.

PRINCIPAL AND AGENT (*Continued*).

The defendants were appointed a "Permanent Committee" to forward a scheme proposed at a public meeting of the citizens of New Orleans, of establishing a railway across the Isthmus of Tehuantepec, and in that capacity contracted with the plaintiff. It was held that the burden of proof, as to the terms of the contract, rested upon the plaintiff, and that to hold the defendants liable, he must show that he contracted with them personally, or that they misled him by assuming to act for others without sufficient authority. *Trout v. Fallo*, 25.

In cases of this character, the controlling question is, whom did the employee trust? If no artifice or deception was used in making the contract, and the employee knew the capacity in which his immediate employer acted and looked to a special fund or to a projected company to reward him, he cannot hold the honest agent personally liable.

*Ibid.*

4. Where the mandatary has made no agreement for a compensation for his services, and it cannot be inferred, either from the nature of the employment or the relation of the parties, that it was in contemplation of both parties that the mandatary should receive compensation for his services—it is a case of a gratuitous procuration, and the mandatary is not entitled to compensation. *Lafourche Nav. Co. v. Collins*, 119.

5. The defendants, the factors of the plaintiff, effected insurance on their stock of tobacco and other merchandise, in four different insurance companies. Some of the insurances were for six months, others for a year, and at different rates. The rate of insurance was equal to one-eighth of one per cent per month. The plaintiff, in the accounts rendered of sales of tobacco, was charged one-fourth of one per cent per month for insurance. *Held*: That the defendants were not to be considered as plaintiff's agents in the insurances they had effected, but they are to be considered as being themselves the insurers of the plaintiff at the rate of one-fourth of one per cent per month, and as having re-insured at the best terms they could obtain in the different insurance offices in the city. *Miller v. Tate*, 160.

6. The plaintiff's tobacco having been lost by fire, the defendants are not entitled to charge commissions on sales not actually made. Their liability to the plaintiff is that of insurers. *Ibid.*

7. The commissioners of the *McDonogh* estate are the mandataries of the cities of New Orleans and Baltimore, and derive no power from the will of the testator. (See case of *Society for relief Orphan Boys v. New Orleans and Baltimore*, 12 Am. 62.) *New Orleans v. Succession of McDonogh*, 240.

8. The commissioners and agents cannot stand in judgment for the cities without the authorization of the latter. *Ibid.*

9. Persons owning or chartering a steamboat, are bound by the acts of the Captain employed by them in matters appertaining to the regular business of the boat. *Mackey v. DeBlanc*, 377.

10. So also a planter for engagements entered into for him by his overseer acting strictly in the line of his employment. *Ibid.*

PRINCIPAL AND AGENT (*Continued*).

11. *A*, being indebted to *B*, deposits in his hands, merchandize to be sold, and the proceeds to be applied to the extinguishment of the debt. This constitutes a contract of mandate between *A* and *B*, which obliges the former to reimburse the latter, whatever necessary and useful expenses have been incurred in fulfilling the object of the mandate.

*Devalcourt v. Dillon*, 672.

12. Brokers may extend their responsibility beyond its limitations as fixed by Art. 2987 C. C., by assuming to themselves other functions than those imposed upon them by law and usage. Where such an agent has disobeyed instructions, he cannot rely upon a ratification of his acts by his principal, without showing that they were ratified after a disclosure of all the material facts.

*Soudieu v. Faurès*, 746.

See ATTACHMENT—*Bullitt v. Walker*, 276.

See ATTORNEY-AT-LAW—*Morel v. New Orleans*, 485.

See USURY—*Gilly v. Berlin*, 723.

## PRINCIPAL AND SURETY.

1. The seizure of property by the Sheriff under a writ of *fiery facias*, and his subsequent carelessness or neglect by which the benefit of the seizure is lost to the seizing creditor, in consequence of the destruction of the property seized, furnishes no ground to the sureties on an appeal bond, to resist the payment of the judgment.

*Grieff v. Steamboat Stacy*, 8.

2. The Sheriff, in such a case, may, by his neglect, become responsible to the defendant whose property was lost by his neglect, or to the plaintiff whose debt he has jeopardized; but the sureties on the appeal bond would only be subrogated to the defendant's rights on payment of the judgment, and not until then could they exercise any right of action against the Sheriff.

*Ibid.*

3. Parties admitted to bail under bond, are, as it were, transferred from the custody of the Sheriff to the friendly custody of the sureties in the bond, who may at any time surrender the accused in discharge of the bond.

*State v. Lazarre*, 166.

4. When the liability of the surety had been fixed by the same judgment in which the principal was condemned, *held*, that an agreement under which, without the formality of a Sheriff's sale, a twelve months' bond was given by the principal, to recover the debt and costs, as if the property seized had been adjudicated on a second crying for that amount, did not have the effect of releasing the surety.

*Hardesty v. Sturges*, 231.

5. A contract with the surety of a creditor to indemnify the surety against the consequences of his suretyship is, in its nature, a contract of personal warranty, recognized by Articles 378 and 379 of the Code of Practice.

*Keane v. Goldemith*, 560.

6. A right of action against one who has come under such obligation, accrues to the surety as soon as he has been condemned by a final judgment to pay the creditor, and it is not necessary that he should have paid the judgment to entitle him to proceed against one who was thus bound to indemnify him.

*Ibid.*

PRINCIPAL AND SURETY (*Continued*).

7. Sureties on an appeal bond sought to relieve themselves from liability, on the ground that proper diligence was not used to make the money out of the principal debtor. *Held*: That it does not appear that by any act or even neglect of the creditor, a subrogation to his rights, mortgages and privileges, can no longer be exercised in favor of the sureties, and they are therefore bound. *Rawlins v. Barham*, 630.
8. Three persons signed a bond for the appearance of *D.*, charged with an assault with a dangerous weapon. Two of the sureties delivered *D.* in compliance with their obligation under the bond. *D.* escaped, after the delivery, and the State sought to hold defendant, the other surety, liable. *Held*: When one, of several sureties, on a single bond, avails himself of the privilege of surrendering the prisoner, it must be presumed to be done in the interest of his co-sureties, as well as of himself, and it absolves all, if it absolves one. *State v. Doyal*, 653.
9. *Non constat* that the endorser of a promissory note against whom a solitary judgment has been obtained with the maker, was a mere surety for the latter. *Manice v. Duncan*, 715.
10. Suffering a sale to be postponed, after a seizure under execution, is not *per se* a prolongation of the term of payment to the judgment debtor, when the sale takes place sooner than it could have been forced in the usual course of legal proceedings. Nor will a mere waiver of forms and delays in the sale under execution discharge the co-debtor, where no resulting injury is shown. Where an execution has been returned, it will be presumed, in the absence of proof to the contrary, that it was ordered to be returned for sufficient reasons. A mere failure to execute the judgment will no more release the co-debtor than a forbearance to sue would have discharged the endorser. *Ibid.*

See *Actio*—*State v. McDonnell*, 741.

## PRIVILEGE.

1. Payments made by a factor of debts due by his principal, are considered as money advanced by the factor and without a subrogation to the rights of the creditor, the factor cannot claim any privilege arising from the nature of the debts thus paid. *Shaw v. Knox*, 41.
2. The terms "necessary supplies" furnished to a plantation, include such supplies only as are essential to the subsistence and management of the plantation. *Ibid.*
3. Factors who have furnished supplies to a plantation, as regards creditors having an equal privilege with themselves, can only claim a ratable proportion of the proceeds of the whole crop. *Ibid.*
4. As between the parties to a building contract, the privilege of the builder may exist without registry. *Thompson v. Parrent*, 183.
5. No privilege, as to third persons, exists in favor of the vendor of an engine and gearing for a sugar mill, if he permits it to be attached to a plantation, without having enregistered the contract of sale.

*Gary v. Burguierea*, 227.

## PRIVILEGE, (Continued).

6. The vendor's privilege on movables can only be exercised whilst such movables remain in the possession of the purchaser or where the vendor claims a preference on the price over the other creditors of the purchaser. *Pena v. Ott*, 233.
7. A privilege on a steamboat for damages, caused by non-delivery of freight, is lost at the expiration of sixty days from the date of the default and consequent liability. After that time elapses, a sequestration will not lie. *Van Wickle v. Steamer Bella Gata*, 270.
8. The furnishers of provisions to the boat's crew are not furnishers of "materials" in the sense of Art. 283, No. 3, of the Code of Practice. *Request v. Steamer B. C. Clarke*, 300.
9. The landlord has a privilege upon the property of the defendant not yet removed from the leased premises. His privilege is continued in force by the order of the court directing the Sheriff to retain in his hands the proceeds of the property seized. *New Orleans v. Vaught*, 339.
10. The keeper of a livery stable has no privilege by law upon carriages and horses kept in his stable. *Powers v. Hubbell*, 418.
11. When the vendor of a carriage conveyed to his vendor not to sell it to the prejudice of his vendor's right, and a subsequent purchaser assumed the payment of the price and received possession from the original vendor—*Held*: That the vendors privilege still existed. *Ibid.*
12. The privilege awarded by Art. 3184 of the Code to furnishers of necessary supplies to a plantation, does not extend to a crop entirely cultivated and gathered after the supplies were furnished, so as to take effect after the plantation has been sold. *McCutcheon v. Wilkinson*, 483.
13. The privilege under that Article "on the product of the last crop and the crop at present in the ground," must be confined to the crop cultivated, standing or being gathered and taken off at the time the supplies were furnished, it cannot be extended to the crop subsequently planted and sold with the plantation to a third party. *Ibid.*
14. The limitation of sixty days does not apply in the case of a privilege of a vendor of coal furnished to a steamboat when the coal had never been received on the boat, but was piled up on the bank of the river. *Succession Broderick*, 521.
15. The privilege of the vendor of the engine, boilers and machinery of a vessel, which form a component part thereof, is a privilege under Art. 3204 of the Code, and is lost in the sixty days after the materials were furnished. *Ibid.*
16. A judgment obtained by the furnisher of such materials, with a lien and privilege, is not binding upon other creditors who were not parties to the judgment. *Ibid.*
17. A pledge, as well as a mortgage, may be made to secure an obligation not yet risen into existence. *Wolf v. Wolf*, 529.

PRIVILEGE (*Continued*).

18. Privileges must be regulated by the law of the forum, and none can be claimed except such as are granted in the Civil Code, Art. 3152, and statutes amendatory thereof. *Swasey v. Montgomery*, 800.

See ATTACHMENT—*McGregor v. Barker*, 280.

See PRACTICE—*Yale v. Hoopes*, 460.

See PARTNERSHIP—*Succession of Beer*, 698.

PROVISIONAL SEIZURE.

1. The writ of provisional seizure cannot be sued out without a bond being given by the plaintiffs, except in the cases expressly enumerated in the Code of Practice. *Roquest v. Steamer Clarke*, 300.

PUBLIC LANDS.

1. Plaintiffs' claim to 574 63-100 *arpens* of land was confirmed by Act of Congress of 28th February, 1823. He claimed 574 63-100 *acres*, and in 1849 his claim was surveyed as containing this latter quantity, and the survey approved. *Held*: That the plaintiffs' title to the whole 574 63-100 *acres* would no doubt be good against third persons, and against any one not claiming under the United States Government; but that it is not so as against a purchaser from the Government, whose patent must prevail against a mere survey without title. *Hébert v. Woods*, 211.
2. A sale of a preëmption right acquired under the Act of Congress of 1841, made prior to the issuing of a patent, is null and void. *Arbour v. Nettles*, 217.
3. The distinction between a transfer of the right of preëmption and a transfer of the occupancy and improvement upon which the right of preëmption is based, commented on, and declared not applicable to this case: *Ibid*.
4. It is only the possessor in good faith, believing himself to be the owner, who can recover from the true owner the value of ameliorations inseparable in their nature from the soil. *Gibson v. Hutchins*, 545.
5. Although a settler upon public lands who hopes to obtain a title under the preëmption laws is not a trespasser, he has no claim against a patentee of the Government for the ameliorations made upon the land of which he has had the use. He has no claim against the Government for the value of the improvements made, and the assignee of the Government takes the land free from any liability. *Ibid*.
6. A mere settler, even with the hope of preëmption, until he actually makes his entry, has no title, and improvements made by him on public land are presumed to be for his own benefit and at his own risk. *Ibid*.
7. The Surveyor General of the United States for the State is the proper person to certify the township maps. *Lawrence v. Grout*, 835.
8. The reservation in the Act of Congress of March 2d, 1849, which devotes a part of the swamp lands to the State, of lands which are "*claimed or held by individuals*," does not apply to persons who claim or hold lands without a sufficient basis for perfecting a title thereto. *Ibid*.
9. No claim can be enforced for improvements made on land while the title is in the sovereign. *Ibid*.

## RAILROADS.

See CORPORATIONS.

## RECEIVER.

1. What the parties might do by a power of attorney, the court may, when their interest require and the parties are properly before the court, order to be done. *Helme v. Littlejohn*, 298.
2. A receiver may be appointed by the court, notwithstanding the death of one partner and the appointment of an executor to administer his estate. *Ibid.*
3. The decree of the court appointing a receiver to collect the partnership assets is itself sufficient authority to him to institute a suit against a debtor of the partnership. The transcript of the proceedings in the suit in which he received his appointment need not be produced. *Ibid.*

## REDHIBITORY ACTION.

1. When, at a public sale, the Deputy Sheriff proclaimed the negro sold to be unsound, the redhibitory action cannot be maintained by the purchaser on account of any latent defects, and parol evidence is admissible to prove such a declaration. *Phipps v. Berger*, 111.
2. The redhibitory action cannot be maintained when the purchaser of a slave permitted many months to elapse, after the first development of disease, without resorting to medical aid. *Williams v. Talbot*, 407.
3. An action of redhibition to set aside the sale of a slave on the ground that the slave had so little mind or sense as to be utterly worthless cannot be maintained. *McCay v. Chambliss*, 412.
4. Such a case falls within the Article 2497 of the Code as a defect apparent to any ordinary observer. *Ibid.*
5. Where the disease of which a slave died manifested itself within three days after the sale, but death was caused by a relapse not attributable to negligence on the part of the purchaser, *held*, that the sale should be avoided. *Cornish v. Shelton*, 415.
6. The presumption of the existence of a disease at the time of the sale, from its manifestation within three days after the day of the sale, may be rebutted by evidence. *Ibid.*
7. When the death of a slave is necessarily connected with and a direct sequence of the vice of character, it can then be no more regarded as a fortuitous event than a death which results from a vice of body. *Riggin v. Kendig*, 451.
8. *Held*: That value of a slave could be recovered where the slave was a notorious runaway, and died of a disease contracted while a runaway, and which was a consequence of exposure in the woods and eating of indigestible food. *Ibid.*
9. In the absence of a special warranty against a particular redhibitory vice, the knowledge of its existence on the part of the vendee at the time of the sale, although nothing was said on the subject, will protect the vendor from liability. *Edwards v. Glasson*, 586.

REDHIBITORY ACTION (*Continued*).

10. The knowledge of the existence of a disease in a slave by the buyer, which would deprive him of his action to rescind the sale for a redhibitory vice, must be clearly established. It will not be sufficient to prove merely, that there was some conversation about the health of the slave, although the vendee may have said "he knew all about the slave."

*Giroud v. Belknap*, 791.

11. The redhibitory action cannot be maintained by the purchaser of a slave at auction where it appears that he was told by the auctioneer in answer to his own question, that the sale was made without any guarantee except of title, and that for a considerable time before he gave his notes in compliance with the adjudication he was aware of the extent, if any, to which the value of the slave was impaired by the alleged malady.

*Rochel v. Berwick*, 847.

12. From this a waiver of any objection to the purchase on the ground of unsoundness will be inferred.

*Ibid.*

## REGISTRY.

1. The registry of a draft on the owner of a saw-mill expressed on its face to be for the value of machinery furnished for the saw-mill, but which was not accepted at the time of its registry, is not a registry under Art. 3239 of the Civil Code against the owner which will affect the property in the hands of an innocent purchaser, although the machinery may have increased the value of the immovable by having become a part of it.

*Shepherd v. Leeds*, 1.

2. The mere trespasser who is defendant in a petitory action, cannot defeat a *prima facie* title made out by the plaintiff on the ground of the non-registry of such title.

*Coucy v. Cummings*, 748.

3. The registry may be made at any time and it does not concern a trespasser that it should be made at all.

*Ibid.*

See MORTGAGE—*Porche v. Le Blanc*, 778.

## RES JUDICATA.

1. If proper parties join issue upon questions either of law or fact, before a competent court, they must abide by the decision.

*Trescott v. Lewis*, 197.

2. The form of procedure, by a rule instead of an injunction, to arrest an execution, having been resorted to without objection, and a decision rendered thereon after issue joined on the merits—*Held*: That the defendant in execution, by whom the rule was taken, could not afterwards renew the litigation by resorting to an injunction.

*Ibid.*

3. The judgment discharging the rule was precisely equivalent to a judgment dissolving an injunction, in lieu of which the rule was taken.

*Ibid.*

4. Such judgment, if not appealed from within the legal delay, would have the finality requisite to sustain the plea of *res judicata*, and although the time for appealing from it may not have elapsed, it precludes any further action of the court on the matters set up on the rule.

*Ibid.*

RES JUDICATA (*Continued*).

5. A judgment homologating the assessment for expense of opening a street, voluntarily executed, has the force of the thing adjudged.  
*Jamison v. City of New Orleans*, 346.
6. A decree pronounced by a competent tribunal, with the proper parties before it, although rendered by consent, being followed by its immediate execution, is a judgment capable of acquiring the force of the thing adjudged, and will produce that effect if no appeal be taken from it, nor action of rescission or nullity instituted within the period allowed by law.  
*Greenwood v. New Orleans*, 426.
7. The creditors of the succession of *W.* opposed the homologation of the administrator's account on several grounds, the principal one of which was, that the administrator had not enjoined an order of seizure and sale of a large portion of the property, when the claim on which it issued was tainted with usury. *Held*: That *W.* in his lifetime had resisted the claim on that plea, which had been decided adversely to him, and that it would not have been proper for the administrator again to set up the same defence.  
*Succession of Wilson*, 591.
8. Where the defendant, in an injunction suit prays, in his answer, for damages against the principal and sureties, and the judgment dissolving the injunction is silent on the subject of damages, it is equivalent to a rejection of the claim for damages, and the judgment is *res judicata* between the parties.  
*Rice v. Garrett*, 755.
9. Where in a suit to enjoin a seizure of property as illegal and to recover damages, the judgment maintaining the injunction is silent as to damages, it is equivalent to a rejection of the claim for damages, and will sustain the plea of *res judicata* in a subsequent suit for damages.  
*Spencer v. Banister*, 766.
10. Where a rule to inflict on a syndic the penalty for not keeping a bank book, &c., &c., has been passed upon by the court in homologating the syndic's account, a second rule, on the same grounds, cannot be taken, unless the right was reserved in the dismissal of the first rule.  
*Stadeker v. His Creditors*, 817.
11. Nor can the debtor take the rule on the pretence that he is the transferee of claims of creditors unless he has been legally subrogated to those claims.  
*Ibid.*

See EXECUTORS—*Succession of Anderson*, 95.See TUTORS—*Porche v. Ledoux*, 350.

## RESPITE.

See INSOLVENT PROCEEDINGS.

## ROADS, LEVEES, &amp;c.

1. The Act passed February 7th, 1829, relative to roads and levees, establishing a highway on the banks of bayous, &c., &c., does not apply to those streams or bayous running through a high country, not subject to overflow, and when the roads are made directly across the country and not along the winding of the stream. *Lyons v. Hinckley*, 655.

## RULE.

See PRACTICE—*Sumner v. Dunbar*, 162.

SALE.

1. It is not necessary that the executor should make a tender of a transfer to the purchaser at public sale, in order to put the latter in default.  
*Harris v. Harris*, 10.
2. Where real property is sold by written title, it is to the written will of the parties at the time of the sale that we must refer, to ascertain the object sold; we are not permitted to defeat the plain and ordinary meaning of their language by theories deduced from a presumed inadequacy of price or a comparison of the business talents of the vendor and vendee, even supposing such matters to be properly in evidence.  
*Delogny v. David*, 30.
3. Where a particular claim comes precisely within the written description of the object sold, the vendor is estopped by the very distinct terms of his act of sale from saying he never meant to sell that claim, and the writing is conclusive upon the parties unless impeached for fraud.  
*Ibid.*
4. Where, from the relation of the parties, as deduced from the answers to interrogatories, it is manifest that although both parties expected that the preliminary arrangements for a sale would be carried out, yet neither of them considered a sale had been concluded unaccompanied with conditions, a sale is not established.  
*Knox v. Thompson*, 114.
5. When a patent from the United States issued to the assignees of parties who had purchased a tract of land from the United States, and obtained the Receiver's receipt for the same, the title will not be invalidated on the ground that the act of transfer from the original purchaser from the United States to the patentees expressed that it was made for *value received*, without mentioning the price.  
*Helluin v. Minor*, 124.
6. The assignment was executed in the form recommended by the Land Department of the United States, and the patentee is the holder of the legal title.  
*Ibid.*
7. In a sale of a family of slaves, the avoidance of the sale as to one child affords no reason for avoiding the whole sale.  
*Montan v. Whitley*, 175.
8. The sale of a right of preëmption acquired under the Act of Congress of the 4th of September, 1841, is null and void.  
*Penn v. Ott*, 233.
9. The purchaser of property at a succession sale delivered to the notary who was to prepare the act of sale and mortgage the cash instalment of the price, and also left with him the notes that were to be given in compliance with the terms of the adjudication. The executor of the estate afterwards asked the notary to give him \$50 of the money on account to pay a bill, which the notary did. The notary afterwards absconded with the balance of the money. *Held*: That the loss should be borne by the purchaser.  
*Succession of O'Keefe*, 246.
10. In order to make a valid tender the money must be placed in the power of the adverse party. If paid into court, it must be with the intention on the part of the debtor that the creditor shall be at liberty to take it out of court. If deposited with the notary, as the agent of both parties, it must be with the consent that the creditor shall be at liberty to withdraw it if he sees fit, otherwise the money is at the risk of the debtor.  
*Ibid.*

SALE (*Continued*).

11. The money and notes could only have been placed at the risk of the succession or executor by a formal putting in default, or by a deposit for the benefit of the succession with the express or implied consent of the executor. *Ibid.*
12. Although the entire interest of a co-heir in a succession fallen to him may be seized and sold under execution at the instance of a creditor of the heir, the Sheriff is not dispensed from the necessity of seeing that a description of the property seized be given in as accurate a manner as the nature of the case will allow, so that bidders may know what they are bidding for, and the property of the debtor may not be unnecessarily sacrificed. *Dearmond v. Courtney*, 251.
13. When the proportion of the heir's interest in the succession was not given, either in the return of the Sheriff or the advertisement of the sale, and it did not appear how many heirs there were, nor of what property the succession consisted, nor what was the amount of the inventory, the sale was properly declared illegal and void. *Ibid.*
14. The adjudication to the husband of property as held in common with the minor children, when such property was in fact the paraphernal property of the deceased wife, does not divest the children of their title. *Bennett v. Bennett*, 253.
15. Nor is such a title sufficient to form the basis of prescription under Article 3444 of the Civil Code. *Ibid.*
16. A title to real estate does not pass by the adjudication of an auctioneer, unless he was authorized in writing to make the sale. *Cronan v. Succession of McDonogh*, 269.
17. Where a charge of false packing is made, in reference to cotton of various planters, in different sections of the country, under circumstances rendering the charge improbable, and the plaintiff urges a reclamation against the factor who sold him the cotton in lots, and without any particular representations as to quality, the cotton having been sampled by the seller and re-sampled by the purchaser, the latter must furnish *clear, consistent and cogent proof* to enable him to recover. Nor is it sufficient for the plaintiff to show that the cotton, or a portion of it, was *mixed*; it must also be proved that it was mixed to the prejudice of the buyer, and be made legally certain that the cotton was inferior to the samples by which it was sold. An unreasonable custom will not be enforced. But whether the cotton was *fraudulently* packed of mixed qualities, or was mixed by carelessness or accident, if it was *inferior* to the samples, by which it was sold, the buyer is entitled to relief, *provided* it was so packed that its defects could not have been discovered on simple inspection. *Mure v. Donnell*, 360.
18. The sampling of the cotton by plaintiff's brokers in Liverpool, and want of correspondence between the cotton he sold there and his samples taken there, cannot affect the defendant. The contract sued on, having been made here, must be governed by our laws. *Ibid.*

SALE (*Continued*).

19. Although there can be no sale without a price in money, it does not necessarily follow that the act is void because it wants this requisite of a sale; if there be no just cause for declaring it null, it may exist in another form as an exchange, a donation or a pledge.  
*Wolf v. Wolf*, 529.
20. The vendor himself is not permitted to question the sale he has made, unless he has reserved a counter-letter, or relies on the answers of his adversary to interrogatories on facts and articles. *Ibid.*
21. Neither can any third party question the same without showing not only that it is simulated or fraudulent, but that it is also injurious to such third person who complains of it. *Ibid.*
22. There is nothing immoral in using the contract of sale as security for money advanced or to be advanced. *Ibid.*
23. The title of owner, under such a contract, must necessarily embrace that of pledge, and enable a party clothed with the legal title to protect himself for advances, on the expectation of which the sale was made.  
*Ibid.*
24. Under the Code of 1825 the purchaser, in case of eviction, can recover from his vendor only such increase in the value of the property as the parties had in contemplation at the time of the sale. *Weber v. Coussy*, 534.
25. The right of an heir to an inheritance is not a litigious right within the meaning of Article 2630 of the Civil Code. Such a right may be sold. C. C. 2426. *Grayson v. Sanford*, 646.
26. The exclusion of warranty in an act of sale is not evidence of bad faith on the part of the purchaser. But where the vendee in an act of sale declares that he is acquainted with the title, and when it is exhibited, the title appears defective, there is made out against the purchaser a *prima facie* case of the want of that good faith necessary in order to prescribe.  
*Templet v. Baker*, 658.
27. The unpaid vendor of a slave sold by private act unrecorded, may enforce the implied dissolving condition against his vendee, to the prejudice of the mortgage creditor of the latter. *Johnson v. Bloodworth*, 699.
28. The signature of the vendee to an act of sale *sous seing privé*, is not necessary under the provisions of our Civil Code, which does not contain the Article 1325 of the Code Napoleon. Under our law a sale of movables may be made by parol; but if the vendor chooses to make the sale in writing, his signature to the act is good proof against him, although without the signature of the vendee. The expression of Art. 2239 of the Civil Code, "between those who have subscribed it," is synonymous with against those who have subscribed it. A party against whom an act under private signature is offered must either acknowledge or deny his signature. The burthen of proof of a simulation is thrown on the defendant who alleges it. A special plea always controls, so far as it goes, the general issue. A party is not allowed to vary or destroy his own voluntary written agreement, by any thing short of written evidence, which includes answers to interrogatories on facts and articles.  
*Lesseps v. Wicks*, 739.

SALE (*Continued*).

29. Where a sale is made with the right of redemption, the right must be exercised within the time agreed on, otherwise the purchaser becomes irrevocably possessed of the thing sold. C. C. 2548.

*Bair v. Abrams*, 733.

See REGISTRY—*Shepherd v. Leeds*, 1.

See SUCCESSION—*Harris v. Harris*, 10.

See LITIGIOUS RIGHT—*Lackey v. Tiffin*, 53.

See MINORS—*Succession of Morgan*, 153.

See PUBLIC LANDS—*Arbour v. Nettles*, 217.

See PRIVILEGE—*Powers v. Hubbell*, 413.

See EVIDENCE—*Martin v. Drumm*, 494.

*Bair v. Abrams*, 733.

## SALE JUDICIAL.

1. When the plaintiff in a suit for a partition sets up title to an undivided half of property in defendant's possession, claiming to have derived title thereto under a Marshall's sale, the defendant not claiming title to the interest of the seized debtor in the object thus sold, cannot contest the validity of the Marshal's sale for the want of formalities which were intended by law for the protection of the judgment debtor alone.

*Oakey v. Aiken*, 11.

2. When neither the judgment debtor nor any third party claims an adverse interest in property thus sold, the want of an appraisement of the property is not such an informality as will avoid the sale.

*Ibid.*

3. The Sheriff's return that property sold by him was duly appraised is sufficient in the absence of any rebutting evidence.

*Waddell v. Judson*, 13.

4. The assignee of a bank mortgage which, by the charter, is not affected by a succession sale, has the same right as the assignor to disregard such sale.

*Beatty v. Clement*, 82.

5. Where property is offered for sale by the Sheriff under a writ of *fi. fa.*, on a credit, and the person to whom it is adjudicated does not offer such sureties as the Sheriff is willing to accept, nor take any proceedings against the Sheriff to force him to accept the sureties offered, the adjudication does not of itself confer a title. The regular course for the Sheriff in such a case is to offer the property again for sale immediately under the same writ, but if it is afterwards regularly sold by the Sheriff under the seizure of another creditor, the purchaser acquires a valid title.

*New Orleans v. Pellerin*, 92.

6. Where, to enforce a mortgage containing the pact *de non alienando* property had been sold under an order of seizure and sale, prosecuted contradictorily with the third possessor, who was an absentee, by the appointment of a curator *ad hoc*, and when the order of sale, and all the proceedings under it, were subsequently homologated by a monition; *Held*: That the judgment could not be collaterally attacked by one claiming to have derived his title subsequently from such third possessor.

*Laforest v. Barrow*, 148.

SALE JUDICIAL (*Continued*).

7. The purchaser in possession under such a sale cannot be disturbed in his title, on the ground of irregularities and defects in the executory proceedings, from which the parties in interest might at the time have been relieved by appeal. *Ibid.*
8. The vagueness and uncertainty in the description of the property in the act of mortgage will not be permitted to operate to the injury of a purchaser in good faith who went into possession under the sale of the property, which was understood at the time to be the object of the mortgage and sale under it. The notice with which the parties under whom a claim is set up adverse to the purchaser, is chargeable, is sufficient to vest in the purchaser a valid title to the land which he went into possession of under the sale, notwithstanding an uncertainty in the description as to the land sold. *Ibid.*
9. The first section of the Act of the Legislature of the 10th of March, 1847, conferring upon administrators and other representatives of a succession, the power of acting as auctioneer in the sale of the property of the succession, was not abrogated by the Act of the 7th of April, 1847, directing the Judge of the court to order the sale to be made by the Sheriff of the parish or such auctioneer as the parties might name.  
*Lafiton v. Doiron*, 164.
10. The two Acts passed at the same session are not so utterly inconsistent with each other as to be wholly irreconcilable. *Ibid.*
11. A judicial sale made to effect a partition among co-heirs, has the effect of extinguishing mortgages given by some of the heirs on their undivided portions, and of transferring such mortgages to the proceeds of the sale.  
*Finley v. Babin*, 236.
12. A judgment debtor is at liberty to waive the formalities of the law, so far as they exclusively affect his personal interests.  
*Mullen v. Harding*, 271.
13. A *bona fide* purchaser at a Sheriff's sale will be protected against any attack upon his title upon the ground of informalities, unless the plaintiff show injury to himself in consequence of such informalities. *Ibid.*
14. It is the duty of the syndic in selling a slave at auction to declare the existence of any disease in the slave known to him, and which could not be discovered on simple inspection.  
*Richardson v. Bell*, 296.
15. Where he has failed to do so, the sale will be rescinded on the ground of such redhibitory vice. *Ibid.*
16. Where the existence of the disease before the sale to the knowledge of the vendor is clearly shown, a *post mortem* examination is not necessary. *Ibid.*
17. A Sheriff's deed is a title translatif of property, and the title and possession under it cannot be treated by a third person as a nullity.  
*Brown v. Kendall*, 347.
18. Where the holder of two notes secured by mortgage on the same property, at the maturity of the first note obtained a judgment on it, with preference on the proceeds of the sale of the mortgaged property, which

SALE JUDICIAL (*Continued*).

being sold under his execution, did not bring a sufficient amount to satisfy both notes. *Held*: That the *fi. fa.* issued under the judgment, should have been first satisfied in full, and the balance held by the purchaser and judgment creditor, who bought in the property, to meet the other note *pro tanto*, when it became due. *Hynes v. Morin*, 742.

19. The plaintiff in the seizure, who was the holder of both of the notes, not having asked for a sale of the property on such terms of credit for the balance of the price, as would correspond with the falling due of the second note, the Sheriff had no right to apply the price first to the outstanding note in the hands of the seizing creditor, and thus leave a balance unpaid on the execution under which the property was sold.

*Ibid*.

See ESTOPPEL—*Gottschalk v. De Santos*, 473.

*Mullin v. Follain*, 538.

## SEIZURE AND SALE.

See SALE JUDICIAL—*Laforest v. Barrow*, 143.

## SEQUESTRATION.

1. When the husband and wife both appear as plaintiffs in an action in revindication of the paraphernal property of the wife, the real plaintiff is the wife, authorized and assisted by her husband.

*Goodin v. Allen*, 448.

2. When in such case the affidavit to obtain a sequestration was made by the husband only, and he alone signed the sequestration bond, *held*, that the sequestration was properly dissolved.

*Ibid*.

3. Where property had been sequestered and was sold by the Sheriff, at the instance of plaintiffs, for cash, pending the suit, as perishable and to save costs, the effect of the Sheriff's sale, under the order of court, was to transfer the legal custody of the officer from the property itself to its proceeds; and the plaintiffs in the sequestration suit could not, by becoming themselves the purchasers of the property at the Sheriff's sale, transfer the legal custody of the sequestered property from the Sheriff to themselves by withholding the price.

*Field v. Broderick*, 552.

4. Plaintiff need not, in order to sustain a sequestration, swear that he fears defendant will conceal, part with, or dispose of, the property sequestered. It will be sufficient if he make oath of his interest in the property sequestered, and that he fears that defendant will send it out of the jurisdiction of the court during the pending of the suit.

*Anderson v. Stille*, 609.

## SERVITUDE.

1. Under the law which prescribes the obligation of proprietors of lands bordering upon the rivers to suffer the servitude of a levee for the use of the public, the soil alone owes the servitude.

*Mithoff v. Carrollton*, 185.

2. When, for the public safety, it becomes necessary to construct the levee on ground on which buildings had been erected by the proprietors of

SERVITUDE (*Continued*).

the soil at a time when no immediate servitude was due to the public, and the buildings are demolished for that purpose, the owners are entitled to be compensated for their value, to be estimated at the time they were taken for public purposes. *Ibid.*

3. By Art. 763 of the Code, which declares: "The use which the owner has intentionally established on a particular part of his property in favor of another part, is equal to a title with respect to perpetual and apparent servitude thereon," is meant the disposition which the owner of two or more estates has made for their respective use.

*Gottschalk v. De Santos*, 473.

4. The intention to create a servitude for the respective estates, will not suffice, nor will it suffice that it was partially established, it must have been perfected in such a manner as to be useful to the adjacent lots.

*Ibid.*

5. Article 446 of the Civil Code does not establish against the proprietor of the soil, on the banks of navigable streams, a servitude in favor of the public at large, *for all purposes*, but only for such as are incident to the nature and the navigable character of the streams washing the land of such proprietor.

*Lyons v. Hinckley*, 655.

6. The erection of a verandah of the same width with the street, in front of one's house, is not an infringement of the rights of the owner of the adjoining tenement and cannot be complained of as in violation of the Articles of the Civil Code regulating the servitudes of light and view.

*Durant v. Riddell*, 746.

7. The Art. 671 C. C. being derogatory of the right of property must be strictly construed. The right granted thereby to the first proprietor of lands in cities, who builds, to take possession of the land of his neighbor for the foundation of his building, must be confined to the side walls, and cannot prevent the latter, who afterwards builds, from occupying the whole front of his land, but he has no right to avail himself of the side wall before paying half the cost of its execution.

*Jamison v. Duncan*, 785.

See POLICE JURY—*Hunsicker v. Briscoe*, 169.

## SHERIFF.

1. When the Sheriff, before the return day of the writ, had notified the plaintiffs of his release of the seizure of a slave on account of an adverse title set up by another, and had called upon both parties to point out property subject to seizure, which they failed and refused to do. *Held*: That the subsequent neglect of the Sheriff to return the writ on the return day, did not subject him to the statutable remedy by rule, which is not applicable to such a case. The plaintiff should have resorted to an ordinary action for damages. *LaSelle v. Whitfield*, 81.
2. Where the Sheriff is incapable of acting by reason of interest and there is no Coroner of the parish, the Judge may appoint a special officer to attend the jury during the trial. *Harbour v. Scott*, 152.
3. The Sheriff has no authority to receive money as security for the appearance of persons accused of crime. *State v. Reiss*, 166.

SHERIFF (*Continued*).

4. The Sheriff may, in the exercise of a sound discretion, levy an execution on property apparently belonging to a third person, when he has good reasons to believe that the property is held for the purpose of sheltering it from the legal pursuit of the creditors of the debtor in execution, but he renders himself liable for damages if he seizes any other property than that of the defendant in execution.  
*James v. Thompson*, 174.
5. A bond of indemnity tendered to the Sheriff, neither lessens nor adds anything to his obligations or duties, nor will it justify him in making an illegal seizure.  
*Ibid.*
6. The mere failure of the Sheriff to make a return of the execution within the legal delay will not subject him to the payment of the amount specified in the writ, if circumstances are shown to excuse his failure.  
*Ibid.*
7. Deputy Sheriffs are expressly authorized by law to represent the Sheriff in all duties confided to the latter. They have the power to receive an appearance bond and discharge the accused upon its execution, although the order of the Judge directed it to be taken by the Sheriff.  
*State v. Wilson*, 189.
8. The Sheriff has a right to sue in his official capacity on a bond executed for the price of property sold by the Sheriff, and for which the bond had been executed in favor of his predecessor.  
*Bell v. Keefe*, 340.
9. The Sheriff may sue upon and enforce the payment of a bond given by the defendants for property seized and sold by him in course of judicial proceedings, otherwise in cases of protracted litigation the right of parties might be impaired or lost by insolvency or prescription.  
*Bell v. Keefe*, 374.
10. The Articles 703, 716, 717 and 718 of the Code of Practice apply to cases where the rights of parties are fixed and determined.  
*Ibid.*
11. The Act of 1846 prescribes the mode of proceeding in contesting the election of a Sheriff. The Supreme Court is not the proper tribunal to entertain such a contest, and cannot go behind the commission to examine the proof upon which the Governor acted in issuing it.  
*State v. Hyams*, 719.

## SIMULATION.

1. The Article 1988 of the Civil Code, which denies the revocatory action to a creditor when the contract of his debtor, which he seeks to set aside, was entered into before his debt accrued, has no application to cases of pure simulation.  
*Simpson v. Mills*, 173.
2. Where an apparent ownership of property has, in reality, no actual existence, no action is necessary to set aside the simulated ownership. The creditor can proceed at once against the property of his judgment debtor.  
*Ibid.*
3. The fact of a title having been acquired at a judicial sale, does not affect the question of simulation.  
*Ibid.*

SIMULATION (*Continued*).

4. A charge of simulation in a judgment or contract will be controlled by an accompanying averment, that certain specified credits were not allowed, which, if they had been allowed, would still have left a balance due the party obtaining the judgment, or in whose favor the contract was made. *Mahier v. LeBlanc*, 207.

5. The facts of this case, it was *held*, establish simulation.

*Hayes v. Clarke*, 665.

6. The authorities are not reconcilable on the subject of the right of a party to an act, his heirs and assigns to attack the act of simulation. It is more consonant with general principles that they should not be permitted to do so. But *forced heirs* are to be viewed as third persons, and have the right to attack the act made by their ancestors, on the ground of simulation. *Louis v. Richard*, 684.

## SLANDER OF TITLE.

1. The rule of practice which, in an action of slander of title, imposes on the defendant who reconvenes and sets up title to the property the burden of proof which rests on the plaintiff in a petitory action, applies only to the case where the defendant is out of possession. Where the defendant is himself in actual possession, the plaintiff cannot so change his position by the form of action to which he resorts, as to escape the burden imposed on him by law of establishing his title. In such an action, if the title relied on by defendant is not a valid one, he cannot be permitted to controvert a confirmation of the plaintiff's title by the government, nor to require that the plaintiff's title should be traced from the original claimant to the confirmee. *Griffon et al. v. Blanc*, 5.

2. The principles of this case decided in case of *Griffon v. Blanc*.

*Moore v. Blanc*, 7.

3. Principles of this case decided in *Griffon v. E. Blanc*.

*Pontalba v. Blanc*, 8.

See SALE JUDICIAL—*Waddell v. Judson*, 18.

See SALE JUDICIAL—*New Orleans v. Pellerin*, 92.

See ATTACHMENT—*Whann v. Hufty*, 280.

## SLAVES.

See EMANCIPATION—*Barclay v. Sewall*, 262.

See WILLS—*Turner v. Smith*, 417.

## STATUTE.

1. The Legislature in 1855 having re-enacted the 17th Section of the Act of 7th April, 1826, without change, thereby ratified the judicial construction the Act had received. *LaSelle v. Whitfield*, 81.
2. Where there is a discrepancy between the English and French texts of a statute, the former must prevail. *State v. Ellis*, 390.
3. The English text is emphatically *the law*. It was intended and is required that the laws should be published and thus promulgated in both languages; but they are enacted, as required by the Constitution, in the language in which the Constitution of the United States is written. A *bona fide* translation into French, and publication of the original and translation, is all that is required; and a mistake in the translation is in the same category with a typographical error. *Ibid*.

STATUTES (*Continued*).

4. In construing Penal Statutes, courts cannot take into view the motives of the law-giver, further than they are expressed in the Statute.

*State v. King*, 593.

5. Where a Statute re-enacts a law, and repeals all other laws upon the same subject matter, the former law will be considered as suspended. The promulgation of the re-enacted law, and the repealing provision at the same time, will not have the effect to continue the old law in force, until the new law goes into operation.

*Ibid.*

See LAW.

See TAXES—*State v. Winfree*, 643.

## STEAMBOATS.

See MORTGAGE—*Succession of Broderick*, 521.

## SUBROGATION.

1. An accomodation endorser against whom, and his principal, a judgment *in solido* has been rendered, on paying the judgment becomes legally subrogated to all the rights of the creditor in a twelve months' bond given in the case by the principal obligor, and may enforce the payment of such bond by the surety therein.

*Toler v. Cushman*, 733.

## SUCCESSION.

1. Where the sale of succession property is ordered to pay debts, an heir cannot be allowed to retain the price of property adjudicated to him.
- Harris v. Harris*, 10.
2. The proceeding of *folle enchère* may be resorted to in succession sales, and a new order of sale is not necessary.
- Ibid.*
3. The homologation of the account and tableau of distribution must be held conclusive upon the heirs of the deceased as well as upon all other persons.
- Bujac v. Loste*, 96.
4. An objection to a document offered in evidence that it was not signed by all the parties, goes to the effect of the evidence, and not to its admissibility. A clerical error in the date of an instrument may be amended by parol evidence.
- Clauss v. Burgess*, 142.
5. The acceptance of an heir is *express* when he assumes the quality of heir in an unqualified manner in some authentic or private instrument, or in some judicial proceeding.
- Ibid.*
6. The intention with which an act is signed by the heir is made by Article 983 of the Code the touchstone of its character. If signed with the intention of binding himself as heir, he becomes heir pure and simple.
- Ibid.*
7. When a written instrument, purporting to be a notarial act of sale of property of the succession, by all the heirs, was signed by some of the heirs, and others refused to sign it, on the ground that they would render themselves liable as heirs, and the act of sale in consequence was not consummated, it is, nevertheless, an express acceptance of the succession by those heirs who signed the instrument, and they are liable as heirs.
- Ibid.*
8. The subsequent formal renunciation of heirs who have thus accepted will not undo the effect of their acceptance.
- Ibid.*

SUCCESSION (*Continued*).

9. The acceptance of a succession may be established against an heir by proof of payment of its debts by him. He may, however, rebut the legal presumption arising from such proof, by showing that it was done under protestation or with other motives and intentions than that of accepting. *Loubière v. LeBlanc*, 210.
10. Where the heirs have formed a partnership, acts done in the partnership name, which would imply an acceptance of the succession, are presumed to be concurred in by all, and will bind them all in the absence of contrary proof. *Ibid.*
11. The executor has the right, whether *seizin* be given to him in the will or not, to cause sufficient property of the estate to be sold to pay the debts, unless the heirs furnish him with money. *Succession of McLean*, 222.
12. He represents the succession fully when he applies to the court for an order for that purpose. *Ibid.*
13. Under the 12th Section of the Act of the Legislature of 18th March, 1820, reënacted in 1855, a prosecution criminally and a conviction is a prerequisite to the civil liability of a party sought to be made liable for the debts of a vacant estate on the ground of having taken possession of it without authority, with the intent of converting the same to his own use. *Walworth v. Ballard*, 245.
14. A paper filed by an administrator purporting to be his account, but which merely gives a statement of the creditors of the estate and the debts which he has paid, but does not show that he had any money in his hands to be distributed, or that he collected or distributed any money of the succession, is not such an account or tableau as could be homologated and made binding upon either the creditors or the heirs, unless they had been personally cited. *Hickman v. Flenniken*, 268.
15. Any one heir may compel the administrator to render his account without the concurrence of his co-heirs and without making his co-heirs parties to the suit. *Ibid.*
16. The heirs must be cited and made parties to an account rendered by an administratrix and homologated, or they will not be concluded thereby, except as to passive debts of the estate; for the payment of which, the administratrix is entitled to be credited. *Succession of Harrell*, 337.
17. The Code of Practice, Art. 1027, and Civil Code, Arts. 1267 and 1259, expressly require the Judge to direct the manner in which the partition shall be made and to refer the parties to a notary, whom he shall appoint to make the partition. *Ibid.*
18. If any question be raised in relation to the separate property of the spouses and collations between the heirs of the deceased, such questions should be determined by the Judge, before referring the partition to a notary. *Ibid.*
19. The question touching the liability of the administratrix for any damages which the estate may have sustained in consequence of her negligence, should be determined by the court, previous to the reference of the partition to a notary. *Ibid.*

SUCCESSION (*Continued*).

20. "Any co-heir of age, at the sale of the hereditary effects, can become a purchaser to the amount of the portion owing to him from the succession, and he is not obliged to pay the surplus of the purchase money, over the portion coming to him, until this portion has been definitely fixed by a partition." *Ibid.*
21. *Held*: That when the other assets are sufficient to pay all the debts and charges due by the estate, the administratrix is not bound to take any steps to enforce the payment of the purchase money due by the heirs, and consequently cannot be held liable for any loss or damage which may arise from such purchases by insolvency or otherwise. *Ibid.*
22. Under the ruling of the court in the case of *Walworth v. Ballard*, 12 An., in an action to render a party liable for a debt due by an estate, on the charge that he had taken possession of the property of the estate without authority, and with the view of appropriating the proceeds to his own use, no recovery can be had without proof of a previous conviction under the penal laws of the State. *Carl v. Poelman*, 344.
23. The terms of sale of the property of a succession accepted with benefit of inventory were for cash. The property, an immovable, did not bring the appraisement. *Held*: That there was no sale which the purchaser could compel the tutrix to complete, although the property was ordered to be sold to pay debts. It should have been re-advertised and sold on terms of credit of not less than twelve months. C. P. 990, 991, 992. *Succession of Fritz*, 368.
24. Conventions by which it is agreed that rights to a future succession shall be sold for a particular consideration are prohibited by law, and consequently null. *Reed v. Crocker*, 436.
25. The renunciation of a succession must be made by a public act before a notary, in presence of two witnesses. *Ibid.*
26. A special transfer and assignment of rights to an estate, in favor of one person, cannot be viewed as a renunciation, and is not a ratification of a promise to renounce. *Ibid.*
27. To determine the nature and effects of acts, the motives of the parties must be considered. *Ibid.*
28. Collation is not obligatory on collaterals who inherit in default of forced heirs. It is only due by those who have received in advance of their legitimate portion as forced heirs. Special legacies to collaterals, when there are no forced heirs, belong exclusively to the legatees, and are not subject to collation. *Ibid.*
29. A testator who has natural children complies with the law if he bequeaths three-fourths of his estate to one or more of his legitimate collateral relatives. They cannot be regarded as forced heirs. *Ibid.*
30. The commission of the curator of an estate cannot be calculated upon debts included in the inventory, but either fictitious in character or exaggerated in amount. *Succession of Foulkes*, 537.
31. The claim of the widow under the Homestead Act of 17th March, 1882, yields to the claim of the minor whose tacit mortgage dates from a period antecedent to the passage of the Homestead Act. *Ibid.*

SUCCESSION (*Continued*).

32. The claim of the widow under the Homestead Act, is superior to all privileges created previously to the death of the husband and subsequently to the passage of the Act, except that of a vendor. Her privilege yields to funeral expenses, expenses of last illness, and law charges growing out of the administration and settlement of the succession.

*Ibid.*

33. It is the duty of the representative of an estate, upon the rendition of an account, to support every charge against the estate by a proper voucher.

*Ibid.*

34. Where a succession is accepted by the heirs purely and simply, the credits belonging to the succession are *ipso facto* and of full right by operation of law divided among the heirs.

*Plunkett v. Perkins*, 558.

35. The creditors of an insolvent succession have a right to require that their debts should be paid before property, the recorded title and possession of which was in their debtor at the time of his death, can be recovered by one claiming to be the real owner and producing a *counter-letter* to defeat the apparent title in the succession.

*Stewart v. Newton*, 622.

36. The law does not prohibit an allowance of alimony, when a proper case is shown, to illegitimate colored children, out of the succession of their father.

*Collins v. Hallier*, 678.

37. The only persons who have an interest in opposing the *submission* by an Administrator of any of the interests of a succession, to arbitrators, are the heirs and creditors.

*Lattier v. Rachal*, 695.

38. Children to the extent of the *legitime* are not considered as heirs, but as creditors of their father's estate. They are entitled to the revocatory action *only* for the enforcement of their *legitime*; beyond that they are mere ordinary heirs and cannot be heard to allege the turpitude or defeat the judicial confession of their father. Vide *Succession of Trim-mell*, decided in 1854, opinion book 24, page 328.

*Maples v. Mitty*, 759.See PRESCRIPTION—*Succession of Waters*, 97.See MINORS—*Succession of Morgan*, 153.See EXECUTORS AND ADMINISTRATORS—*Hickman v. Flenniken*, 268*Succession of Grover*, 334.*Succession of Sloane*, 610.See HUSBAND AND WIFE—*Succession of Pratt*, 457.See EVIDENCE—*Miller v. McEluee*, 476.

## SUPREME COURT.

1. The Supreme Court derives its jurisdiction from the Constitution, and the repeal of a statute which had conferred jurisdiction on it does not affect its powers.

*Knight v. Knight*, 59.

2. The affidavit of the appellant, in a suit for divorce, that his interests involved in the suit exceed three hundred dollars, is sufficient to give the Supreme Court jurisdiction.

*Ibid.*

3. The certificate of the Clerk that "the transcript contains a true copy of all the papers and documents filed and all the proceedings had, all the orders of court of record and all the evidence adduced by the parties

SUPREME COURT (*Continued*).

on the trial of the cause, cannot be contradicted by an affidavit in the Supreme Court that the original citation to the defendant was among the papers when the judgment by default was rendered and when the appeal was taken." *Connolly v. Martin*, 80.

4. The Supreme Court is without jurisdiction when an indictment is quashed *in limine*, and consequently no fine has been actually imposed, and the offence charged is not punishable with death or imprisonment at hard labor. *State v. LeBlond*, 863.
5. The Supreme Court can only act in criminal cases upon matters which appear by bills of exceptions or assignments of error. *State v. Smelser*, 386.
6. A *mandamus* will be issued by the Supreme Court only as auxiliary to its appellate jurisdiction. *State v. Judge of the Sixth District*, 405.
7. The Constitution does not confine the judiciary to the examination of such questions as may arise under the laws in force at the time of its adoption, but leaves to the Legislature the power of creating new classes of cases for the action of the courts. *Ibid.*
8. It is not necessary, to constitute a judicial proceeding, that it should have all the requirements of a regular suit. *Ibid.*
9. The Act of 1855 "To enable married women to contract debts and bind their paraphernal or dotal property," is but an extension of the powers already vested in the courts, and the Legislature had the right of imposing the duty required by this Act upon any court of original jurisdiction. *Ibid.*
10. It not appearing that the refusal of the Judge to grant the certificate will occasion the applicant damage to the amount of \$300, the *mandamus* is for this additional reason refused. *Ibid.*
11. Writs of *mandamus* and *prohibition* to the District Judges will only be issued in aid of the appellate jurisdiction of the Supreme Court. *State v. The Judge of the Fifth District*, 513.
12. Judgment amended in the Supreme Court so as to cover an instalment of the mortgage debt falling due since the order of seizure and sale was granted. *McCalop v. Fluker*, 551.
13. The Clerk's certificate being defective, the case was continued by the Supreme Court to enable the Clerk to complete it. *Cory v. Eddens*, 582.
14. The original papers from other Clerks' offices will not be received to complete a record in the Supreme Court. *Hays v. Clarke*, 666.
15. Excessive damages awarded below will be reduced by the Supreme Court. *Creevy v. Breedlove*, 745.
16. Where the amount in controversy does not exceed \$300, the Supreme Court is without jurisdiction, unless the case involves the constitutionality or legality of some tax, toll, or impost, or of some fine, forfeiture, or penalty of a municipal corporation. Such a case is not presented in a suit by the farmer or lessee of a market to recover the dues or rents of stands in such market, as fixed by ordinance of the Common Council of New Orleans. *State v. The Third Justice*, 789.

SUPREME COURT (*Continued*).

17. If laws and ordinances of a municipal corporation, not unconstitutional in themselves, are misapplied by the inferior tribunal, it is not in the power of the Supreme Court to relieve the parties where the amount involved is insufficient to give jurisdiction. *Ibid.*
18. The Supreme Court is without jurisdiction to determine whether an ordinance of a municipal corporation levying a tax, or imposing a fine, forfeiture, or penalty, less than \$300, has or has not been repealed by an Act of the State Legislature. *Police Jury v. Villaviabo*, 788.
19. It is too late to raise objections in the Supreme Court as to the time of calling the jury and the notice to the master of the slave where no such objections were made at the trial. *State v. Kitty*, 805.
20. The jurisdiction of the Supreme Court is limited by the Constitution and the statutes which have organized the court, and although the parties are willing to waive the objection, the court itself will refuse to entertain an appeal in a case which by law is unappealable.

*Johnston v. Cocke*, 859.

See APPEAL.

## SURVEYOR GENERAL.

See OFFICE AND OFFICER.

## TAXES, TAXATION, TAX COLLECTOR AND TAX SALES.

1. Where a tax, levied under a municipal ordinance passed without the legal formalities, has been voluntarily paid, it cannot be recovered back on the ground of error. *Campbell v. New Orleans*, 34.
2. There being no law exempting the plaintiff's property from taxation, for the purposes contemplated by the ordinance, he was under a natural obligation to contribute his quota to the support of the municipal government from which he derived protection. No suit will lie to recover what has been paid or given in compliance with a natural obligation. *Ibid.*
3. One can only be bound by the assessment rolls of the parish or district within which one has taxable property, after having failed to appeal without a sufficient excuse. *New Orleans v. Estate of McArthur*, 47.
4. Under the city ordinance providing that "every keeper of a transient theater, circus, menagerie, or other public exhibition or show, shall pay in advance a tax of ten dollars for each performance," &c., a tax cannot be levied on one who keeps a *permanent* establishment for an exhibition consisting of natural and artificial curiosities, for admission to which visitors are charged a certain price. *New Orleans v. North*, 205.
5. The Act of 1855, entitled "An Act to provide a revenue and the manner of collecting the same," is not unconstitutional. *State v. Waples*, 343.
6. The practice of the profession of law is not shielded from taxation. *Ibid.*

TAXES, TAXATION, TAX COLLECTOR AND TAX SALES (*Continued*).

7. An attorney-at-law may be taxed as well as persons pursuing any other employment. *State v. Fellows*, 344.
8. Where payment has been made of a tax which might have been resisted at law, the money cannot be recovered back :
  - 1st. If the tax is on property, whether exempt from general taxation or not, and the assessment is rather a toll or contribution than a tax, and the party paying has derived a direct benefit from the improvements made by the imposition of the tax or assessment.
  - 2d. Where the property was liable to taxation, and the illegality of the tax depends upon some informality in the passage of the law establishing the tax.

But where the tax is imposed, not for the direct benefit of the party who sues to recover it, as having been paid in error, but for the general support of the commonwealth, and it has been imposed upon property or a profession exempt by law from taxation, the money must be refunded.

*Bank of New Orleans v. City of New Orleans*, 421.
9. The treaty made in 1853, between the United States and France, confers on Frenchmen, in all the States of the Union, whose laws permit it, the right of possessing real and personal property by the same title and in the same manner as the citizens of the United States, and declares that, in no case, shall they be subjected to taxes on transfers, inheritance, or any others, different from those of citizens of the United States, or to taxes which shall not be equally imposed. *Held* : That the succession of a French citizen, who died before the treaty was made, will not be exempted from the operation of the Act of the Legislature of Louisiana, in 1842, imposing a tax of ten per cent. on successions falling to foreigners. *Succession of Prevost*, 577.
10. The parish Treasurer is the depository of the School Fund due to his parish ; he may demand payment from the collector, and on his default sue him to recover it. *Hendricks v. Bobo*, 620.
11. The Act of 1857 which gave to the Auditor of Public Accounts the remedy of a writ of distress against delinquent tax collectors and their sureties, merely provided a remedy of which the auditor could have availed himself while it was in force. But the failure of the auditor to exercise the remedy and enforce the demands of the State against tax collectors, cannot deprive the State of its right to collect the unpaid dues by another remedy provided subsequent to the delinquency ; for when an obligation is due, a change in the mode of procedure does not affect it. *State v. Winfree*, 643.
12. Where the obligation of the sureties on a tax collector's bond is solidary, the State may proceed against them before obtaining judgment against the principle obligor. *Ibid.*
13. The case as presented by this action, is not inconsistent with the Code of Practice, it is not affected therefore by any repealing clause in the law of 1855, for there is a saving clause in the Act excluding from repeal the provisions of the Code of Practice on the subject. *Ibid.*

**TAXES, TAXATION, TAX COLLECTOR AND TAX SALES** (*Continued*).

14. Parties who sign a bond impliedly waive defects in it form. *Ibid.*
15. Actions against tax collectors or their sureties, are not prescribed by 1, 2, 3, 4, or 5 years. *Ibid.*
16. In forced sales for taxes the forms of law must be rigidly pursued and a title thus derived cannot be aided by intendment.  
*Coucy v. Cummings*, 748.
17. When the proceedings are against one described as an absentee, the purchaser at the tax sale would acquire only the interest of such absentee.  
*Ibid.*
18. The defendant, sued for a tax bill, objected to the citation, that the advertisement by which he was cited, under the Act of the Legislature, April 15, 1853, was only once inserted in the official newspaper. The objection held not to be valid.  
*New Orleans v. Saloy*, 751.
19. None are legal voters at an election held by order of the Police Jury to decide whether an ordinance imposing a tax for works of internal improvement shall be approved, but the proprietors of landed estate in the parish or municipal corporation where the election is held.  
*Police Jury v. Landry*, 841.

See EVIDENCE—*State v. McDonnell*, 741.

See CONSTITUTION—*State v. Merchants Ins. Co.*, 562.

**TENDER.**

See SALE—*Succession of O'Keefe*, 246.

See PAYMENT—*Walker v. Brown*, 266.

**TRUSTS.**

See WILLS—*Partee v. Hill's Succession*, 767.

**TUTORS AND TUTORSHIP.**

1. The new tutor is the proper person to call on the former tutor to account, and has the faculty of standing in judgment for the minor, as regards that cause of action.  
*Porche v. Ledoux*, 850.
2. Art. 615 C. P., as amended by the Act of 1826, does not imply the nullity of a judgment when a minor has been regularly represented according to law.  
*Ibid.*
3. The Art. 615 finds its application in the case (among others) where the tutor renders his account to the under tutor, the minor in this instance not being fully represented *on the rendition of the account*. *Ibid.*
4. A judgment regularly rendered between the new tutor and the former tutor of a minor, will sustain the plea of *res judicata*, in an action brought by the minor, arrived at his majority, against his former  
*Ibid.*
5. The 58th and 59th Articles of the Civil Code, relating to the sending into provisional possession of the presumptive heirs of an absentee, have no application to the question whether letters of tutorship have been improperly granted upon the persons and property of minors whose father is still living.  
*Succession of Jones*, 397.

TUTOR AND TUTORSHIP (*Continued*).

6. In an action against a tutor for advances, supplies, &c., furnished to the estate of his wards, the under-tutor, who alleges that the advances, &c., &c., went to the benefit of the tutor, personally, and not to the wards, shows sufficient grounds to justify an intervention.

*Urquhart v. Scott*, 674.

7. Where the tutor has created an indebtedness without authority of law, the burden of proof is thrown upon the creditor, to show that the indebtedness thus created, was absolutely necessary either for the support of the minors, or for the preservation of their property; and that the supplies thus furnished, actually enured to the benefit of the minors.

*Ibid.*

8. On the death of his wife, defendant qualified as natural tutor to his children. Having married a second time, he left his two daughters with their uncle and under-tutor, and moved with the rest of his family out of the State. Plaintiff, the under-tutor, brought suit to deprive the father of his tutorship. The District Court dismissed the suit for want of jurisdiction. But *Held*: The act of defendant in changing his domicile has not deprived his daughters, who have never left the territorial limits of the jurisdiction, which originally conferred their guardianship upon defendant, of the protection of the court which conferred such guardianship.

*Lyons v. Andrews*, 685.

9. Sequestration of the slaves maintained, and the appointment of the father as tutor annulled.

*Ibid.*

10. A family meeting in consenting to the natural tutrix, who is about to marry a second time, retaining the tutorship of her minor children after such marriage, have no right to restrict her in the legal exercise of her rights and discharge of her duties as tutrix, and a requirement which they may undertake to make, that all her drafts for moneys belonging to the minors shall be drawn to the order of, and endorsed by, the under-tutor, is mere surplusage, and will be considered as not written.

*Stone v. Payne and Harrison*, 726.

See MINORS.

## USURY.

1. Since the Statute of 1844, money paid for usurious interest can be reclaimed if suit is brought within one year after the payment.

*Keane v. Branden*, 20.

2. A commission merchant cannot charge a planter for insurance unless he was instructed to insure, or a subsequent ratification by the latter is shown. Eight per cent interest, and two and one-half per cent commission, avowedly charged for advancing, taken together constitute an usurious charge.

*Gilly v. Berlin*, 723.

## WARRANTOR AND WARRANTY.

1. Where work was done on the road and levee under a contract with the Police Jury, in which it was stipulated that the contractor should not look to the parish for payment but to the owner of the land, and it turned out that the land on which the road and levee was made belonged to the United States, it was held that the parish was liable.

*Semel v. Gould*, 225.

WARRANTOR AND WARRANTY (*Continued*).

2. There was an implied warranty on the part of the Police Jury, that the land on which the work was to be done belonged to persons whose property could be reached under their ordinances, to defray the expenses of such work. *Ibid.*
3. The warrantor, who is not represented by counsel at the trial, is not bound by admissions made by the other parties of the contents of notarial acts not produced in evidence. *Weber v. Coussy*, 534.
4. The apparent servitude of passage or right of way is an appurtenance of the property sold, and any sale implies, without its being expressed a warranty against acts of the vendor, that would prevent or interfere with the full enjoyment of the thing sold.

*Bruning v. Canal and Banking Co*, 541.

## WIDOW (HOMESTEAD, PRIVILEGE OF).

See SUCCESSION—*Succession of Foulkes*, 537.

## WILLS.

1. The deceased by his will, which was executed in 1848, after a legacy to his wife of certain specified property, declared as follows: "All the balance of my property, I will to my six brothers and two sisters, to be equally divided between them, after all claims against me are paid. And I hereby appoint *John Valentine*, my brother, to execute this will; and, in case of his death or absence, *Palitzen Belcher*, my wife's brother. I would recommend that this property be sold, for one-fourth cash, and the balance on six, twelve, eighteen and twenty-four months' time; and the notes secured by mortgage to secure payment. I would recommend that the money be paid to them, so as to be of the greatest advantage to them possible. There will be somewhere from two to three thousand dollars for each of them, if it were so divided at the present time. What my property is, and where situated, you will find by the copy of the titles in my bank-box. Although I have made several errors, yet I think the above will be easily understood. I have one house on Circus street; two on Gravier; two on Adele; one corner of Camp and St. Mary; and one vacant lot, corner of Plaquemines and Seventh streets." *Held*: That this was a disposition of the property which the testator then had, and was not intended to cover his future acquisitions; and that, consequently, property purchased by the testator in 1853, after the will was made, did not pass under it."

*Succession of Valentine* 286.

2. "A disposition, the terms of which express no time, neither past nor future, refers to the time of making the will." C. C. 1715.

*Ibid.*

3. The will of the testator *John D. Fink*, of New Orleans, contained the following clause: "That after the payment of my just debts and the legacies mentioned herein above mentioned, that the proceeds of the whole of my estate, property, rights, effects and credits be applied to the erection and maintenance and support of a suitable asylum in this city, to be used solely as an asylum for protestant widows and orphans, to be called *Fink's Asylum*: and I do hereby authorize my friend *Diedrich Bullerdieck*,

## WILLS (Continued).

*after my decease, to name and appoint three worthy and responsible persons as trustees to carry out my said intentions respecting the aforesaid asylum."* It was held, that the widows and orphans for whom it was intended the building to be erected should be a refuge and a home, were the objects of the testator's bounty. *Fink v. Fink*, 301.

4. The clause in the will in reference to the appointment of trustees, is to be construed as a delegation by the testator to a third person of the choice of administrators of a portion of his estate, and this clause is a mere nullity, and is to be considered as not written. C. C. 1506, 1566. *Ibid.*
5. The words "Protestant widows and orphans," used in the will, taken in connection with other words, indicate with certainty the meaning to have been "Protestant widows and orphans in the city of New Orleans." *Ibid.*
6. The general form of expression used by the testator, as to the objects of his benevolence, is sanctioned by the Article 1536 of the Civil Code, which sanctions a donation to the *poor of a community*, and the word community in this Article means a municipal corporation. *Ibid.*
7. The qualification "Protestant" of the nouns-substantive widows and orphans, is not so vague as to vitiate the bequest. It will be for the administrators of this charity to determine what widows and what orphans come under the denomination of "Protestant." *Ibid.*
8. The Article 1536, of the Code, which provides that donations made for the benefit of the poor of a community shall be accepted by the administrators of such community, although found under the head of donations *inter vivos* is applicable to donations *mortis causa*. *Ibid.*
9. The corporation formed by the title of the Fink Asylum since the death of the testator is without interest. *Ibid.*
10. The charity created by the testator's will is legally to be administered only by the city corporation of New Orleans. *Ibid.*
11. In interpreting a will, the intention of the testator must be ascertained as far as practicable, and regard will be had to all the facts and circumstances under which the will was made. *Succession of Thorame*, 384.
12. An acknowledgement by the father of natural children by his own slave, besides being offensive to morals, is a mere nullity. *Turner v. Smith*, 417.
13. A slave can neither sue for alimony nor inherit. *Ibid.*
14. The Act of the Legislature of the 6th March, 1857, which forbids the emancipation of slaves thereafter in this State, renders impossible the enfranchisement of slaves under a last will and testament, not carried into execution for that purpose prior to the passage of the Act of the Legislature. *Ibid.*
15. The testator, after a disposition in favor of his slave *Rachel* and her children, of one-third of his estate, declared as follows: "*I give and bequeath the remainder of my estate to my said executor, Charles Dudley Smith.*" Held: That as it was not the intention of the testator to give to his executor the portion of the estate previously devised to others,

WILLS (*Continued*).

the legacy in favor of the slaves which lapsed in consequence of the impossibility of their enfranchisement, enured to the benefit of the heirs of law of the testator as in case of intestacy. *Ibid.*

16. A testator having no descendants living, devised his whole estate to his mother, brother and sister, omitting entirely his father who survived him. The father made a notarial act of renunciation of all his rights and interest in the estate of his deceased son. Creditors of the father claimed the right to have the renunciation set aside on the ground that it was made by their debtor in fraud of their rights as judgment creditors, and to have the portion of the estate for which they alleged the father was the forced heir of his son, subjected to the payment of their claims against the father. *Held*: That such an action could not be maintained. *Tompkins v. Prentice*, 465.
17. There are rights of the debtor which the creditors cannot exercise, even should he refuse to avail himself of them. *Ibid.*
18. The debtor in this case would only have the right to demand the reduction of the donation *mortis causa* to the disposable portion. *Ibid.*
19. By Art. 1491 Civil Code, this reduction can be sued for only by *forced heirs or by their heirs* or assigns; the word "assigns" is defined to mean those whose rights have been transmitted by particular title, such as sale, donation, legacy, transfer and cession. C. C. 3522. *Ibid.*
20. The creditors of the forced heirs are not embraced within the definition, and cannot sue for the reduction. *Ibid.*
21. When the law requires certain forms to be observed in the *confection* of a will, the party who relies upon any want thereof, should expressly allege such informality. MERRICK, C. J., and COLE J.  
*Lawson v. Lawson*, 603.
22. The law does not require in nuncupative testaments by public act, that mention be made in the will that it was *dictated* by the testator to the notary in the *presence* of the witnesses. It is sufficient if express mention be made that it was dictated by the testator and written by the notary as dictated. MERRICK, C. J., and COLE, J. *Ibid.*
23. It appears by Art. 1571 C. C., that express mention is required to be made, in nuncupative testaments by public act, of the facts that the will was dictated by the testator and written by the notary, as it was dictated—but no such *express mention* seems to be required of the fact that it was "written in presence of the witnesses." By the next clause of Art. 1871, it appears that the presence of the witnesses when the will is *read* to the testator, must be expressly mentioned. It would seem to follow that the presence of the witnesses at the *dictation*, (which had been uniformly held to be necessary in a will of this form—*Langley v. Langley*, 12 La. 114; *Mouton v. Cameau*, Ann. 566.) may be implied from the general tenor of the will. SPOFFORD, J. *Ibid.*



## WILLS (Continued).

24. Where it is fairly deducible from the tenor of the will that the witnesses were present during its dictation, the burthen of proof to establish the contrary is upon those who attack the validity of the will. Temporary absence of one of the witnesses, and for the purpose of getting a drink of water, in a passage opening upon the room where the Act was received by the notary, will not be sufficient to invalidate the will. *SPORFORD, J.* *Ibid.*
25. Temporary cessation during the confection of a will, occasionally induced by the weakness of the testator, does not constitute such an interruption as will vitiate the will. *Ibid.*
26. The appointment by will of trustees to receive a sum of money bequeathed by the testator and to pay the interest on it annually to the legatee, will be disregarded if the legatee refuses to acquiesce in the creation of such an agency. *Partee v. Succession of Hill, 787.*
27. The legatee under such a disposition, is capable of standing in court and directly demanding payment of the legacy. *Ibid.*
28. *Fidei-commissa*, the trusts of the English law, cannot be created in Louisiana and enforced in our courts. *Ibid.*
29. *BUCHANAN, J.* The testator, who lived in Mississippi, owned, besides his property in that State, a large real estate in Louisiana, worth \$340,000. He bequeathed to his daughter, a married woman, \$20,000, upon the express condition that she should renounce, within twelve months after his disease, all claims upon the property of his succession situated in Louisiana: failing in which, she should forfeit the legacy of \$20,000. This sum was paid to her, and a deed of relinquishment executed by her in accordance with the requirements of the will. She received also the further sum of \$25,000 from the property of the father's succession situated in Mississippi. *Held:* That the receipt of these sums did not amount to a valid ratification of the act of relinquishment of her claims upon the estate of her father situated in Louisiana; that this deed of relinquishment was without effect, whether tested by the law of Mississippi or of this State. If the law of the former State is to govern, the deed would be void for want of the acknowledgment of the grantor, a married woman, apart from her husband, before a Judge or Justice of the Peace, that she signed, &c., without threats or compulsion of her husband. If the Mississippi statute, prescribing these formalities, be laid out of view, the general principle of the common law, which prevails in Mississippi, that a married woman being considered *sub potestate viri*, can, in general, do no act to bind her, would render this deed equally inoperative. 2. If the deed of relinquishment be judged by the law of Louisiana, it is equally void, as not having a lawful purpose. The testator left three children, who are his forced heirs, as to his real estate and slaves, situated in Louisiana, and the clause of his will requiring one of them to relinquish her lawful claim as heir to one-third of his Louisiana property, exceeding in amount \$100,000, on receiving \$20,000 cash from his executors, under the penalty of being completely disinherited, was contrary to law, and, there-

WILLS (*Continued*).

fore, not a valid cause or consideration for the deed of relinquishment. The two sums of \$20,000 and 25,000 must be viewed simply as so much received by her on account of her inheritance, and which she may be bound to collate. *Hoggatt v. Gibbs*, 770.

30. SPOFFORD, J., concurring. *Held*: That in so far as the deed of relinquishment affected property situated in Louisiana, its force and effect must be determined by the law of this State, but expressed no opinion upon the validity of the deed, under the law of Mississippi. *Ibid*.
31. MERRICK, C. J., also concurred in the opinion of BUCHANAN, J., but did not consider it clear that the deed of relinquishment should be considered as void; and doubted whether this deed should be set aside without plaintiffs first tendering to the defendants the \$45,000 which was received as its consideration out of the Mississippi estate, and which the testator had a right to withhold from his daughter. *Ibid*.
32. A will is null and void which is contained in one and the same act with the will of another person. C. C. 1565. *Orelina v. Haggerty*, 880.
33. It cannot be inferred that the testator intended to give a general *seizin* to the executor from the following expressions: "*I leave the whole of this foregoing, as written, to the management of Fergus Hawthorn, to have my request carried out fully and faithfully.*"

*Succession of Boatwright*, 893.

See LEGACY—*Orphan Society v. New Orleans*, 62.

See SUCCESSION—*Tompkins v. Prentice*, 465.

## WITNESS.

1. The clerk of the ship is a competent witness for his employers to prove the instructions given by the owner to the clerk, in shipping the slave. *Fartwell v. Harris*, 50.
2. A formal release of a witness from any liability over to the party interrogating him, annexed to the interrogatories and transmitted with the commission under which he was examined, is sufficient to remove the objection to his testimony on the score of interest *Ibid*.
3. In an action against a common carrier upon the penal statute for taking slaves out of the State without the consent of the owner, the ostensible owner in whose name the slave was shipped, and the vendor of such owner, have no interest in the suit, and are competent witnesses for the defendant. The judgment in such an action is not conclusive as to the title to the slave. *Ibid*.
4. A witness, called to testify to the existence and contents of a deed, cannot be objected to on the ground that he obtained his information as attorney of the party against whom he is called to testify, if the deed had been intrusted to him after the relation of attorney to the party had ceased. *Williams v. Benton*, 91.
5. The assignor of a claim, being bound to warrant the existence of the debt assigned, is not a competent witness to prove the debt, without a previous release, and cannot establish such release by his own testimony. *Delee v. Sandel*, 208.

WITNESS (*Continued*).

6. The usual and proper course is, for the release to be tendered to the witness before he is sworn in the cause; and when the testimony is taken under commission, to insert it in the return, with the Commissioner's certificate that it was so tendered. *Ibid.*
7. A witness may be interrogated on cross-examination upon matters unconnected with those on which he was examined in chief.

*Davidson v. Lallande*, 826.

See EVIDENCE—*Massey v. Hackett*, 54.

